

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2007 10077

IN THE MATTER OF AWB LIMITED (ACN 081 890 459)

BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

v

TREVOR JAMES FLUGGE

Defendant

- AND -

S CI 2007 10081

IN THE MATTER OF AWB LIMITED (ACN 081 890 459)

BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

v

PETER ANTHONY GEARY

Defendant

JUDGE:

ROBSON J

WHERE HELD:

Melbourne

DATE OF HEARING:

12, 13, 14, 15, 19, 20, 21, 26, 27, 28 and 29 October, 4, 5, 9, 10, 11, 12, 16, 17, 18, 19, 23, 24, 25, 26 and 30 November, 3, 7, 8, 10, 11, 14 and 15 December 2015.

DATE OF JUDGMENT:

15 December 2016

CASE MAY BE CITED AS:

ASIC v Flugge & Geary

MEDIUM NEUTRAL CITATION:

[2016] VSC 779

CORPORATIONS - Civil penalty proceedings - Alleged breach of ss 180 and 181 of the *Corporations Act 2001* (Cth) (the Act) - Flugge chairman of AWB Limited (AWB) - Geary an officer of AWB - Whether Flugge and Geary breached these duties in failing to inquire into and stop conduct by AWB that was contrary to United Nations Resolutions - United Nations had called on Australia, and all other member nations of the United Nations, to prevent its nationals from engaging in certain conduct with Iraq - United Nations resolutions prohibited the provision of hard currencies to Iraq - ASIC alleged that AWB had, contrary to the United Nations resolutions, supplied hard currencies to Iraq as part of its sale of wheat to Iraq -

United Nations Oil-for-Food Programme permitted proceeds from the sale of Iraqi oil that was held by the United Nations in an escrow account to be used to pay for humanitarian goods and services provided to Iraq – ASIC alleged that AWB used proceeds to pay for non-humanitarian goods and services supplied to Iraq – ASIC alleged such conduct caused considerable damage to reputation and assets of AWB – ASIC alleged that Flugge and Geary knew of or ought to have known of the improper conduct by AWB and failed to stop the conduct in breach of their duties under ss 180 and 181 of the Act.

CORPORATIONS – Duty of directors and officers to inquire into possible wrongful conduct being engaged in by the company.

CORPORATIONS – Six-year limitation period – Whether a breach of duty to inquire into possible improper conduct by officers of AWB imposed on the chairman Flugge continued whilst he continued to serve as a director such that his conduct fell within six-year limitation period imposed under the Act.

EVIDENCE – Application of *Jones v Dunkel* in a civil penalty proceeding.

EVIDENCE – Use of inferences to establish breach of the Act.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
In proceeding S CI 2007 10077		
For the Plaintiff	Mr N J O'Bryan AM SC with Mr J P Moore QC, Mr C H Truong and Ms C E Klemis	ASIC
For the Defendant	Mr S K Dharmananda SC with Mr R F R Pintos-Lopez	Corrs Chambers Westgarth
In proceeding S CI 2007 10081		
For the Plaintiff	Mr N J O'Bryan AM SC with Mr J P Moore QC, Mr C H Truong and Ms C E Klemis	ASIC
For the Defendant	Mr I D Hill QC with Mr A Tragardh	Galbally & Rolfe

HIS HONOUR:

Introduction

- 1 ASIC alleges that two former officers of AWB Limited (AWB), Trevor James Flugge (Flugge) and Peter Anthony Geary (Geary), breached their duties under ss 180 and 181 of the *Corporations Act 2001* (Cth) (the Act). ASIC seeks civil penalties against the defendants.
- 2 In this judgment I have used ASIC's reproduction of the terms of the relevant emails contained in the written submissions and have assumed that they are correct. There was no suggestion at the trial that ASIC had incorrectly reproduced the emails.
- 3 AWB was incorporated on 1 May 1998 and took over the business of the Australian Wheat Board. During the period relevant to these proceedings, AWB held an effective monopoly over the export of Australian grown wheat. One of AWB's largest customers was Iraq. During this period, the sale of wheat to Iraq was subject to United Nations (UN) sanctions arising out of the First Gulf War.
- 4 In the period 1999 to 2003, ASIC contends that AWB sold wheat to Iraq in a manner contrary to UN sanctions. Initially during the First Gulf War in 1990, the UN imposed strict sanctions on trading with Iraq or the provision of internationally traded currencies to Iraq. In 1995, the UN established the Oil-for-Food Programme (OFFP). Under the OFFP, moneys from the sale of Iraqi oil was placed in an escrow account under the control of the UN, and moneys from the account could be applied towards the sale of wheat to Iraq (along with other humanitarian uses).
- 5 The case against Flugge and Geary relates to the alleged misuse of the moneys obtained by AWB from the escrow account. In particular, ASIC says that AWB sold wheat to Iraq under the OFFP in a manner contrary to UN sanctions. Under the OFFP, subject to UN approval, AWB could obtain the price of the wheat agreed to be purchased by Iraq from the UN escrow account (the escrow account established for the purposes of Resolution 986 of the United Nations Security Council, adopted on 14 April 1995 (Resolution 986) to which funds paid from the sale of Iraqi petroleum and

petroleum products where required to be paid into (the UN escrow account)).

6 ASIC alleges that under contracts for the sale of wheat by AWB to Iraq entered into after June 1999, AWB was to pay Iraq an inland transportation fee (purportedly for the wheat to be distributed within Iraq). Under the arrangement, AWB was to compensate itself for the payment of the inland transportation fee by correspondingly inflating the price of the wheat to be paid by Iraq and obtaining the inflated price from the escrow account operated by the UN.

7 ASIC alleges that the payment of the inland transportation fee was a sham and a means by which Iraq could obtain internationally traded currencies. ASIC alleges that the payments of the fee to Iraq by AWB was contrary to UN sanctions. Further, ASIC says that AWB obtained the inland transportation fees from the UN escrow account and applied the moneys for a purpose, not permitted for the funds in the escrow account, by using the money to pay inland transportation fees.

8 Flugge was the chairman of AWB in the period 1999 until he lost office in March 2002, when he failed to win re-election to the board. Geary was an executive of AWB during the period 1999 to 2003.

9 In substance, ASIC's case against Flugge is that he knew that AWB was acting contrary to UN sanctions in paying the inland transportation fees and using moneys obtained from the UN escrow account to do so, or alternatively, that if he did not know, that he was put on sufficient notice such that he ought to have made enquiries which would have alerted him to the breaches of UN sanctions. In either case, Flugge ought to have put a stop to AWB's conduct.

10 In substance, ASIC alleges that Flugge breached his duties under ss 180 and 181 of the Act by failing to stop the offending conduct, or by failing to make adequate enquiries that should have led him to stopping the offending conduct.

11 Flugge left AWB in March 2002. The limitation period applicable to the allegations against Flugge means that his conduct in the last few months of his term as chairman

of AWB is the only conduct that is subject to ss 180 and 181. Nevertheless, ASIC alleges that Flugge had a continuing duty to stop the offending conduct, or make enquiries that should have led him to stopping the offending conduct.

12 The case against Geary differs in that it involves two further transactions. These transactions occurred after Flugge had left AWB, and are not the subject of allegations made against Flugge.

13 ASIC describes the first transaction as the Iron Filings wrongdoing. In substance, ASIC alleges that AWB agreed to pay Iraq compensation for iron filings that were allegedly found in shipments of wheat made to Iraq by AWB under the OFFP. ASIC alleges that AWB and Iraq agreed on compensation and also agreed that AWB could inflate the price of wheat sold to Iraq under later contracts, recover the inflated price from the UN escrow account, and pay Iraq the agreed compensation. ASIC alleges that the payment of the compensation was in breach of the UN sanctions against paying internationally traded currencies to Iraq and also a misuse of the UN escrow account.

14 ASIC describes the second transaction as the Tigris wrongdoing. In brief, shortly after the First Gulf War, BHP sold some wheat to Iraq for humanitarian purposes. BHP was not paid for the wheat. Subsequently, the debt owed by Iraq to BHP was assigned to a company called Tigris. ASIC alleges that, AWB for a fee, with the agreement of Iraq, inflated the price of wheat to be purchased by Iraq under several contracts and used the inflated element to pay Tigris the money owed by Iraq to Tigris. ASIC alleges that this transaction was contrary to UN sanctions, as the escrow account moneys were being used for a purpose other than for humanitarian aid. There is no allegation that internationally traded currencies were paid to Iraq, as the money was to be paid to Tigris.

15 ASIC alleges that Geary, who was a senior executive in AWB, knew of the Iron Filings transaction and knew that it was contrary to UN sanctions but failed to stop it, or alternatively ought to have known and failed to stop it. Further, AWB alleges that

Geary knew of the Iron Filings transaction and that it was contrary to UN sanctions and failed to stop it, or alternatively ought to have known and failed to stop it.

16 Further, ASIC also alleges that Geary knew of, or ought to have known of, the payment of the inland transportation fees and failed to stop them as alleged against Flugge.

17 In substance, ASIC alleges that Geary breached his duties under ss 180 and 181 of the Act, by failing to stop the Iraqi Grain Board (IGB) fees wrongdoing, failing to stop the Iron Filings wrongdoing and the Tigris wrongdoing, or failing to make proper enquiries which should have led to him doing so.

18 After the United States of America led the coalition invasion of Iraq in March 2003, AWB's conduct was exposed. The Australian government established a Royal Commission to investigate the conduct of AWB. The Royal Commission made damning findings against AWB and many of its officers. As a result of the Royal Commission and the publicity surrounding the exposure of AWB's conduct, AWB's reputation was greatly sullied. The Australian government withdrew AWB's monopoly on the export of wheat. AWB suffered financially and was eventually taken over.

19 The summary I have given is very general. The pleadings distinguish between Iraq and its agencies, such as the IGB. The inland transportation fees were increased over time and another fee, called the after sales service fee, was also imposed.

20 In my reasons below, I fully set out the pleadings and deal with each of the allegations. It would serve little purpose to more fully summarise the pleadings at this stage.

21 For the reasons given below, I find that Flugge did breach his duties as a director under s 180(1) of the Act, by failing to make adequate enquiries about the propriety of the payment of inland transportation fees and as a consequence, failing to stop AWB engaging in improper conduct in paying the inland transportation fees. I also find that the breach occurred during the period in which the Act permits penalty

proceedings to be instituted against Flugge.

22 For the reasons given below, I find that Geary did not breach his duties in relation to the payment of the inland transportation fees to Iraq by AWB, or in relation to the Iron Filings Claim (the Iron Filings wrongdoing) and the payment of the Tigris Debt (the Tigris wrongdoing).

The outline of the judgment

23 The judgment proceeds as follows. I examine the evidence relating to Flugge, which also includes some facts relevant to Geary. The evidence includes both documentary evidence and evidence of witnesses. I then set out the matters pleaded against Flugge and make findings in relation to each pleaded fact. Finally, based on those findings, I reach my conclusions on the breaches of duty alleged against Flugge.

24 I then consider the evidence, both documentary and from witnesses, against Geary. I then set out in detail the pleadings against Geary and make findings in relation to each pleading. Finally, based on those findings, I reach my conclusions on the breaches alleged against Geary.

The nature of ASIC's case against Flugge

25 ASIC describes 'the IGB fees wrongdoing' as AWB's increasing of the contract price of wheat sold to Iraq to obtain payment of that increased price from the escrow account and then paying those moneys to Iraq.

26 ASIC alleges that Flugge knew of the IGB fees wrongdoing and that he had a duty to stop the IGB fees wrongdoing.

27 In many instances, ASIC seeks to establish Flugge's knowledge by drawing inferences from documents that it contends that Flugge read of from conversations he had with certain witnesses. ASIC also seeks to rely on *Jones v Dunkel*¹ to more readily draw those inferences, as Flugge did not give evidence to seek to rebut inferences that ASIC

¹ (1959) 101 CLR 298.

sought to draw.

28 Importantly, ASIC also seeks to more readily draw the inference that Flugge knew of the IGB fees wrongdoing from the fact that the IGB fees wrongdoing was well known within AWB.²

29 ASIC alleges that the certain matters were widely known in AWB. In particular, ASIC alleges that by late October 1999 it was widely known in AWB:

- (a) the inland transportation, or trucking, fee was fixed by the IGB;
- (b) the President of Iraq required funds on account of the trucking fee to be paid to Iraq before any cargo of wheat was unloaded in Iraq;
- (c) the fee was to be paid to Iraq, being a 'refund' of trucking charges to Iraq;
- (d) because payments of US dollars to Iraq could not be made because of UN sanctions, a method of payment to circumvent those sanctions had to be found;
- (e) payment of the fee could be hidden by having the shipowners pay it to the entity nominated by Iraq, with the charter party (between AWB and the shipowner) being amended to accommodate that payment; and
- (f) payment of the fee to a Jordanian entity nominated by the IGB would further disguise the fact that the payment was being made to Iraq and represented an obvious breach of the sanctions.³

30 There are other matters that ASIC alleges were widely known within AWB relating to the alleged IGB fees wrongful conduct and by which ASIC seeks to infer that Flugge also had the same knowledge. I will deal with these at the appropriate point in the discussion of the relevant facts.

² Plaintiff's closing submissions of 10 December 2015 (PCS), [756].

³ PCS, [377].

31 ASIC's final closing oral submissions submit that AWB knew that it was acting in a manner that was flagrantly in breach of its obligation, as imposed upon Australia under UN sanctions.⁴

32 ASIC contends that within AWB it was widely understood that money for the inland transport fees was being paid to the Iraqis. ASIC submits that it is very relevant when the Court is considering the likelihood that Flugge or Geary did not hear on any AWB grapevine about the existence of the IGB fees or what was happening. ASIC submits that given the extraordinary number of people within AWB who knew what was going on, it is highly unlikely that Flugge, a chairman with the direct hands-on interest in the market that Flugge had, did not know that the IGB fees were being paid.⁵

33 I will come to similar submissions that were made by ASIC as I go through the evidence.

34 The importance of these allegations is that although they were not pleaded, ASIC nevertheless relies on them to make out its case against Flugge and Geary. The allegations will require me to make findings as to whether the matters alleged by ASIC to be widely known within AWB were in fact so.

35 There was no submission by either Flugge or Geary that ASIC's submissions and evidence that certain matters were widely known within AWB, were not open to be made. On reflection, I consider that the evidence, on whether the IGB fees wrongful conduct was widely known within AWB, was admissible, and the submissions made by ASIC that the IGB fees wrongdoing was widely known within AWB was an evidentiary matter going to the issue of whether I could more readily draw the inferences that either or both of Flugge and Geary knew the matters that ASIC alleged each knew.

36 ASIC tendered in evidence, a large quantity of documents that it is not alleged either Flugge or Geary read or was aware of. Evidence was led from former employees of

⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (10 December 2015) T2841, L19 - 10, T2842.

⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (10 December 2015) T2913.

AWB on events and discussions that Flugge and Geary were not alleged to be party to.

37 It is apparent from the way that ASIC conducted its case that it led this evidence in part to seek to establish what it alleges was widely known within AWB, and to support its case that the inference should be drawn that Flugge and Geary knew of the IGB fees wrongful conduct.⁶ ASIC also submits that such inferences can be more readily drawn, as Flugge and Geary did not give evidence to rebut the inference.

AWB's structure

38 AWB was a major corporation that exported wheat to buyers throughout the world. As discussed below it was initially a government corporation but it was later privatised. AWB's main office was based in Lonsdale Street, Melbourne.

39 The wheat sold by AWB was sold on behalf of Australian wheat growers. AWB had a near monopoly on the sale of Australian wheat overseas. Iraq was a major buyer of Australian wheat from AWB. The state instrumentality that purchased the wheat was the IGB. Wheat trade to Iraq was interrupted by the First Gulf War when the USA and its allies drove Iraq out of Kuwait that it had recently invaded.

40 As a consequence of Iraq's invasion of Kuwait, the UN imposed sanctions on trade with Iraq. Those sanctions interfered with AWB's sale of wheat to Iraq. In 1996, however, the UN introduced the OFFP. Under this program, the proceeds of the sale of Iraqi oil was placed in a UN controlled escrow account and with UN approval the moneys could be used to buy goods and services for Iraq. The AWB thereupon was able to make sales of wheat to Iraq under the oil for food program administered by the UN and obtain payment from the UN escrow account.

41 Prior to 1999, AWB delivered wheat to Iraq on terms described as CIF or C & F, which involved the supplier paying for cost, maritime insurance and freight (in the case of CIF trade) or cost and freight (in the case of C & F). AWB would recover those costs

⁶ PCS, [756].

from the contract price. In June 1999 Iraq, however, the IGB informed AWB that it would have to pay an inland transportation fee of US\$12 per tonne of wheat sold to the IGB to an Iraq instrumentality and that the AWB could add the fee to the price of the wheat sold to the IGB. Further details of UN sanctions and the dealings that led up to the payment of the fee are discussed below.

42 When the IGB sought the payment of the inland transportation fee Trevor Flugge was the chairman of the board of AWB. He remained chairman until early 2002 when he lost office as a director of AWB. Flugge hailed from Western Australia and was a major wheat grower in his own right. Flugge was not engaged in executive duties for AWB although as chairman he did represent AWB on activities outside his board functions. Flugge held other board positions and had a wide range of interests. Flugge was a man of some standing in the community and with the Australian Government. Peter Geary was a full time senior officer of AWB who had been representing AWB in New York and in particular in AWB's dealings with the UN. In June 1999, however, Geary was back in Australia holding executive functions.

43 In June 1999, when the IGB sought the payment of the inland transportation fee, AWB had several divisions, as well as a wholly owned subsidiary, AWB International Ltd (AWBI). AWB handled the sale of wheat that was supplied to AWBI by growers. Within AWBI was a division known as the 'Pool'. AWB was retained by the Pool to market and sell the wheat.

44 The Pool administered the distribution of proceeds from the sale of wheat to the growers who contributed their wheat. The Pool received the so-called Free on Board (FOB) proceeds, which described the proceeds before costs such as insurance, freight and demurrage, from the sale of the wheat and divided the proceeds up between the suppliers.

45 The division within AWB that administered sales to Iraq and internationally generally was known as International Sales and Marketing (IS&M). Wheat supplied to AWB was administered by the Pool.

- 46 The IS&M division included Nigel Officer (Officer), who was the Global Sales and Marketing General Manager.⁷ Dominic Hogan (Hogan) was the Account Manager for Iraq and was stationed in Cairo. Hogan answered to Mark Emons (Emons), who was the Regional Manager Marketing, for the Middle East and Africa. Emons answered to Officer.
- 47 The Chartering Manager was Michael Watson (Watson), who answered to Officer in the IS&M division.
- 48 Geary worked in the Pool section of the AWB business. Geary was the Manager Export and answered to Ted Laskie (Laskie), the General Manager, AWB International Pool, who answered to the Chief Operations Officer, Michael Tighe (Tighe).⁸
- 49 From 1 July 1999 to 30 June 2008, AWBI was ‘nominated company B’, as it was referred to in the then *Wheat Marketing Act 1989* (Cth). As a result, AWBI was authorised to export wheat in bulk from Australia without the prior permission of the Wheat Export Authority, also known at different times as the ‘*Export Wheat Commission*’ and ‘*Wheat Exports Australia*’ (WEA).⁹
- 50 In addition, for the period up to approximately December 2006, WEA could not grant permission for the export of bulk wheat by an exporter other than AWBI without first obtaining AWBI’s prior permission. AWBI’s veto power over bulk export of wheat by others was commonly referred to as the ‘Single Desk’ (discussed below).
- 51 WEA’s first report to growers in 2001 states that WEA was established on 1 July 1999, among other things, to:
- (a) control the export of wheat;

⁷ Court Book (CB) 1/317. The CB references in this judgment are taken from the parties submissions. There was no suggestion at the trial that the references were incorrect.

⁸ Organisational chart for AWB for the period 1999 to 2003, Exhibit MFI-P4, CB 1/317.

⁹ Flugge’s closing submissions (‘FCS’), annexure B.

- (b) monitor, examine and report on AWBI's performance in relation to the export of wheat; and
- (c) examine and report to the federal government and the growers on the benefits to all wheat growers that result from its performance.¹⁰

AWBI: the national pools and the Single Desk

52 AWBI held the benefits of the Single Desk. AWBI was responsible for the operation of the national pools through the existing wheat export arrangements, which arrangement included the Single Desk.

53 AWBI was obliged to maximise net pool returns for growers. A new pool was opened for each annual wheat harvest season, and each pool usually operated for approximately two years commencing several months prior to each harvest (with pre-harvest hedging of commodity and foreign exchange exposures) and then for approximately 12 to 15 months after harvest until all the wheat in that pool had been sold and proceeds were distributed to pool participants. The Pool sold wheat principally to the export market through AWBI, although some wheat was sold domestically. The pools operated for the purpose of producing a maximum net return to growers.

54 In practice, the grower was paid an amount per tonne of grain delivered into the relevant pool at the time of delivery, which represented the sale price less the cost of marketing, risk management, storage, handling and delivering the grain to its final destination.

The service agreements between AWBI and AWB Ltd

55 AWBI contracted with AWB to provide AWBI services under a service agreement.

56 As a result, AWB provided to AWBI all the necessary staff, management (commodity and currency hedging) marketing operations and infrastructure (computers, finance

¹⁰ CB 12/9823-9831, p3.

and supply chain) in order to market and execute grains contracts and so as to maximise the returns for the growers delivering wheat into the pool. AWBI did not have its own employees until October 2006.

The Single Desk

57 At the times relevant to this proceeding, AWB through its wholly owned subsidiary AWBI, held a statutory monopoly for the marketing and export of bulk wheat to international markets. As noted above, this monopoly was described as the Single Desk.

58 Prior to 1988, the Single Desk was controlled by the Australian Wheat Board, a statutory wheat marketing authority. In 1988, the Australian Wheat Board was corporatized, and was subsequently privatised in 1999. The Single Desk was controlled by AWB's subsidiary AWBI. On 22 August 2001, AWB listed on the Australian Stock Exchange.

59 ASIC submits that AWB's control of the Single Desk assumed relevance in at least three respects. First, ASIC submits that it is an important surrounding circumstance when considering the content of Flugge's and Geary's duties to AWB, and the foreseeability of some of the harm which eventually accrued to AWB as a result of the revelation of its misconduct.

60 Secondly, ASIC submits that the fact of the Single Desk and the accompanying corporate reforms that AWB undertook in the period between 1999 and 2001 brought with it greater internal and external scrutiny on its activities, which made it more important that AWB conduct all its operations ethically and with propriety, a fact well known within AWB and reflected in AWB's code of conduct and corporate governance documents.

61 Thirdly, ASIC submits that the benefits that flowed from the Single Desk were valuable to AWB and were lost following public revelation of its wrongdoing.

62 ASIC referred to the High Court's decision in *Neat Domestic Trading Pty Ltd v AWB Ltd*,¹¹ where the High Court held that no public law obligation was imposed on AWBI in connection with its power to refuse consent to other companies exporting bulk wheat. ASIC submits that the decision provides a useful summary of AWB's position as the holder of the Single Desk at the relevant times and its historic transformation from a statutory wheat board to a publicly listed company.

63 ASIC submits that this decision highlights the importance of the Single Desk to AWB, important circumstances surrounding the Single Desk that are relevant to the duties owed by the officers to AWB in this case, and reasons why the public revelation of AWB's wrongdoing was likely to, and did, cause it to lose the Single Desk as a consequence of conduct the subject of these proceedings.¹²

64 In their plurality judgment, McHugh, Hayne and Callinan JJ observed:¹³

The object of AWB, stated in its constituent document was 'to be primarily involved in the business of Grain Trading.' This was further defined as the undertaking of grain trading activities and investments with a view, among other things:

in relation to wheat growers who sell pool return wheat to the company or its subsidiaries, to maximise their net returns from the pools by securing, developing and maintaining markets for wheat and wheat products and by minimising costs as far as practicable.

The reference to 'pool return wheat' was a reference to arrangements by which Growers and others sold wheat to a single purchaser which would then negotiate the sale of that wheat overseas. At the times relevant to these proceedings that purchaser, or pool company, was AWBI. The pool company would take the amounts it received from sales of wheat of a particular grade and divide the returns (net of costs) rateable among those who had supplied the grain that was sold. These arrangements were often referred to as 'Single Desk' selling arrangements. There was to be a single seller of Australian wheat in overseas markets and thus no competition between sellers of Australian wheat in those markets.

...

¹¹ (2003) 216 CLR 277 ('NEAT litigation').

¹² PCS, [18].

¹³ NEAT litigation (2003) 216 CLR 277, 291-292 [33], 294 [40]-[41], 296 [47].

Regulation of wheat marketing

Since the end of World War 2 there has been a series of federal Acts dealing with aspects of the marketing of wheat. (There had been earlier federal legislation affecting the wheat industry but the War of 1939-45 marks a convenient point at which to begin reference to past legislation.) As originally enacted, the 1989 Act provided a very different regime for the marketing of wheat from that provided by it at the times relevant to this matter. The Australian Wheat Board, a statutory corporation tracing its roots to the *Wheat Industry Stabilization Act 1948* (Cth), played a central role in the marketing scheme for which the 1989 Act originally provided. As enacted, the 1989 Act provided for the Australian Wheat Board to control the export of wheat. By s 57, as it then stood, export of wheat, without the Board's consent, was forbidden.

In 1997 and 1998, significant changes were made to the 1989 Act and the scheme for which it provided. The Explanatory Memorandum and the Wheat Marketing Legislation Amendment Bill 1998 (by which the second part of these changes were made) described their purpose as being to 'restructure' the Australian Wheat Board 'from a statutory marketing authority to a grower owned company.' From 1 July 1999, there were to be three grower-owned companies involved in the marketing of wheat - AWB, AWBI and a third company undertaking domestic trading of grains and other non-pool commercial activities not handled by AWB. A Wheat Export Authority was to control export of wheat and to monitor the performance of AWBI in relation to the export of wheat.

...

AWBI and the Act

AWBI does not owe its existence to the Act; is a company limited by shares incorporated under the *Corporations Law*. To a very great extent, its powers, and the powers and obligations of its organs, are regulated by the applicable companies legislation. So, for example, at the time of the events giving rise to this appeal, its board of directors owed duties to its sole shareholder, AWB. The content of those duties was to be found in the *Corporations Law* (Vict) and the considerable body of judge-made law affecting directors' duties. The central duty of the board of AWBI was to observe its constitution and to pursue the interests of the company as expressed in that document. As a wholly owned subsidiary of AWB those duties would, no doubt, have required the board of AWBI to pursue the interests of its parent (and thus, its parent's shareholders) to the extent that those interests were compatible with other obligations of AWBI. In fact the interests of the two companies coincided. The constituent documents of both AWB and AWBI required that AWBI seek to maximise returns to those who sold wheat into AWB wheat marketing pools.

65 AWB's initial public offering prospectus, dated 6 July 2001, explained the importance of the Single Desk to AWB as follows:

The Australian Wheat Board was established as a statutory authority by Wheat Acquisition Regulations contained in the National Security Act 1939 (Cth). It continued in existence as a Government controlled marketing authority under

successive legislation until 1 July 1999.

In 1989, the Government established the Wheat Industry Fund imposing compulsory levies on wheat sales. This fund was held and managed by the Australian Wheat Board and by July 1999 was approximately \$600 million.

In June 1998, the assets and liabilities of the statutory authority (other than the Wheat Industry Fund) were transferred to AWB and AWBI, then wholly subsidiaries of the statutory authority.

In July 1999, the Wheat Industry Fund was transferred to AWB and B Class Shares were issued to the holders of units in that fund. A Class Shares were issued to persons who met the definition of 'grower' in AWB's constitution. Upon the issue of these A Class and B Class Shares, AWB became a grower-owned and controlled corporation.

As part of the restructure, Government guarantees of borrowing for the pools ceased and AWB commenced directly financing pooling and commercial activities using its own capital and credit enhancement.

OPERATION OF THE NATIONAL POOL

AWBI was established as separate wholly owned subsidiary of AWB and is responsible for the operation of the National Pool on behalf of growers who deliver to it through the Single Desk. AWBI's responsibility is to maximise net pool returns for growers who sell wheat into the National Pool, by securing, developing and maintaining export markets for wheat and minimising costs as far as practicable.

The Single Desk is established under the Wheat Marketing Act in which AWBI is appointed as the sole marketer of Australian export bulk wheat. The performance of AWBI is monitored by the Wheat Export Authority, a Commonwealth Government statutory authority. ...

The operation of the Single Desk was recently reviewed in the NCP Review of the Wheat Marketing Act, which reported in December 2000. The Government responded to this review in early 2001 by retaining the existing arrangements under which AWBI is responsible for the operation of the Single Desk. The Single Desk legislation is not scheduled to be reviewed under NCP guidelines until 2010, although there will be a review of the performance of AWBI in managing the Single Desk in 2004.

...

In operating the National Pool, AWBI utilises a number of services provided by AWB. The provision of these services is covered by a Service Agreement that details the nature of the services and sets out the manner in which AWB is to be compensated for providing them. ...¹⁴

66 ASIC submits that AWB's annual reports between 1999 and 2003 each emphasised the

¹⁴ See pages 18-19 of the prospectus.

importance of retaining the Single Desk and maximising returns to the National Pool.¹⁵ ASIC submits that AWB greatly valued the Single Desk and made great efforts to retain it, as evidenced by AWB's own business records.¹⁶

The importance of the Iraq trade to AWB

67 Iraq was at all relevant times a major buyer of Australian wheat. Prior to the Gulf War in 1990 and 1991, Iraq was a major buyer with annual purchases in excess of 1 million tonnes. In 1990, Iraq was Australia's largest wheat market and Iraq's preference was for Australian Hard wheat, with prices achieved at a premium to other markets and sold at freight delivered (C&F) basis.¹⁷

68 A number of internal information papers and Iraq briefs prepared during the OFFP revealed the importance of the Iraq trade to AWB.¹⁸

69 Iraq continued to be a primary overseas market for AWB during the OFFP, and AWB became Iraq's largest supplier of wheat, increasing its percentage of the market to 85 per cent.¹⁹ The annual reports of AWB noted Iraq as a key market.²⁰

70 For the period 1 October 1999 to 30 September 2000, AWB exported 2,516,776 tonnes of wheat to Iraq (Wheat Exports Australia: Statistics 1999-2000²¹). Over the period 1 October 2000 to 30 September 2001, Australia exported 2,500,893 tonnes of wheat to Iraq.²²

¹⁵ CB 1/615 (1999 report), CB 3/1987 (2001 report).

¹⁶ PCS, [122].

¹⁷ CB 1/121.

¹⁸ CB 1/247.

¹⁹ CB 3/1560.

²⁰ 2001 report, CB 3/2003.

²¹ CB 2/1335.

²² CB 3/2083.

71 In the 2003 Investor Fact Book, it was estimated in 2001 that the Middle East (including Egypt) contributed to 25 per cent of the AWB National Pool, and the fact book set out the role of the Single Desk and the details of the wheat supply process to Iraq.²³

72 An AWB document setting out 'success stories' for inclusion in the 2002 to 2003 Pool Performance Report (covering the period 1 October 2002 to 30 September 2003) states that Iraq was '*one of AWB's strategically important markets.*'²⁴

73 When the Iraq market was threatened because of the impending Iraq war, AWB undertook a number of steps to try to protect this market and also undertook detailed calculations of what the Iraq market meant for the Pool. These matters are dealt with more fully in the section dealing with the alleged IGB fees wrongdoing.

United Nations Resolutions

74 UN Resolutions were, and are, not binding upon Australian nationals, including AWB, unless adopted and imposed by Australian law. The UN Resolutions typically called on member states to prevent certain activities by their nationals. Whether the member states did or did not pass laws to prevent such activities was up to the particular state. In the case of the relevant resolutions to this proceeding, the Australian Government did not pass any laws to give effect to the Resolutions save requiring AWB to obtain Australian Government approval to export goods to Iraq.

75 The substance of ASIC's case is that if AWB as an Australian national did not comply with what the UN had called on its member states to prevent, then AWB's reputation would be tarnished to the detriment of AWB and its financial welfare.

76 On 2 August 1990, Iraq invaded Kuwait. The UN immediately, by Resolution 660 of 1990,²⁵ condemned the Iraqi invasion of Kuwait and demanded that Iraq withdraw

²³ CB 6/3811.

²⁴ CB 6/3893.

²⁵ S/Res/660 (1990).

immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990.

77 Shortly thereafter, on 6 August 1990, under Resolution 661 of 1990,²⁶ the Security Council passed Resolutions with the aim of bringing the invasion and occupation of Kuwait by Iraq to an end.

78 The Security Council noted that Iraq had failed to comply with Resolution 660 of 1990 and had usurped the authority of the legitimate government of Kuwait. The Security Council resolved as follows:

- 3 *Decides* that all States shall prevent:
 - (a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution;
 - (b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products from Iraq or Kuwait; and any dealings by their nationals or their flag vessels or in their territories in any commodities or products originating in Iraq or Kuwait and exported therefrom after the date of the present resolution, including in particular any transfer of funds to Iraq or Kuwait for the purposes of such activities or dealings;
 - (c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products;
- 4 *Decides* that all States shall not 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 shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or

²⁶ S/Res/661 (1990).

bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs.

79 The Security Council also called upon all states to act strictly in accordance with the provisions of the Resolution. The Security Council decided to establish a committee, and it decided to keep this item on its agenda, and to continue its efforts to put an early end to the invasion by Iraq. The committee was called the 661 Committee and was to undertake the following tasks:

To examine the reports on the progress of the implementation of the present resolution which would be submitted to the Secretary-General;

To seek from all States further information regarding the action taken by them concerning the effective implementation of the provisions laid down in the resolution.

80 Resolution 661 contains three separate requirements on member states:

- (a) first, that member states not 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;
- (b) second, that member states should prevent their nationals and any persons within their territories or otherwise making available to the government of Iraq, or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any such funds or other financial or economic resources; and
- (c) third, that member states should prevent their nationals and any persons within their territories or otherwise 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.

81 The effect of the Resolution was, first, a blanket prohibition on the provision of any funds or financial or economic resources to the government of Iraq, or to any commercial, industrial or public utility undertaking in Iraq; and second, a prohibition on remittance of funds to any other person or body within Iraq, unless for exclusively

medical or humanitarian purposes. ASIC says that this was presumably to ensure that private citizens and aid agencies were not prevented from receiving funds for food and medicine.

82 On 4 April 1995, the UN Security Council adopted Resolution 986 of 1995,²⁷ which set up the OFFP and procedures for export of foodstuffs to Iraq and payments from the UN escrow account.²⁸ The OFFP was subsequently extended by UN Security Council Resolutions 1111, 1143, 1153, 1210, 1242, 1275, 1280, 1281, 1302, 1330, 1352, 1360, 1382, 1409, 1443, 1447.²⁹

83 Resolution 986 approved the sale of petroleum and petroleum products originating in Iraq, with payments to be made into the escrow account.³⁰ The funds in the escrow account were to be used as follows:³¹

8. ... the funds in the escrow account shall be used to meet the humanitarian needs of the Iraqi population and for the following other purposes, and [the Security Council] requests the Secretary-General to use the funds deposited in the escrow account for:
 - (a) To finance the export to Iraq, in accordance with the procedures of the Committee established by resolution 661 (1990), of medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs...

84 Taken together, Resolutions 661 and 986 established a regime, the sole purpose of which was to allow Iraqi oil to be sold, and the proceeds used to buy humanitarian supplies, without hard currency being made available to the government of Iraq, or any business or public undertaking in Iraq. A key component of the scheme was that the proceeds from the sale of Iraqi oil would be held by the UN in an escrow account and it was these moneys that would be used to buy humanitarian supplies to be made

²⁷ S/Res/986 (1995).

²⁸ CB 1/30 (also CB 1/91, more legible).

²⁹ CB 1/91.

³⁰ CB 1/91.

³¹ CB 1/31.

available to the government of Iraq.

85 By these UN Resolutions, the UN had called on member states to prevent their nationals from:

- (a) transferring funds into Iraq or to any Iraqi government, public, industrial, or commercial entity;
- (b) obtaining funds from the UN escrow account , unless it was for the supply of foodstuffs and health supplies under the OFFP to meet the humanitarian needs of the Iraqi population.

86 Regulation 13CA of the *Customs (Prohibited Exports) Regulations 1958* (Customs Regulations) was enacted by the Australian Government to give effect to the UN Resolutions. Regulation 13CA provided:

(1) Except in accordance with a permission granted under subregulation (2), a person must not:

- (a) export goods if the immediate or final destination of the goods is, or is intended to be, the Republic of Iraq; or
- (b) export goods that originated (wholly or in part) in the Republic of Iraq.

(2) The Minister of State for Foreign Affairs and Trade (in this regulation called the Minister) may grant a permission for the exportation of specified goods, or goods of a specified kind, where the exportation without the permission would contravene subregulation (1), if the Minister is satisfied that permitting the exportation will not infringe the international obligations of Australia.

(3) A permission granted under subregulation (2) may specify, in relation to the exportation of goods that it permits:

- (a) conditions or requirements, including times for compliance, to which the exportation is subject; and
- (b) the quantity of goods that may be exported; and
- (c) the circumstances in which goods may be exported.

(4) The Minister may revoke or modify a permission granted under subregulation (2) if the Minister is satisfied on reasonable grounds that:

- (a) a condition or requirement of the permission has not been complied with; or

(b) permitting, or continuing to permit, the exportation of goods in accordance with the permission would infringe the international obligations of Australia.

(5) The powers of the Minister under this regulation may be exercised by a person in writing by the Minister to exercise those powers.

87 The approval process for Australian companies wishing to supply goods under the OFFP involved the following UN approval and approval by the Australian Government through the Department of Foreign Affairs and Trading (DFAT).³²

88 As to the UN contract approval:

- (a) Australian suppliers would complete a pro-forma application form entitled 'Notification or Request to Ship Goods to Iraq', and forward this form, together with a copy of the relevant contract, to the Middle East and Africa Branch (MAB) within DFAT.
- (b) MAB staff would check that the application form had been filled in properly and was accompanied by a copy of the relevant contract. Apart from checking that the goods to be supplied under the contract were not obviously outside the OFFP, MAB staff did not examine the detailed terms of the contract, as responsibility for contract approval lay with the UN itself.
- (c) This documentation was then forwarded to Australia's UN Mission in New York (UN Mission) for submission to the relevant UN body for assessment and approval.
- (d) The UN Mission would receive a fax from DFAT Canberra comprising the 'Notification or Request to Ship Goods to Iraq' and a copy of the relevant contract. The UN Mission then checked that all areas of the pro-forma application had been completed in full and the application would also be briefly checked to ensure that the goods to be exported were on the UN list of approved goods under the OFFP. The 'Notification or Request to Ship Goods

to Iraq' would then be stamped by the UN Mission and a UN Mission coversheet attached to the documents, and they were then sent to the Office of Iraq Programme (OIP) to be examined and processed.

- (e) Customs experts at the OIP reviewed the contracts submitted under the OFFP for accuracy, price, value and conformity with the Distribution Plan and UN Resolutions and guidelines of the 661 Committee. The review conducted by customs experts included an assessment that the goods were included on the distribution plan for the relevant phase, that the quantities were within the distribution plan limits specified within the plan and querying the price of goods where it appeared unreasonable. At the conclusion of the review process the customs expert prepared a report summarising the detail of the contract application together with any causes for concern which the 661 Committee might wish to consider. Contracts for foodstuffs were generally standard form contracts and given priority due to their humanitarian importance.
- (f) Following OIP processing, if the 661 Committee (or, under an expedited procedure designed for humanitarian items that was introduced in 1999, the OIP) approved the application, a written authority to export was issued by the UN and sent to the relevant country's UN Mission. The written authority had attached to it a copy of a report prepared by the OIP for the 661 Committee concerning the OIP's examination and assessment of the application.
- (g) Once the Australian UN Mission received a written authority to export from the OIP, it faxed a copy to DFAT Canberra for forwarding to the exporter and, if it was urgent, also faxed a copy directly to the exporter.³³

89 In the case of each contract there were two versions. One the AWB version, and a longer one described as the IGB version. The procedure laid down by the 661 Committee required the AWB contract to be provided to the Committee by the Australian government. This function was carried out by the Australian Mission to

³³ See for example CB 1/99 (fax), CB 1/101 (OIP authority to export).

the UN in New York where the 661 Committee was based.

90 AWB completed an application with the contract annexed, which was delivered to DFAT for the Australian Mission to lodge with the 661 Committee.

91 The Committee had an executive that vetted the applications. If in order, and many were not, they were given to the Committee in formal meeting to approve or decline.

92 As for DFAT export approval:

(a) Once the written UN authority to export had been issued by the OIP, AWB would then request DFAT Canberra to issue a 'permission to export' under the Customs Regulations in respect of each shipment.³⁴

(b) However, with effect from July 1999, during Phase VI of the OFFP, the IGB proposed a significant change to the terms on which it would purchase wheat (see 'The commencement of the IGB fees wrongdoing' below).

USA sanctions

93 In addition to UN sanctions, viva voce evidence was given by former AWB employees of US sanctions involving Iraq. The exact terms of the sanctions were not tendered. Hogan said that the US sanctions prevented the use of the US banking system to transfer moneys to Iraq. The sanctions may have gone beyond this but, as I said, no specific evidence was tendered about them.

94 It is the US sanctions that some AWB employees said raised difficulties with making payments of the inland transportation fees to Iraq. ASIC, on the other hand, did not tender any evidence about the US sanctions and contended that it was the UN sanctions that raised difficulties with AWB paying the inland transportation fees to Iraq.

95 For the reasons discussed below, I find that it was probable that there was a perception

³⁴ See for example CB 1/103, 105.

among some AWB employees, particularly in 1999 when AWB tendered on the new trade terms, that the difficulties AWB encountered in paying the fees were in fact US sanctions rather than UN sanctions. Some of the emails tendered by ASIC, discussed in detail below, demonstrate that some difficulties with payment were acknowledged by employees of AWB. On ASIC's case, it was known within AWB that a method of payment to Iraq needed to be found to circumvent UN sanctions, which prevented the payment of US dollars into Iraq. On this case, the fact that AWB employees acknowledged difficulties with payments into Iraq would demonstrate that there was knowledge of impropriety and a potential breach of UN sanctions. The evidence was that US sanctions presented practical difficulties in transferring the transportation fees to Iraq as according to Hogan if there was any mention of Iraq in a transfer of money that involved the USA transfer system the transfer would be frozen.

96 As discussed below, the prevailing view in AWB was that the UN had approved the payment of the inland transportation fees. The evidence on the US sanctions suggests an explanation for the difficulties that some in AWB nevertheless acknowledged they faced in making those approved payments. Although there was no evidence and no pleadings relating to the US sanctions, I consider that this evidence becomes relevant in light of ASIC's submissions and evidence concerning what was widely known within AWB.

97 ASIC did not tender any evidence to rebut the evidence given by the AWB employees that US sanctions presented difficulties in AWB transferring funds to Iraq.

AWB knowledge of UN procedures

98 From mid-1996, information concerning the UN Resolutions, including their effect and procedures, was being circulated from AWB's New York offices to AWB's offices in Melbourne. Geary was the main conduit of this information to AWB as he was in New York at the time.

99 In May 1996, a Memorandum of Understanding (MOU) between the UN and Iraq was

reached in relation to the OFFP.³⁵ The document recorded Iraq's undertaking in respect of a distribution plan and following procedures in accordance with the UN escrow account.

100 The distribution plan³⁶ itself set out the procedures and obligations on the UN and Iraq for distributing humanitarian supplies within Iraq, and amounts were specifically allocated for the purchase and distribution of food. An amount of US\$207 million was allocated 'to ensure the procurement of the current needs of the sector' in relation to the transport of food, including provision for 1000 trucks to transport grain.³⁷

101 The distribution plan underwent various revisions with the different phases of the OFFP.³⁸ Importantly for present purposes nothing in the MOU, or in any version of the distribution plan, impacted on the prohibitions in Resolution 661.

102 On 3 May 1996, Geary forwarded a memo from AWB employee R J Storey (Storey) entitled 'IRAQ-UN Sanctions' to a number of AWB employees (including Officer) regarding a meeting held that day between Storey, Tony Mott (Mott), Richard Rowe (Rowe) (Deputy Permanent Representative of the Australian Mission to the UN in New York) and Anastasia Carayanides (Carayanides) (First Secretary of the Australian Mission to the UN in New York) to discuss the progress of the Resolution 986 negotiations.

103 That memo stated:³⁹

Australian officials are quite optimistic for an outcome ... It seems Iraq is keen to do a deal and all parties are more optimistic than ever before.

The sticking point last time was UN (especially the U.S. and UK) surveillance of food distribution in both the North and South of Iraq. If agreement can be reached on this issue and the audit requirements for the escrow account, then

³⁵ CB 1/96-1.

³⁶ CB 1/96-17.

³⁷ CB 1/96.73, 96.83.

³⁸ 1999 distribution plan – CB 1/96-71 references back to Phase III distribution plan.

³⁹ CB 1/119; Geary, sch A [2].

there will be an oil for food/medicine deal done. ...

In regard to the apparent increase in bureaucratic involvement from Canberra with our applications, there is no pressure from the UN quarter except that the U.S and UK hold very strong on their position regarding the Sanctions rules. For example, an application stipulating payment by a 'Letter of Credit with up to five-year terms' (a la BHP) would be flatly blocked by the U.S. and UK. An application, however, which stated payment to be by 'Letter of Credit' with no details as to terms, would probably be approved.

We were advised that other nations clearly provide limited information in their applications to avoid the potential embarrassment of an application being rejected. There is political risk, of course, that should one go down the minimal information route and being subsequently found out, of being branded a Sanction buster.

The Australian Government will obviously not sanction such an approach.

...

7 Humanitarian aid includes medical supplies, food products, agricultural equipment to produce food (including pesticides and the like).

- 104 On 9 and 10 July 1996, Flugge and Michael Long (Long), with Emons and Greg Harvey (Harvey), travelled to Iraq. As reported to the Australian government,⁴⁰ the main purpose of this visit was to re-establish high level AWB contacts with the Iraqi government and to attempt to secure sales of Australian wheat, following the agreement by the UN to allow sales of wheat to Iraq under Resolution 986.
- 105 As a result of these meetings, AWB and the IGB reached an in-principle agreement for the supply of a minimum of 100,000 tonnes per month of Australian wheat to be shipped to Umm Qasr port in Iraq during the first six months of the operation of the OFFP, with further supply to occur if Resolution 986 was extended.
- 106 During this visit, Flugge met with the Iraqi Minister for Trade, during which meeting, the Minister expressed concern that AWB may lose the Single Desk. Flugge quickly dispelled these concerns, and the Minister replied that Iraq was very pleased, as this made their procurement planning more certain.⁴¹

⁴⁰ CB 1/121.

⁴¹ CB 1/122-3.

107 On 17 March 1997, Geary sent an email entitled 'UN 90-day review of sec.986 operation' to various AWB employees, detailing the operation of Resolution 986 of 1995 and the impact on AWB. It referred to 'changes made to the Sanction's Committee approval procedures which potentially could have ramifications for the AWB ...'⁴²

108 On 24 March 1997, Geary sent an email entitled 'IRAQ 986 PROCEDURES' to a number of AWB employees, including Emons, Hogan and Officer, advising that he had attended a briefing arranged by the UN Secretariat 'regarding UN procedures under 986 "Oil for Food"'.⁴³ Geary stated that the UN had advised on application procedures, including (amongst other things) the requirement that:⁴⁴

1 Make sure all pages of a contract are submitted.

....

4. Contractual terms (i.e. C&F or CIF to be clearly spelled out etc., etc., etc.).

....

Whilst the Sanctions Committee will prescreen applications before monies are available in the Escrow Account, there can be no que jumping unless the UN decides the commodity is urgently required as earlier advised.

Regards

Peter Geary

109 At around the same time, Geary also faxed to Hogan and another senior AWB employee in the contracts area, Mr Rex Lister (Lister), a set of papers that were handed out at the UN briefing. The procedures also referred to matters the UN expected to find in a contract, such as whether it was CIF or CIP or some other contract and also what transport conditions applied, such as air or road or rail.⁴⁵

⁴² CB 1/155.

⁴³ CB 1/157, 159. Geary, sch A [3].

⁴⁴ CB 1/157, 159. Geary, sch A [3].

⁴⁵ CB 1/162.

110 On 17 April 1997, Geary received a fax sent by Carayanides of the Australian Mission to the UN which attached:⁴⁶

- (a) a chronology of the implementation of Resolution 986;
- (b) an explanatory note regarding the Oil-for-Food Programme Distribution Plan, which materially stated that the distribution of foodstuffs under the Oil-for Food Programme would be undertaken by the Iraqi Ministry of Trade through the existing rationing system;
- (c) a copy of the text of Resolution 986; and
- (d) a copy of the procedures to be followed by the 661 Committee in implementing the Oil-for-Food Programme, including the procedures for the payment of humanitarian food contracts from the UN escrow account , which procedures:
 - (i) did not contain any provision permitting payment to be made from the UN escrow account on account of funds paid to the Government of Iraq or its instrumentalities; and
 - (ii) stipulated that any payments in favour of the IGB arising out of any commercial dispute should be paid into the UN escrow account.

111 Consistent with the above, Hogan recalls that he received a lot of information regarding the OFFP – including UN documents, MOUs and distributions plans – initially from the New York office of AWB.⁴⁷

112 Emons recalls a lot of broad-ranging discussion within AWB at this time about the methodology and the requirements of the UN Resolutions/legislation with the finance department, the Pool and the legal department.⁴⁸

113 On 7 November 1997, Hogan prepared an information paper on Iraq which described the effect of Resolution 986. He noted that:

- (a) AWB had negotiated eight contracts with Iraq since the OFFP started and sold 1.45 million tonnes of wheat;

⁴⁶ CB 1/183, 185. Geary, sch A [4].

⁴⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T919, L27–31.

⁴⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1684, L18–23.

- (b) there was a longstanding trade relationship with Iraq;
- (c) Iraq was an '*excellent premium market*' for AWB; and
- (d) there were problems with the market given the non-commercial nature of the UN, the Sanctions Committee was both slow and cumbersome – the two main costs were the procedure and the difference between Bill of Lading weights and discharge weights, and that AWB was investigating discharge facilities at Umm Qasar.⁴⁹

114 On 10 November 1997, Flugge wrote a letter to the Iraqi Minister for Trade⁵⁰ which referred to:

- (a) AWB's commitment to continuing its supply of wheat to Iraq despite all the difficulties experienced by AWB and the IGB in operating '*under United Nations requirements*;
- (b) the considerable delays in the receipt by AWB of payment from the UN caused by the payment arrangement imposed on AWB and the IGB by the UN; and
- (c) AWB's recognition that the '*United Nations requirements create special circumstances for the people of Iraq.*'

115 On 2 April 1998, Flugge wrote to the Honourable Tim Fischer, Minister for Trade, outlining AWB's ongoing concerns as to the future of Australian wheat sales to Iraq, and to seek Mr Fischer's assistance with a visit to Baghdad the following month. In this letter, Flugge advised that he will be in Baghdad the following month to meet with the IGB and Minister Mohamed Medi Saleh (Minister Saleh), and expected this to be '*a difficult and problematic series of meetings for the AWB.*' Flugge noted that the visit would be '*critical in trying to ease some of the tensions in our relationship not only to protect existing contracts and future Australian wheat sales, but also to*

⁴⁹ CB 1/247.

⁵⁰ CB 1/251.

ensure that we have a close working relationship with Iraq in order to best ensure the repayment of outstanding debt once sanctions are lifted' and requested that the Minister consider providing a message to pass to Minister Saleh indicating the importance of the wheat trade between Australia and Iraq.⁵¹

AWB sales prior to June 1999

116 For each of the first five phases of the OFFP, the usual basis on which AWB (and the Australian Wheat Board before it) sold wheat to the IGB was 'CIF free out Umm Qasr' or 'C and F free out Umm Qasr'.

117 Between 1995 and June 1999, AWB and IGB executed:

(a) 'Standard Terms and Conditions' which stated that payment was to be on CIF terms;⁵²

(b) a number of contracts for the sale of bulk wheat on C and F terms⁵³ and on CIF terms.⁵⁴

118 Under the CIF element of those terms, the price per tonne for which the wheat was sold included:

(i) the cost of the wheat;

(ii) the freight, or the cost of the carriage of the wheat from Australia to Umm Qasr (the ocean carriage); and

(iii) the cost of insuring the shipment against the risk of loss of or damage to the wheat during its carriage to Iraq (marine cargo insurance).⁵⁵

⁵¹ CB 1/271.

⁵² CB 1/137, 141.

⁵³ CB 1/145, 147, 151, 153.

⁵⁴ CB 1/217, 219, 221, 223, 229, 237, 243, 253, 255, 259, 261, 265, 269, 275, 279, 281, 285, 287, 291, 297-313.

⁵⁵ CB 1/137-8.

- 119 As the seller of the wheat on such terms, AWB was required to arrange, and in the first instance pay for, both the cost of the ocean carriage and the cost of the marine cargo insurance for each shipment. It would in turn recover those costs from the proceeds of the sale of the wheat.
- 120 In determining the price at which it was prepared to sell its wheat, AWB took into account the anticipated costs of the ocean carriage and marine insurance that would need to be recouped from the proceeds, as well as the FOB price it wished to obtain.
- 121 During this period, AWB sold wheat to the IGB that did not include in the sale price any allowance for the cost of the discharge of the wheat from the vessel on its arrival at Umm Qasr. That was because the IGB had full responsibility for operation of the port facilities at Umm Qasr, as well as for the wheat's accumulation, storage and distribution to flour mills.
- 122 Under the terms of the IGB's contracts with AWB, the obligation to effect or arrange for the discharge of the wheat from the vessel at Umm Qasr rested with the purchaser, the IGB. The costs of discharge, along with the usual port dues, were also to be borne by the buyer (the IGB).⁵⁶ AWB therefore had no obligation to discharge the wheat shipped to Iraq or to arrange for its discharge. Nor did it have any obligation to pay for the cost of the wheat's discharge or the costs of distributing the wheat within Iraq. Under the terms of its contracts with the IGB, AWB had no obligation to make any payments in or to Iraq.

Flugge's AWB role and experience

- 123 Both Flugge and Geary held longstanding positions with AWB.
- 124 In 1984 Flugge was appointed to the Board of AWB. In 1991 he was appointed Deputy Chairman of AWB, and on or about 28 March 1995 he was appointed as Chairman of AWB, which appointment was referred to and confirmed in a letter to Flugge dated

⁵⁶ CB 1/139.

21 August 1995.⁵⁷

125 Flugge was Chairman of AWB from 1995 until March 2002. ASIC alleges that while he was notionally a non-executive chairman, his experience, work and hands-on approach to international markets such as Iraq (as set out below) demonstrate that on occasions he assumed executive duties. ASIC contends that the true nature of Flugge's role is a key consideration in the Court's determination of his knowledge and the content of his duties in the relevant period.

Geary's AWB roles and experience

126 On or about 30 July 1985 Geary was offered a position with AWB as a Registration/Payments clerk.⁵⁸

127 On or about 21 June 1990, Geary received a letter confirming his appointment as Assistant Manager based in London, and this letter includes an acceptance of the appointment, apparently signed by Geary, dated 28 June 1990.⁵⁹

128 On or about 19 May 1992, Geary received a letter confirming his appointment in Middle East Marketing, and this letter includes an acceptance of the appointment, apparently signed by Geary.⁶⁰

129 On 10 August 1995, Geary's appointment as manager of AWB's New York office was detailed in a letter from AWB. The extension of the appointment was confirmed in a facsimile from Officer to Geary dated 1 August 1997.⁶¹ Geary's role in that position was 'to represent AWB political interests in the US and to manage US operations including grain marketing.' His key working relationships included the US government and agricultural industry associations and he was responsible for

⁵⁷ CB 1/5.

⁵⁸ CB 1/7.

⁵⁹ CB 1/9.

⁶⁰ CB 1/13.

⁶¹ CB 1/111, 117.

providing analysis on US and Canadian agricultural policy. While in New York, Geary was at the forefront of AWB's dealing with the UN regarding the introduction of the OFFP, and fed information back to the IS&M team in Melbourne regarding the effect of UN Resolutions on Iraq and the operation of the OFFP.

130 In around September 1998, Geary returned to Australia from New York to replace Phil Pyle as Pool Manager. In 1999, Geary was still working in the Pool. On 2 June 1999, Geary entered into a new 'Employee Service Agreement' witnessed by Ted Laskie (Laskie).⁶² Laskie was Geary's supervisor at this time.

131 In this role, Geary reported to the general manager of AWBI and his responsibilities included managing the Single Desk on a day to day basis and the wheat export program, as well as ensuring that policies and procedures were in place to protect the integrity of the Single Desk. He was also required to exercise the powers and carry out the duties appropriate to the appointment and to use his best endeavours to further the prosperity and enhance the reputation of the group.

132 From June 2000 until 2006, Geary was a member of an executive committee known as the Small Executive Group, the Small Executive Management Group and the Executive Leadership Group (ELG), comprising the Managing director and senior executives of AWB. The ELG set out the strategy for the business of AWB, executing against strategy, reviewing activities and keeping abreast of strategy. The following documents show Geary's continuous membership of the ELG (in its various guises): Small Executive Management Group minutes 6 June 2000⁶³ – Geary in attendance; Full Executive Management Group minutes 20 June 2000⁶⁴ – Geary attended; ELG action list 19 March 2002⁶⁵ – Geary responsible for items; ELG Agenda

⁶² CB 1/327.

⁶³ CB 2/1067.

⁶⁴ CB 2/1071.

⁶⁵ CB 2/1079.

30 September 2003⁶⁶ – Geary a member.

133 Geary occupied a number of senior positions within AWB and was Group General Manager of Trading from 2001 until 2006. In that role, from February 2002, he took over direct responsibility for IS&M, including trade with Iraq.

The introduction of the trucking fee or cost of discharge

134 We have now arrived at the beginning of the alleged inland transportation fee wrong doing.

135 The following part of the judgment describing the documentary evidence is essentially taken from ASIC's written closing submissions which set out in great detail the correspondence and events relied on in chronological order.⁶⁷ ASIC's written closing submissions were in two parts. In substance, the first part dealt with the alleged payment of the inland transportation fees and evidence and against Flugge and Geary. In substance, the second part dealt with the Iron Filings claim and the payment of the Tigris debt which relate solely to Geary.

136 I have relied heavily on ASIC's written closing submission seeking to identify ASIC's submissions on findings I should make as well as adopting ASIC's summary of the relevant documents relied on by ASIC. In many cases, I do not comment on ASIC's submissions on conclusions I should draw. My failure to do so does not necessarily mean that I accept the submission. In many instances the evidence and comment is not related to the case pleaded against Flugge or Geary. The relevance to the case against Flugge and Geary is limited to the case expressly pleaded against each of them which I detail below. ASIC also submit that certain matters were 'well known' or 'widely known' within AWB and thus I should be more readily able to draw the inference that Flugge and Geary knew the relevant matters which are specifically pleaded against each of them. ASIC rely on the documents and chronology of events that I set out in support of its case that certain facts were 'well known' or 'widely

⁶⁶ CB 2/1081.

⁶⁷ PCS.

known' within AWB.

- 137 I now turn to the chronology of events relied on by ASIC.
- 138 By a tender dated 16 June 1999, in accordance with the memorandum of understanding between Iraq and the UN and the resolution implementing Phase VI of the OFFP, the IGB sent to AWB an invitation to tender for the supply to the IGB of 200,000 tonnes of wheat. This tender sought to introduce a different term to those previously agreed that would have AWB pay US dollars to Iraq as a term of the contract for the sale of wheat by AWB to the IGB.
- 139 The tender document included a term stating: 'CIF free on truck to silo at all Governorate. Cost of discharge at Umm Qasr and land transport will be USD12 per metric tonne. To be paid to the Land Transport Co. For more details contact Iraqi Maritin in Basrah [sic].'⁶⁸
- 140 This was the first time that the IGB had requested such a payment be made by AWB for inland transport. The IGB apparently sought to have AWB pay Iraq a fee of US\$12.00 per tonne, described as being for the cost of the discharge of the wheat from the vessel at the port of Umm Qasr and the cost of transporting the wheat by road from the port of Umm Qasr to the various Governates throughout Iraq.
- 141 As will be discussed below, AWB agreed to pay the fee. The payment of the fee is alleged by ASIC to be conduct that the Australian Government was called on to prevent by the UN resolutions. As discussed above, the Australian Government did not pass any laws prohibiting Australians from engaging in the conduct that the UN had called on Australia to prevent, save for passing the regulation referred to earlier whereby Australians were prohibited from exporting wheat to Iraq without an export approval.
- 142 There are a number of important early emails within AWB as to the new pricing terms

⁶⁸ CB 1/360.

contained in the 1999 Iraqi tender and what AWB should do in response to this term.

143 Geary was the recipient of many of these early emails in which the IGB fees were being discussed within AWB and the methodology to pay the fees formulated and implemented.

144 On 16 June 1999, Hogan, from Cairo, circulated an email addressed to Geary (and others including Watson), seeking information in preparation for Hogan and Emons' imminent visit to Baghdad.⁶⁹ The information he sought related to UN restrictions on trade with Iraq. He wrote:

Hence Mark [Emons] requires – copy of contract, copy of their contract, copy of MOU (Copy of MOU is in a folder – I know that much) and copy of UN contract conditions – not sure how much I stipulated on UN docs regarding the contract conditions – but if you find anything relevant regarding please fax through.

145 The email also stated that Zuhair Daoud (Zuhair), the Director General of the IGB wanted to discuss some contract terms and conditions in person. There is also a note directed specifically to Geary and Ms Sarah Scales (Scales), who worked in the Pool and was pricing manager of AWBI, informing under the topic of 'price levels and tonnages for September to February' that, 'although Zuhair did not want to discuss pricing – goog [sic] to know.'⁷⁰

146 On 17 June 1999, Geary replied to Hogan's email of 16 June 1999 referring to details of the IGB Wheat Tender which had been received that morning.⁷¹ Under the heading '10. Price', the tender referred to payment of:

CIF Free on Truck to Silo at all Governorate. Cost of Discharge at UMM QUSER and Land Transport will be U.S.D. 12 per metric ton. To be paid to the Land Transport Co. For more Details contact Iraqi Maritin in Basrah. [sic]

Geary also stated in the email that:

There are some things in the tender doc we cannot offer against, Darryl will go

⁶⁹ CB 1/367.

⁷⁰ Geary, sch [5]; CB 1/367.

⁷¹ CB 1/369.

through these with you.

147 The wheat tender also contained terms, the material effect of which were that each contract required UN approval and the payments to AWB would be made to the UN escrow account upon receipt from the 661 Committee.⁷²

148 On 17 June 1999, in an email to another IS&M employee, Darryl Borlase (Borlase) and copied to Emons and Hogan and others,⁷³ Graham Owen (Owen) (AWB's National Trade Finance Manager) commented on the IGB's wheat tender, including the proposed new price terms (item 10):

Our price has to include Land transport costs of USD12 per tonne. Why??? and how do we pay Land Transport company when all Iraqi funds frozen?????????.

149 The problem that Owen referred to may also have been the separate US sanctions imposed on the transfer of funds to Iraq. As discussed below at paragraph 1289 and following, the US sanctions were identified by Hogan and Emons as the primary reason that AWB could not transfer US dollars to the Iraqi body nominated by the IGB, rather than UN sanctions.

150 On 21 June 1999, Hogan and Emons visited Iraq to discuss the 1999 Iraqi tender. Emons took handwritten notes of a meeting with Zuhair and Hogan in Iraq in the IGB office.

151 One of his entries is 'Iraq meeting 21 June 1999.' The reference to 'Distribution plan, contract terms, through banking system, subject to UN approval. Check New York' was in reference to the distribution plan that was going to be subject to UN approval. AWB would have to check with its New York office. All the parties present spoke about these matters.⁷⁴ The particular provision 'CIF free on truck to silo at all

⁷² Geary, sch A [6].

⁷³ CB 1/371.

⁷⁴ CB 1/373; Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1694, L25 – T1696, L10.

governorates' in the 1999 Iraqi tender⁷⁵ was an issue. It was discussed with Zuhair.⁷⁶

152 AWB objected to the payment of the inland transport fee during this first meeting in June 1999 and on subsequent trips also. Zuhair's response at any time there was an objection was that this was a decree by the president and it was going to be a standard contract term for all suppliers into Iraq.⁷⁷

153 On 24 June 1999, following his return from Baghdad to Cairo, Hogan sent an email to Emons, copied to Geary and others, reporting on the outcome of the meeting with the IGB. Hogan included in this email a report on the new terms for the price at which wheat was to be supplied, which included the following:⁷⁸

1. FREE IN TRUCK

IGB have requested that the offers are submitted CIF, FREE IN TRUCK, IRAQ. The cost for this is USD 12.00 per tonne which the supplier adds to their offer.

Hence this part is not an issue.

The problem which still needs to be resolved is the payment mechanism as all Iraq accounts have been frozen. IGB have stated that we will be required to pay the Maritime Agents, and one possible way would be to pay this to an Iraq bank in Amman.

IGB will provide details of the banks which we can pay this through.

MICHAEL – as mentioned to you, there may be a way to pay this through the vessel owners. Mark will discuss this with you, so you have to think about the possibilities.

Reason for wanting suppliers to pay this amount is due to the excessive amount of Iraqi Dinars placed into the market by the Ministry of Finance for every Phase (Phase V = 23 billion Dinars, which has an impact on their currency rates).

154 ASIC submits that the need to find a means to pay the fee to Iraq, other than directly, necessarily involved absence of UN approval of such payments.

⁷⁵ CB 1/360.

⁷⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1703, L25–31; CB 1/388.

⁷⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T930, L5–25.

⁷⁸ CB 1/375; Geary, sch A [7].

155 Emons explained in his evidence that, as well as UN sanctions, the United States had placed restrictions on currency transfers to Iraq. Emons says that the US restrictions were the source of AWB's concerns about transferring moneys to Iraq or its entities.

156 A possible solution was to pay the US dollars into an account in an Iraqi bank situated in Jordan.

157 According to Hogan, discretion was required in relation to implementing the inland transportation fee of US\$12.00:⁷⁹

The USD12.00 will be added onto CIF price – so no skin off our nose - however we need to find a way to implement the payments as Iraq a/c's frozen. Discretion is required here.

158 As Hogan explained in his evidence, the problem with making a payment to an entity in Iraq by AWB was that payment *could* not be made using US banks. AWB would receive US dollars from the escrow account in New York. On the other hand, the existence of UN sanctions meant that payments of US dollars to Iraq or its instrumentalities *should* not be made, rather that they *could* not be made.

159 Initially, the first payment of the fee was made into the bank account of a transport company that had contacted AWB regarding inland transport, Alia for Transportation and General Trade (Alia) in Jordan, at the direction of Zuhair. Subsequently payments were made via shipowners to parties nominated by Iraq, then through Ronly Holdings Limited (Ronly), and finally via Alia to the Iraqi government.

160 ASIC submits that Hogan's email made clear two things:⁸⁰

(a) the 'Maritime Agents' to whom the US\$12.00 fee was to be paid was an Iraqi entity; and

(b) the purpose of the fee (as reported to Hogan) was to reduce the impact on the

⁷⁹ CB 1/381.

⁸⁰ PCS, [278].

Iraqi Ministry of Finance of having to print more dinars.

- 161 ASIC submits that conspicuous by its absence is any suggestion that the payments were necessary to provide for transportation of wheat which, given the separate \$207 million provision made for transport under the Phase VI Distribution Plan, was scarcely surprising.⁸¹
- 162 ASIC also submits that the email made clear that Emons and Hogan had discussed with Zuhair the problem of making payments of US dollars to an Iraqi entity in Iraq. A possible solution was to pay the US dollars into an account in an Iraqi bank situated in Jordan. Irrespective of into which account the sums were to be paid, or where that account may have been situated, ASIC says that it is apparent that the payment was to be, directly or indirectly, to an Iraqi entity. ASIC says that was prohibited by Resolution 661.
- 163 ASIC submits that Hogan's email did not discuss:
- (a) which company was to perform the discharge or physical transportation of the wheat within Iraq;
 - (b) the need to obtain quotations from companies either within or outside Iraq for the discharge or transportation of grain within Iraq;
 - (c) the need to enter into a contract with a company, wherever situated, to perform the discharge or transportation that AWB was, by the contract, undertaking to perform.
- 164 ASIC says that the only discussion was how to pay the funds to Iraq, possibly to an Iraqi bank in Amman, Jordan. ASIC submits that the reason for this is that, from the outset of the introduction of the inland transportation fee, it was understood by AWB that, notwithstanding the terms of the 1999 Iraqi tender and of the contracts AWB subsequently concluded with the IGB, AWB had no obligation to arrange or effect the

⁸¹ CB 1/96.73, 96.83.

discharge or transportation of the wheat within Iraq. Its obligation was to pay a fee to an Iraqi entity. The difficulty was how to achieve that when payments to an Iraqi entity were prohibited by UN sanctions.

165 ASIC submits that it might be asserted that the AWB employees involved believed in 1999 that contracts would require approval from the UN, and that the fee to be paid was a fee required to address the cost of transportation in Iraq. ASIC submits that it is impossible to understand, if that was the case, why there was difficulty in paying the fee directly to Iraq if the UN approved of the payment. As mentioned above, Hogan explained that the difficulty was the existence of US sanctions on transfers of hard currency to Iraq. Hogan said that even though he believed that the UN was approving the payments to Iraq, his view of the UN was such that it wouldn't surprise [him] that the UN would implement something like that and not understand the mechanics that it can't physically be done.⁸²

166 Hogan concluded his 24 June 1999 email with a 'To do' list. The last item on the list was directed to the Manager of AWB Chartering, Michael Watson. It read:⁸³

4. Watson – payment method of USD 12.00 Free in Truck (via owners).

ASIC submits that the reference to 'owners' was a reference to the owners of the ships used to carry the wheat from Australia to Iraq.⁸⁴

167 ASIC submits that it was therefore plain to AWB from the outset that the purpose of the fee was for the government of Iraq to obtain hard currency and thereby mitigate the effect of economic sanctions.

168 Thus, ASIC says that AWB had either to agree to the new conditions of tender or risk losing its Iraq market. According to Hogan, AWB at first rejected the amended terms

⁸² Transcript of hearing, *ASIC v Geary & Flugge* (27 October 2015) T944 (Xn Hogan).

⁸³ CB 1/375.

⁸⁴ Geary, sch A [7].

and complained to the IGB but was told that it was a presidential decree and that every supplier supplying Iraq would be operating under the same terms and conditions.⁸⁵

169 ASIC submits that but for that initial reluctance, there is no evidence that suggests that AWB ever contemplated the possibility of losing the Iraq trade. Indeed, ASIC says that AWB was determined to do what it had to in order to safeguard that trade. ASIC says that finding a method of satisfying the conditions of tender was required. This was reflected in conversations within AWB. In particular, ASIC submits that Officer spoke of the new contract terms with Flugge, and Flugge's response reflected an attitude of 'do whatever you have to in order to secure the trade with Iraq.'⁸⁶

Q: What did you say to the chairman about the payment of the \$12 a metric tonne?

A: Well, as I recall, to the best of my ability, this was an imposition that was placed upon us by the buyer, the Iraqi Grain Board. There was no option. There was no choice. It was \$12 or not, or if you don't make that payment then, of course, there would be no business. That was made very clear. It was in that context that I discussed it with the chairman, and that was the nature of those discussions.

170 Thus, from June 1999, ASIC submits that AWB knew:

- (a) the purpose of the newly imposed inland transportation fee was to extract US dollars from the escrow account to be paid back to Iraq;
- (b) AWB did not have to arrange or effect transportation of the wheat within Iraq. The IGB would attend to that, as it had before, but now using in whole or in part the US dollars so provided to it; and
- (c) no question existed of AWB having to enter into a trucking contract – that is, an agreement with a transportation company to transport the wheat for AWB or on its behalf within Iraq.

⁸⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T930, L13–25.

⁸⁶ Officer Cole Transcript T2318, L16–25 at CB 9/6648.4.

171 ASIC submits that within AWB it was widely understood that the money for the inland transportation fees was going to the Iraqis.

172 According to Hogan, AWB at first rejected the amended terms and complained to the IGB but was told that it was a presidential decree and that every supplier supplying Iraq would be operating under the same terms and conditions.⁸⁷

173 As discussed below at paragraph 1289 and following, some within AWB perceived the main problem facing AWB was the difficulty in transferring the funds to Iraq in view of the US sanctions. ASIC contends that the problem was how to make payments to Iraq in light of the existing UN sanctions. I am not satisfied that this was the case. As discussed below, Hogan said the problem was the US sanctions.

174 Emons says that he discussed this problem of how to pay the inland transportation fee to the Iraqis with others at AWB, including Paul Ingleby (Ingleby), the Chief Financial Officer, Watson, Owen and Officer.⁸⁸ Although for the reasons discussed below, I have said I am not prepared to accept Emons' evidence unless corroborated by other evidence, I accept that it is inherently likely that the problem of paying the fee was discussed with other sales and marketing employees of AWB.

175 Tim Snowball (Snowball) (from AWB's New York office) also responded to Hogan's email of 24 June 1999. This was in an email dated 25 June 1999,⁸⁹ in which he sought advice in relation to the proposed changes to the contract conditions:

Can you advise what proposed changes to contract terms and conditions are to be agreed between IGC and UN, and what will be agreed between AWB and IGC only.

176 According to ASIC, Snowball contemplated, as early as June 1999, arrangements with

⁸⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T930, L13-25.

⁸⁸ CB 1/367, 375; Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1694, L3-8; T1694, L21-22, Emons' statutory declaration [28]-[30] at CB 9/6684.2; Cole Transcript T1856, L9-23 at CB 9/6618.3, Officer.

⁸⁹ CB 1/379.

Iraq that were not to be disclosed to the UN.

177 According to the Storey memo earlier circulated by Geary in May 1996,⁹⁰ this minimal information approach being proposed by Snowball in June 1999 was inherently risky because the Australian government would not sanction such an approach and AWB could later be branded a sanctions buster. ASIC says that AWB, through Geary and others, knew this and did nothing to stop the IGB fees being paid or adopting the minimal information approach.

178 Snowball also reported:

The Australian mission to the UN spoke to the UN today. The UN said that they were looking at some proposed changes to contract terms and conditions, but we will not find out much more until it is finalised.

179 On 25 June 1999, Geary (and others including Emons, Officer and Watson) received an email from Hogan entitled 'Re: IRAQ'⁹¹ in response to Snowball's email. The email passed on the proposed changes to the terms and conditions and comments Hogan had received from Owen on 17 June 1999, annotated with his own comments. The email reproduced Owen's comment from his email of 17 June 1999 (referred to at paragraph 148.⁹²

180 According to Hogan's evidence, the reference to Iraq's accounts being frozen is a reference to the US sanctions.

181 According to Hogan, discretion was required in relation to implementing the inland transportation fee of US\$12, because Iraq had told AWB that it had been submitted to the UN for approval expecting AWB to take that at face value. Hogan explained in his oral evidence that the comment as to discretion being required meant that he was suggesting discrete inquiries with the UN as to 'what's happening with the

⁹⁰ See paragraph 102.

⁹¹ CB 1/381.

⁹² Geary, sch A [8].

submission from the Iraqis to the UN.⁹³ This suggests some doubt at the time that the payments had yet been approved, but as outlined below at 910, he and others later thought the payments were approved.

182 Hogan gave evidence that funds could not be transferred electronically into Iraq.⁹⁴ Following the Gulf War when Australia was trading with Iraq between 1991 and 1996, because of US sanctions Zuhair used to travel out with his people to a bank and bring suitcases full of cash and would meet AWB people at the Central Bank of Amman and transfer the funds into Australian accounts from that bank.⁹⁵

183 According to ASIC the payment of the trucking fees was 'no skin off [AWB's] nose' because the entire amount of the payments would be later recovered from the UN escrow account as part of the contract price. Therefore there was no real financial impost on AWB or the Pool. In contrast, ASIC says that later demurrage issues were an actual financial cost and AWB took urgent steps with every party concerned including the IGB, DFAT and the UN to try and expedite discharge of wheat and reduce demurrage.

184 ASIC submits that the clear implication of Hogan's evidence was that the wheat trade with Iraq was paramount, and neither he nor anyone else in AWB wanted to put it in jeopardy. ASIC submits that if the Iraqis had not sought or obtained approval for the inland transportation fee, he did not want AWB to raise the issue with the UN.

185 ASIC says that the message from Zuhair had been clear: it was one of 'pay the inland transportation fee or Iraq will not buy your wheat.'

186 On 25 June 1999, Watson responded to Hogan's email of 24 June 1999 (sending a copy to Geary):⁹⁶

⁹³ T, 932; Xn.

⁹⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T943, L31 - T944, L13.

⁹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T945, L1-18.

⁹⁶ CB 1/385; Geary, sch A [9].

Freight

reverting on this regarding payment of USD 12.00 I will discuss this with Mark [Emons] upon his return to find a suitable method.

My concern re CIF to trucks is that we are also now insuring cargo once unloaded from the vessel – i.e. truck – tfore our liability does not cease upon passing the ship's rail.

This leads to next problem, regarding shortage as I anticipate loss will take place from ship to truck.

Above for reflection, not insurmountable but we need to ensure that we fully aware and put into place suitable procedure etc.

- 187 On 25 June 1999, Geary received an email from Snowball, the material effect of which was that Snowball asked which proposed changes to the contract terms and conditions would be agreed between the IGB and the UN, and which contract terms and conditions would be agreed between AWB and the IGB only.⁹⁷
- 188 On 28 June 1999, AWB sent a telex to the IGB setting out an offer to supply Iraq with 600,000 metric tonne (mt) of wheat on terms '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 seller's to the nominated maritime agents in Iraq.'⁹⁸ This was the first time AWB offered to pay inland transportation fees under the OFFP. The tender was sent by Emons to Zuhair at the IGB.
- 189 On Monday 5 July 1999, Zuhair rejected the tender and counter offered at US\$155.00 for 700,000 tonnes of wheat at 'CIF F.O.T. to silo.'⁹⁹
- 190 On 6 July 1999, AWB submitted to IGB a revised offer of 700,000 at US\$167.00 'CIF, Free in Truck' with the same discharge cost of US\$12.00 payable to nominated maritime agents in Iraq.
- 191 On 9 July 1999, AWB submitted a fresh offer of US\$162.00 per tonne 'CIF, Free in

⁹⁷ Geary, sch A [10].

⁹⁸ CB 1/387.

⁹⁹ CB 1/391.

Truck'.¹⁰⁰

192 On Tuesday 13 July 1999, Emons faxed Zuhair, referring to another counter offer of USD155 by the IGB, informing Zuhair that discussions had taken place at the highest level with Flugge, who confirmed the importance of the longstanding relationship between both parties and noting that he was authorised to offer USD158 per metric tonne, CIF Umm Qasr 'delivered onto truck at a cost of USD12.' Emons said that 'this clause remains subject to UN approval of the Iraq distribution plan.'¹⁰¹

193 On the following day, on Wednesday 14 July 1999, the contracts were agreed at USD155 per tonne (A4653, A4654 and A4655). Under price, each contract provided 'The CIF, Free in Truck price per tonne of 1000 kilos is United States of America dollars as follows: US\$155.00 per tonne.'¹⁰²

194 Each contract provided that '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 will be paid by Sellers to the nominated Maritime Agents in Iraq. This clause is subject to UN approval of the Iraq distribution plan.'

195 Two written contracts were prepared and signed for each of the three contracts comprising this sale. The first was a single-page contract prepared by AWB (short-form contract).¹⁰³ The second was a contract several pages long and prepared and signed by the Iraqi 'Ministry of Trade, Grain Board of Iraq' (long-form contract).¹⁰⁴

196 The AWB short-form contract identified the quantity and quality of wheat sold under that contract. It specified that the wheat was to be shipped to one safe berth at Umm Qasr, Iraq, during the period from 1 October to 31 December 1999, subject to receipt

¹⁰⁰ CB 1/395.

¹⁰¹ CB 1/397.

¹⁰² CB 1/399-403.

¹⁰³ CB 1/399, 401, 403.

¹⁰⁴ CB 1/405, 409, 413.

of UN approval.

197 The short-form contract was substantially in accordance with the short-form contracts AWB had prepared for the sales it had concluded with the IGB under earlier phases of the OFFP. That is, except for one difference.

198 The shipment clause in the short-form contract for these three contracts also contained the following provision:

The cargo will be discharged Free into Truck to all silos within all Governates of Iraq at the average rate of 3,000 metric tons per weather working day of 24 consecutive hours. *The discharge cost will be a maximum of USD 12.00 and shall be paid by Sellers to the nominated Maritime Agents in Iraq. This clause is subject to UN approval of the Iraq distribution plan.* [emphasis added].

199 An identical clause had also appeared in AWB's 'electronic message' of 14 July 1999.¹⁰⁵ This provision, and in particular the emphasised sentence, had not previously appeared in AWB's earlier contracts.¹⁰⁶ Despite the inclusion of this reference to 'discharge cost', this clause (and short-form contract) made no mention of 'land transport' or 'the land transport co.' (see clause 10 of the IGB's wheat tender¹⁰⁷).

200 ASIC submits that contrary to the text of the contract, no approval was ever sought or obtained by AWB from the UN in relation to any discharge cost or inland transportation costs, and no confirmation was ever sought that the Iraq distribution plan authorised the payment of cash in hard currency to Iraqi government instrumentalities. ASIC says that as the distribution plan made plain, \$207 million was allocated for the costs associated with transport, including trucks and spare parts in Phase VI from 25 May 1999 to 20 November 1999 of the OFFP alone.¹⁰⁸

201 The long-form contract was not in identical terms to the short-form contract prepared by AWB. In particular, the IGB long-form contract contained no clause equivalent to

¹⁰⁵ CB 1/539.

¹⁰⁶ See e.g. CB 1/279, 291, 297-307.

¹⁰⁷ CB 1/363.

¹⁰⁸ CB 1/96.73, 96.83.

either the shipment clause in the AWB short-form contract (quoted above at paragraph 198) or clause 10 of the IGB's wheat tender. The IGB long-form contract contained no mention whatsoever of the costs of discharge or land transport or any obligation on AWB to pay those costs or the IGB nominated fee of US\$12.00 per tonne. This was notwithstanding that the obligation to pay this fee was part of both the terms of the wheat tender and the subsequently concluded agreement for the sale of the wheat. Nor did the IGB long-form contract mention that a component of the purchase price was the US\$12.00 per tonne fee payable in respect of such costs.

202 The price for which the wheat was sold was also expressed in terms slightly, although not materially, different from the terms used in the short-form contract. It was described in clause 6 of the IGB long-form contract to be 'CIF F.O.T. to silo at all governorate of Iraq via Umm Quser port' [sic].

203 ASIC submits that although this carried with it the implication that the price included the cost of discharge and transportation of the wheat within Iraq, it did not disclose the amount of that cost or that the 'cost' was in truth a fee nominated by the IGB to be paid to the person nominated by the IGB and which was added to the CIF price of the wheat.

204 ASIC says that although the use of these terms to describe the price in the long-form contract may have carried with it the implication that AWB was responsible for the discharge and transportation of the wheat within Iraq and was including the costs incurred by it in discharging those obligations, the reality was that under the contract AWB concluded with the IGB these obligations remained with the IGB, and AWB's only obligation was to pay the fee nominated by the IGB to the person nominated by the IGB (which obligation the long-form contract did not disclose).

205 ASIC contends that neither AWB's short-form contract nor the IGB's long-form contract expressly provided for the payment of an 'inland transportation fee' – or, more particularly, the inland transportation fee AWB had agreed to pay (and which

had been added to the price of the wheat to be paid from the UN escrow account).¹⁰⁹

206 ASIC says that it was implicit in the terms in which the price was quoted in both the signed and approved long-form and short-form contracts that responsibility for discharging the grain from any vessel into trucks and for transporting the grain from the discharge port to the silos in each of the governorates of Iraq (or for arranging for that discharge and transportation) rested contractually with AWB.¹¹⁰

207 ASIC submits that the reality, however, was that AWB had no responsibility for either the discharge of the wheat from the vessel at Umm Qasr or the inland transportation of the wheat within Iraq. This was notwithstanding the terms in which the price was expressed. Every aspect of the arrangement for the discharge and transportation of the wheat rested with the Iraqis, as it had under contracts concluded before July 1999 and under earlier phases of the OFFP. Under the terms of the agreement it concluded with the IGB, AWB's only obligation in these respects was to pay the Iraqis a fee as dictated by the IGB.

208 In an email dated 11 October 1999 to Emons, Borlase and Owen, Hogan described the origins of the fee as being a direction issued by 'the President' that all suppliers must pay the US\$12.00 before the ship bringing the produce into Iraq arrived.¹¹¹ Emons likewise described the origins of the fee as being a 'Presidential decree.'¹¹² In email exchanges between Watson, Emons, Officer, Lister and Owen on 20 October 1999, AWB's obligation was variously referred to as an obligation to 'refund the trucking charges to Iraq', or a contractual obligation to pay a 'trucking fee'. Emons described it as being 'the payment of the trucking cost as per our contract back to IGB'.¹¹³

209 ASIC submits that AWB understood that it was not responsible for trucking. On 4

¹⁰⁹ CB 1/363, 391, 395, 397.

¹¹⁰ CB 1/401-16.

¹¹¹ CB 2/665.

¹¹² CB 2/703.

¹¹³ CB 2/704.

November 1999, Emons emailed Officer saying:

To date IGB have not advised the trucking co. to whom payment should be made. We have been approached by a company in Jordan but our response has been to ask for confirmation from IGB before discussing further.

We are not responsible for trucking in Iraq only the payment. Payment to us occurs as per existing contract after UN inspectors cert is issued at discharge.

When I see Zuhair at the end of Nov I hope to clear a number of the details up.¹¹⁴

210 ASIC says that AWB was not itself responsible for the trucking of the wheat within Iraq. At no time prior to late 2003 did AWB seek to make any arrangements with any contractor for the discharge or transportation of grain within Iraq.

211 ASIC submits that, in summary, following AWB's receipt of the wheat tender for Phase VI of the OFFP and the visit of Emons and Hogan to Iraq in June 1999, there had been widespread communication amongst Officer, Lister, Emons, Owen, Watson, Geary and Hogan regarding the terms of the new tender and how they could be met.

212 ASIC says that it was understood by those discussing these terms within AWB that:

- (a) the inland transportation fee (or trucking fee) was fixed by Iraq;¹¹⁵
- (b) it was being paid to Iraq;¹¹⁶
- (c) it was being paid for the benefit of the Iraqis;¹¹⁷
- (d) imposition of the inland transportation fee would form part of the contract

¹¹⁴ CB 2/741.

¹¹⁵ CB 1/376, 665; Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T930, L20-5; T940; T1124, L22-24; T1170, L16-24; T1712, L12-13; Cole Transcript T1941, L17-19 CB 9/6618.4, Cole Transcript T2318, L16-25 CB 9/6648.4.

¹¹⁶ CB 1/376, 2/665, 677, 697, Transcript of hearing, *ASIC v Geary & Flugge*, (21 October 2015) T1712, L24-31; T1718, L6-9.

¹¹⁷ CB 2/697.

price, and accordingly, would be recovered from the UN escrow account;¹¹⁸

- (e) AWB did not have to arrange or effect the discharge of the wheat at Umm Qasr;¹¹⁹
- (f) AWB did not have to arrange or effect the transportation of the wheat within Iraq;¹²⁰
- (g) AWB was not required to enter into a contract with any transport company;¹²¹
- (h) the Iraqis would continue to organise the discharge, transportation and distribution of wheat in Iraq, as they had under the earlier phases of the OFFP and under their earlier contracts with AWB;¹²²
- (i) AWB's obligation was limited to payment of the fee set by the Iraqis;¹²³
- (j) the Iraqis had said they either had obtained or would obtain UN approval for the payment of the inland transportation fee;¹²⁴ and
- (k) the method of payment of that fee had not been approved.¹²⁵

213 ASIC says that under the terms of the proposed sale, AWB was not required to discharge the wheat and effect delivery to all or any governorates in Iraq, despite the

¹¹⁸ CB 1/376, 382.

¹¹⁹ CB 2/665, 741.

¹²⁰ CB 2/741, 665, Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1209, L28 – T1210, L2; T1724, L9.

¹²¹ CB 2/741, Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1209, L28 – T1210, L2; T1724, L9.

¹²² CB 2/665, 677.

¹²³ CB 2/741, Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1209, L28 – T1210, L2; T1724, L9.

¹²⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T944, L16–21; T1190, L26 – T1191, L3; T1219, L6–16; T1704, L23–7.

¹²⁵ CB 2/703, Transcript of hearing, *ASIC v Geary & Flugge*, (21 October 2015) T1717, L25 – T1718, L1.

specification of the price in terms to that effect in the wheat tender (and subsequent written contracts).¹²⁶ The obligation to transport the wheat sold by AWB to all governorates within Iraq was to rest upon the Iraqis, as it always had.

214 ASIC says that according to Officer, the question of sanctions and the issue of the trucking fee was one that evolved within the Iraq market.¹²⁷ It was the first time such a fee had been imposed on AWB anywhere in the world.¹²⁸ The question of not agreeing to the inland transport component meant no business.

215 Officer said that this was a generally held view within the AWB business.¹²⁹

216 On 14 July 1999, Emons sent an email to Flugge and others noting that AWB had concluded a sale of 700,000 tonnes at USD155.00 CIF Umm Qasr with the IGB.¹³⁰

217 That sale was divided into three contracts numbered A4653, A4654 and A4655, which were submitted to the UN for approval. The UN reviewed the contracts on or about 10 August 1999.¹³¹

218 Felicity Jane Johnston (Johnston), the UN reporting officer,¹³² reviewed the contracts and recommended their approval. I find that she either overlooked, or did not understand the meaning or relevance of, the clause in these three AWB short-form contracts that included the words:

The cargo will be discharged Free into Truck to all silos within all Governates of Iraq at the average rate of 3,000 metric tons per weather working day of 24 consecutive hours. The discharge cost will be a maximum of USD 12.00 and shall be paid by Sellers to the nominated Maritime Agents in Iraq. This clause

¹²⁶ CB 2/741.

¹²⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1169, L27-8.

¹²⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1187, L10.

¹²⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1185, L16-19.

¹³⁰ CB 1/541; TFASOC the particulars alleged , [6].

¹³¹ Johnston statement (exhibit P31) [15].

¹³² Johnston statement (exhibit P31) [15].

is subject to UN approval of the Iraq distribution plan.

219 The UN 661 Committee approved these three contracts without it having been noted by those charged with checking the contracts that they provided for a discharge cost to be paid in US dollars to an Iraqi entity.¹³³

220 There is no evidence, however, that AWB or any of its officers knew or believed that the contracts had been approved by the UN by mistake.

221 Nevertheless, the discharge cost clause did not clearly, fully or accurately disclose the true nature of the fee payable and the arrangements actually in place between AWB and IGB in relation to it.

222 ASIC submits that the clause misleadingly described the fee as a 'discharge cost', connoting that it was a payment referable to the actual cost of discharging the cargo incurred at the port by maritime agents in Iraq. ASIC says that moreover, the approvals were issued in circumstances where the UN inspectors had no knowledge that it was proposed that AWB would pay a fee to the IGB or its nominee, although it would have been known, had the two inspectors properly checked the contracts, that a fee of up to US\$12 per tonne was to be paid to 'Maritime Agents in Iraq'.

223 ASIC submits, and I agree, that it is less likely that the clause would have been overlooked if it had clearly, fully and accurately disclosed the true nature of the fee payable by AWB and the actual arrangements between AWB and IGB in relation to its payment.¹³⁴

UN approval of IGB fees in first three contracts

224 In August 1999, the UN confirmed that contracts A4653, A4654 and A4655 were eligible for payment from the UN escrow account,¹³⁵ being the first contracts

¹³³ Johnston statement (exhibit P31) [15].

¹³⁴ PCS, [335].

¹³⁵ CB 1/551-7.

incorporating trucking fees.

225 ASIC submits that the defendants presumably seek to make much of the fact that these contracts included a clause '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 seller's to the nominated maritime agents in Iraq' and therefore contend that the UN implicitly at least approved the inland transportation fees.

226 ASIC says that this is wrong in at least the following respects.

227 First, the UN approved the contracts but never approved the inland transportation fees being paid to the government of Iraq or one of its instrumentalities. ASIC submits that all the key witnesses agreed that the UN was never approached on this issue. ASIC submits that no document suggests that the UN was ever asked to approve this.

228 ASIC says that unlike other issues such as demurrage or how to pay compensation for iron filings, the UN's position was never explicitly sought by AWB on the inland transportation fees.

229 ASIC submits that secondly, Resolution 661 was never qualified by any distribution plan between the UN and Iraq, or by any contractual clause. The prohibition on funds to Iraq was always present.

230 ASIC says that thirdly, the clause referring to the trucking fees was removed from all future wheat contracts between AWB and the IGB in January 2000.¹³⁶ ASIC says that if there was no concern with the clause and there was a genuine belief that the UN had approved the fees, the clause would have remained in the contracts and would have been more frank to begin with.

231 ASIC submits that none of the IS&M witnesses recalled any confirmation from, or the need to discuss confirmation with, the UN that it had approved the free in truck

¹³⁶ Compare CB 6/4243 (draft) with CB 6/4245 (final).

arrangements or the inland transportation payments.¹³⁷

232 As discussed below at paragraph 1859 and following, Flugge believed that the UN had approved the payment of in the inland transportation fees. So did other AWB executives that gave evidence, although Officer said there initially was a 'grey area' about the fees, suggesting that something may have been amiss, but subsequently became reassured that the UN had approved of the payment of the inland transportation fees.

233 In late August 1999, Flugge received a document entitled 'Chief Financial Officer's Report' prepared by Paul Ingleby (Ingleby) which referred to an AWB marketing delegation that had visited Iraq at the 'urgent request' of the IGB to discuss 'changed terms and conditions being sought by Iraq for the distribution of food under the OFFP'. This report was tabled at a board meeting of AWB on 25 August 1999.¹³⁸

The AWB Code of Conduct promulgated in August 1999

234 Shortly after the introduction of the IGB fees, AWB promulgated a company-wide corporate code of conduct.¹³⁹ It was discussed at a board meeting on 26 August 1999¹⁴⁰ and later approved by the board and adopted by AWB.¹⁴¹ A presentation was given to staff in December 1999. ASIC submits that it is impossible that Flugge was not aware of the code of conduct and its requirements.

235 Relevantly, the code of conduct emphasised the following:

(a) AWB maintaining a reputation for high standards of business conduct,

¹³⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T952, L8 (Hogan), T962, L3-8 (Hogan), T967, L23 - T968, L6 (in relation to the after sales service fee) (Hogan), T986, L3-7 (changes to the trucking fees) (Hogan); T1199, L11-12 (Officer); T1716, L9-12 (Emons); Scales (T2004, L25)

¹³⁸ CB 1/559, 567 at 611; TFASOC the particulars alleged , [7].

¹³⁹ CB 1/566.1.

¹⁴⁰ CB 1/559.

¹⁴¹ CB 2/804-1-6.

professionalism and integrity;

- (b) acting in accordance with the highest standards of integrity and propriety was the fundamental principle of AWB's operations and business affairs;
- (c) that AWB was not to engage in any illegal or unethical agency payments, the test being if its disclosure would cause embarrassment to the company.

236 Flugge made it clear with a new board that he wanted the company to be seen and to operate under the highest levels of governance, the highest levels of performance in business, business ethics, accountability and behaviour.¹⁴²

237 The issue of conducting operations legally, ethically and in accordance with the highest standards of integrity was discussed at board level.¹⁴³ The code of conduct was discussed at board level in circumstances where it was incumbent on the company to express to its officers, directors and employees the expectation of the company in the modern world where corporate misdemeanours are quickly seized upon by the press.¹⁴⁴

238 The topic 'adherence to the values and standards at all times as set down is considered essential towards ensuring that AWB maintains a reputation for high standards of business conduct, professionalism and integrity' was discussed at board level.¹⁴⁵

239 The board discussed the code of conduct policy and there was a general agreement with the need for a code of conduct in light of recent examples in the press of individuals and companies being in embarrassing situations where people had not behaved ethically. The board was aware of what could happen in a foreign land with

¹⁴² Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1457, L27 - T1458, L1.

¹⁴³ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1457, L6.

¹⁴⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1457, L7-17.

¹⁴⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1457, L25-6.

foreign cultures.¹⁴⁶

240 According to Mr Stewart, the AWB's code of conduct and the requirement that its business affairs and operations be conducted legally, ethically and in accordance with the highest standards of integrity and propriety was absolutely important to AWB because, from Mr Stewart's perspective, the actions of the individuals, both at board and at management level, should always be ethical and passes the smell test or the front page test.¹⁴⁷

241 The phrase, 'You should consider if payment would be ethical or if its disclosure would cause embarrassment to the company' accords with Mr Stewart's understanding of the code of conduct policy at that time; Stewart believed that the test was not whether conduct was legal and within policy – there must be a value judgment on whether the person would be happy for it to be in the public arena and to defend it in the public arena.¹⁴⁸

242 The code of conduct was discussed widely within AWB at the time of implementation,¹⁴⁹ and the issue of agency payments or payments to third parties was raised, which was of considerable concern to members of staff including Emons.¹⁵⁰

Method of payment of the fee

243 After contracts A4653, A4654 and A4655 had been concluded and approved by the UN and the details of the letters of credit had been settled, there were two matters that required further consideration before the contracts could be fulfilled.

244 One was the method by which the inland transportation fees were to be paid to Iraq

¹⁴⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1461, L16-22.

¹⁴⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1519, L9-18.

¹⁴⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1520, L24-9.

¹⁴⁹ See Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1708, L31 – T1710, L10 (Emons' evidence).

¹⁵⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1710, L13-20.

by AWB. This had already been the subject of some discussion in June 1999, before the contracts had been negotiated. The other matter was through whom those fees were to be paid.

245 On 30 September 1999, in preparation for an upcoming Iraq visit, Emons sent an email to Hogan discussing matters that would need to be discussed with the Iraqis. Emons wrote:¹⁵¹

1. There is the issue of the USD 12 inland transport payment that we are required to make under the new contract. Speaking with [Owen] he suggests that the only way we can make the payment would be either hold the money in an account in Australia until sanctions etc. are lifted or, we can make a payment into a Jordanian account. Because of sanctions we can't do any of this thru an OECD country. Alternatively we drop the USD 12 from the contract. Suggest that you discuss with Zuhair.

246 Emons recalls discussing this issue with Hogan at this time.¹⁵² Hogan was asked to discuss with the IGB the method of payment and the US sanctions that prevented payment through any OECD country.

247 In October 1999, Flugge headed a further AWB delegation to Iraq. The delegation comprised Flugge, Murray Rogers, (Rogers) (the then CEO of AWB) and Hogan, at that time Manager-AWB Cairo and 'back-up' account manager for Emons. The visit was to coincide with an IGB grains conference in Baghdad. Hogan was standing in for Emons who was unable to attend. I deal with this trip in detail below at paragraph 1346 and following as it constitutes an element of ASIC's pleaded case of Flugge's knowledge.¹⁵³ What follows is merely a brief summary of the trip and its outcome.

248 On 9 October 1999, Hogan, Flugge and Rogers met with Zuhair in Baghdad and discussed matters including the trucking fee.

¹⁵¹ CB 2/653.

¹⁵² Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1711, L9, CB 2/653.

¹⁵³ TFASOC [38]-[40].

- 249 On 10 October 1999, Hogan sent an email to Emons and others including Geary. The email reported on the outcome of the meeting with Zuhair. At the conclusion of his email, Hogan stated, 'Mark, I will send a separate note on the FIT [free in truck] payment system.'¹⁵⁴
- 250 The email referred Geary ('Peter') to despatch and demurrage issues and noted that Iraq had no mechanism to settle any amounts:
- Sarah/Peter/Stu—I will explain the no despatch/demurrage. Iraq have no mechanism to settle any amounts ... we will need to do some work on the IGB to introduce carry into contracts, which I believe can be included under 986???
- 251 I infer the reference to 986 to be to Resolution 986.
- 252 The email then refers to '1 CIF contract, new contract FIT'.
- 253 ASIC says that the UN sanctions, and the changed contract terms with the IGB, were thus to mind.¹⁵⁵ The evidence suggests, however, that it might have been the US sanctions that presented the problem with payment.
- 254 On 11 October 1999, Borlase sent a facsimile to Zuhair, signed by Emons, the subject of which was 'Wheat Offer', which makes reference to 'recent discussions with Dominic Hogan, AWB Chairman Trevor Flugge and AWB Managing director Murray Rogers' but does not otherwise refer to the content of those discussions.¹⁵⁶ Under the heading 'Shipment' the document states that 'The cargo will be discharged free into truck to all silos within all Governates [sic] of Iraq ... The discharge cost will be a maximum of USD12.00...'
- 255 The fax refers to 'recent discussions with Hogan, Flugge and Rogers.' Emons said he was informed about those discussions having occurred by Hogan. According to Emons, Hogan told Emons that the discussion in Baghdad had revolved around tonnage, the shipment period, the price and the trucking payment methodology,

¹⁵⁴ CB 2/659-660.

¹⁵⁵ PCS [354].

¹⁵⁶ CB 2/661-663.

which Hogan said was for further discussion within the staff, Graham Owen (Owen), Terry Aucher (Aucher) and Officer, 'basically across the board.'

256 On 12 October 1999, as promised in his earlier email, Hogan sent an email to Emons, Borlase and Owen in relation to the inland transport fees in the following terms:

I did have a brilliant idea how to settle the USD12 Free in Truck payment to the transport CO's – we do a contract with them when enough equity was built up and then they sell to IGB and IGB pay them in USD (via 986 system).

However Zuhair advised that the President has issued to all ministers bringing product into Iraq that suppliers must pay the USD 12.00 before ship arrive so that unloading could proceed. If the USD 12.00 was not in place then they would not be unloaded.

I voiced our protest to this system as we already wait so long for payment, that we would be unhappy to prepay this amount. Also with the weight discrepancies – there would be a lot of juggling with payments etc.

Zuhair could understand this point and was approaching the minister for a special concession for AWB. We will wait upon outcome.

The system that will be the most workable would be that AWB create an account in Jordan and transfer funds to this account. From this account, we would transfer to a special account (nominated by IGB) for each vessel.

(We could probably by pass the Account in Jordan and transfer directly to the 'special' nominated account – as long as the link is not apparent that the funds were going into Irq.

I will let you and Graham have a think abt it and wait for Zuhair s decision from the Minister.

(other option is to use Maritime agents/vessel owners account/or buy a very large suitcase).¹⁵⁷

257 On 12 October 1999, Owen replied to Hogan, copying in Emons and Borlase, asking, 'Why do we try and make our business more difficult?' In his email, Owen reported that he had checked the possibility of opening an account in 'our name' in Jordan and set out the requirements where such an account was to be opened with a friendly bank, such as the ANZ. One requirement was 'copy of board resolution authorising the opening of an account and nominating signatories. This assumes senior management/audit will sign off on opening an account.' Owen concluded that in

view of these requirements:

I do not think that this proposal is a possibility to handle the payment of USD 12 per tonne for inland transport costs to Iraq.

I do not think that we need to open an account, I think that we could effect payment *to the Iraqi transport companies USD account with a bank in Jordan* from Australia. Despite the problems with USD payments to Iranian companies we are able to effect USD to GTC [the Iranian Grain Trading Company] for monies owed to them via their bankers in Europe. To enable payment, we would need to know the Banks name in Jordan and also where the bank conducts its USD account in USA. On payment for each shipment, we arrange the USD payment to the Iraqi transport company via ANZ thru their office's in Jordan.

[emphasis added by ASIC]

258 ASIC contends that the emphasised words show an understanding that Iraqi entities were to perform the transportation but that they should be paid through Jordan since payment to them in Iraq was not possible.

259 Emons responded to Owen's email on 12 October 1999, with a copy to both Hogan and Borlase,¹⁵⁸ suggesting 'a couple of ideas to follow on with:'

If we had an operable L/C could we not prepay the USD 12 prior to discharge in Iraq? I know we are risking USD 12 if the vessel does not get UN inspectors approval but with our ongoing shipping program are we really risking that much?

Iraq should then be in a position to put in place an L/c that does not require truck receipts.

We would then not be needing UN approval as we already have this for the existing contract and if we are to pay/or have another contract with IGB or a third party we would then need approval. Am I correct?

Thoughts any way, please revert.

260 ASIC contends that the recognised difficulty was the absence of UN approval for a payment AWB intended to make. It is not clear, however, that the recognised difficulty did not refer to US sanctions on currency transfers to Iraq.

261 Emons had a discussion with Owen about the issue of opening an account in Jordan. They discussed Owen's suggestion, 'Why not retain the US\$12 per tonne and then

supply them with additional wheat at no cost. Pay the money to the UN so that they can add to the process of the oil sales used to purchase other requirements that in the list of approved products so Iraq can purchase additional products under this program.¹⁵⁹

262 On 13 October 1999, Borlase sent an email to Snowball concerning the payment for the clause 'Free in Truck'. Borlase wrote, 'We are getting closer to a solution on how we pay the transport companies in Iraq without jeopardising the current procedure of getting paid.'¹⁶⁰

263 On 14 October 1999, AWB and the IGB entered into contracts A4821 and A4822. Significantly, contract A4821 was under Phase IV of the OFFP,¹⁶¹ and so did not include the 'CIF Free in Truck' clause or obligation to pay the USD12.00 fee; accordingly despite being entered into at the same time (and for a much smaller amount of wheat) the price was exactly USD12.00 per tonne lower than contract A4822, which included the CIF Free in Truck clause and obligation to pay USD12.00 to nominated Maritime Agents in Iraq.¹⁶² The IGB confirmed both contracts by facsimile on 17 October 1999.¹⁶³

264 By 20 October 1999, AWB had decided that the inland transportation fee for shipments of wheat to Iraq under contracts A4653, A4654 and A4655 would be paid via the shipping companies that were to carry that wheat to Iraq. The plan included a component whereby the shipowners would debit AWB for the trucking charge, together with a handling fee and the cost of the freight.

265 On 20 October 1999, Watson sent to Emons an email headed 'Iraq' in which he

¹⁵⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1714, L26 - T1715, L15.

¹⁶⁰ CB 2/677.

¹⁶¹ CB 2/659.

¹⁶² Contract A4821: CB 2/679; Contract A4822: CB 2/681, 683.

¹⁶³ CB 2/685.

stated:¹⁶⁴

Further to our discussion concerning the best means in which to arrange to refund the trucking charges to Iraq, I have arranged with the various shipowners to handle this on behalf of AWB Limited.

Therefore the Owners will debit AWB this extra trucking charge, plus their handling fee together with the freight which has been finalised, upon completion of loading.

I therefore would suggest that you amend the contract system to reflect both the agreed freight rate and the required trucking charges, as Chartering will need to debit the pool for both amounts and pay same to the Owners.

Please let me know in due course the banking details that Iraq will require as will then ensure that Owners remit the 100 pct of trucking costs directly to that a/c upon completion of loading.

Assume this will overcome the current difficulty that arising from L/c wording etc.

266 ASIC says that this was explicit recognition that the trucking fees were being paid to Iraq and that AWB was arranging the fees to be paid through shipping companies.

267 Also on 20 October 1999, Emons sent an email to Officer, copied to Watson, Lister and Owen. This followed a discussion between Emons and Zuhair the previous evening.¹⁶⁵ Emons wrote:

Subject: Private and Confidential: Iraq trucking fee

I had a lengthy discussion last night with Zuhair. I needed to resolve quickly the amendments that we have requested with L/C and the payment of the trucking cost as per our contract back to the IGB.

With payment of the trucking fee we are prevented of doing this direct to Iraq for obvious reasons. Our contract which complies with the tender document details approved by the UN does not specify how this payment will be undertaken. As a result of this we requested of Zuhair that he supply us with suitable bank details to facilitate this payment.

We have always been aware from the outset that this issue is somewhat grey however I realised during my conversation with Zuhair that we need to be particularly careful on the execution of the contracts. Zuhair stated that he will supply details of the company to be paid and the account details. He also stated that the trucking fee may vary in the future.

¹⁶⁴ CB 2/697 [emphasis added by ASIC].

¹⁶⁵ CB 2/699 [emphasis added by ASIC].

To remove any potential criticism potentially of AWB or longer term considerations relating to facilitation payments etc as previously discussed I have recommended that the Charter Party be amended to include the trucking fee and therefore the payment of this fee will be carried out by the shipping companies.

I trust that this action meets with your approval.

268 It should be noted that Emons says that the UN had approved the payment but not how it would be paid.

269 ASIC contends that the reference to 'Private and confidential - Iraq trucking fee'¹⁶⁶ was because it was a very sensitive matter – Emons believed there were still a lot of hurdles.¹⁶⁷ AWB was unsure of any response from the UN or from any other party involved so wanted to keep the matter confidential.¹⁶⁸

270 ASIC submits that the reference to 'aware from the outset that this issue is somewhat grey' is to the payment of the trucking fee and the actioning of the trucking fee.¹⁶⁹ ASIC says that the reference to 'any potential criticism of AWB' was a reference to criticism of facilitating a payment to Iraq.¹⁷⁰

271 In the email, Emons records that Zuhair told Emons that the trucking fee may vary in the future.¹⁷¹

272 Owen responded to this proposal on the same day setting out his concerns to Emons and others.¹⁷² In this email, which was copied to Officer, Watson and Lister, Owen stated:

I have a number of problems with the suggested proposal in regards to payment of USD12 per tonne to Iraqi trucking company. I details below my

¹⁶⁶ CB 2/699.

¹⁶⁷ PCS [369].

¹⁶⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1717, L25-9.

¹⁶⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1719, L4-7.

¹⁷⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1719, L21-4.

¹⁷¹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1719, L13-19.

¹⁷² CB 2/701.

comments on this issue.

1. I believe it is contractual obligation of AWB to pay the fee and we are transferring that responsibility to a 3rd party.
2. I am concerned if the shipping company incorrectly effects payment the money will be frozen in New York, then Iraq may not release the vessel, until money is received in their nominated account. What happens then.
3. What happens if shipping company goes broke, (this has already happened to us a number of times in the last 18 months) and payment has not been effected to Iraq's.
4. At any one time, we could have 5-6 vessel on the water and if they are all Panamex vessels we could be talking about approx. USD3.3 million to USD4 million and payment doesn't have to be made prior to vessel's arrival in Umm Qasr. Shipping company would have the benefit of that money.
5. Over all the contracts we are talking about USD11.34 million why can't we remit those funds to BNP for use by the Iraqi Government to purchase approved commodities as is done with the Oil for food agreement. If the UN has approved the USD12 per tonne payment. Or get a one off approval to allow payment of the USD12 per tonne back to Iraqi trucking company.
6. Hold funds in an account with AWB for buyers benefit. Even if we have to pay interest on the funds and repay funds back once sanctions removed. They still owe us in excess of USD400million, so they should be able to trust us for USD11 million.

Mark I trust you find my comments constructive I just have a problem relying on a 3rd party to perform this administrative function of our contract and worry if they stuff-up, we have to explain, why we had to pay the USD12-twice.

I am happy to discuss further if required.

273 Owen does not identify UN sanctions as a problem. Rather, his concerns are more practical about paying the fee in advance. The sanctions he refers to were presumably the US sanctions about transferring funds to Iraq, as so understood by Owen in the following reply email.

274 Emons responded to Owen in an email later the same day.¹⁷³ He rejected Owen's concern about shipping companies going broke. He stated:

I will reply in reverse order.

6. This is not an issue that the Iraqi Government recognise as the funds are frozen in US accounts by the US Government.
5. The UN is an unnecessary complication and would delay the Current contracts by some 3 to 6 months. Are you prepared to wear the storage and finance costs?
4. Presidential decree requires prepayment of the fee prior to arrival. Therefore we have to resolve payment in the least potentially damaging method to AWB.
3. Companies going bust are natural commercial risk, however our Iraq trade is conducted by a small number of reputable companies that have to date shown no evidence of financial stress. Also without payment being made there could be no discharge and I would therefore expect that we could arrest the vessel, after all we do have the dox's.
2. Good point but that is a manageable issue within the time frame of shipment to Iraq.
1. Correct, that is why we put the requirement in the charter party.

275 Emons first observation about funds being frozen in US accounts appears to be a reference to US sanctions, not UN sanctions.

276 Watson also responded to Owen's email dismissing Owen's concern about 'shipowners going bust.'¹⁷⁴

277 Owen sent a further email to Emons on 20 October 1999.¹⁷⁵ It stated, 'How can we manage somebody else doing a payment ????????' Owen did not receive a response.

278 According to Officer, in October 1999 the inland transportation fee was a somewhat 'grey' issue – AWB was relying on a well-respected, longstanding erudite individual (Zuhair) who told AWB that the UN were on board.

279 ASIC submits that was not clear whether the UN were in fact on board and AWB did not test that directly with the UN.¹⁷⁶ ASIC contends that the 'greyness' problem was

¹⁷⁴ CB 2/707.

¹⁷⁵ CB 2/709.

¹⁷⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (29th October 2015) T1199, L1-9; T1200, L8-13.

a general concern within AWB amongst at least those people who attended Officer's office in mid-1999 – Emons, Watson, Ingleby and probably Tighe.¹⁷⁷

280 I do not accept that the 'greyness' was or at least remained a general concern. Officer gave evidence that he was conscious of the 'greyness' of the trucking issue in mid-1999. Officer said, however, that the fact that the contracts stated that they were subject to UN approval gave 'us a high level of comfort that it was within – it had been approved by the UN.'¹⁷⁸

281 ASIC submits that as a result of the foregoing, by late October 1999 the following was widely known within AWB:¹⁷⁹

- (a) The inland transportation, or trucking, fee was fixed by the IGB.
- (b) The President of Iraq required funds on account of the trucking fee to be paid to Iraq before any cargo of wheat was unloaded in Iraq.
- (c) The fee was to be paid to Iraq, being a 'refund' of trucking charges 'to Iraq'.
- (d) Because payments of US dollars to Iraq could not be made because of UN sanctions, a method of payment to circumvent those sanctions had to be found.
- (e) Payment of the fee could be hidden by having the shipowners pay it to the entity nominated by Iraq, with the charter party (between AWB and the shipowner) being amended to accommodate that payment.
- (f) Payment of the fee to a Jordanian entity nominated by the IGB would further disguise the fact that the payment was being made to Iraq and represented an obvious breach of the sanctions.

282 I do not accept that propositions (d), (e) and (f). The prevailing view in AWB was that

¹⁷⁷ Transcript of hearing, *ASIC v Geary & Flugge* T1201, L14-18.

¹⁷⁸ Transcript of hearing, *ASIC v Geary & Flugge* T1220, L16 – T1221, L11.

¹⁷⁹ PCS, [377].

the UN had approved the payment of the inland transportation fees, the difficulty perceived by some within AWB with payment was due to the US sanctions and UN sanctions and that the payment of the fee to a Jordanian entity nominated by the IGB was affected to avoid difficulties with the US sanctions.

To whom the IGB fees were to be paid

283 ASIC says that what remained was to receive from the IGB the name and account number of the company to whom Iraq required the money to be paid.

284 On 19 October 1999, AWB received a facsimile from Alia. The facsimile was addressed to 'Australian Wheat Board', to the attention of 'Mr Murray Rogers Manager Director' [sic].¹⁸⁰ It read:

We would like to introduce to you our company being one of the Jordanian Establishments specialized on the fields of overland and ocean freight transportation moreover, our company is a member of the syndicate of shipping agents in Jordan also we are agents of the state company for Iraqi land Transport and Iraq.

We have informed officially that your company won a contract to supply Iraq by (921000) tons of (Wheat).

So, we are pleased to offer our services on the field of transport from Um Qaser port in Basrah to the other governorate in Iraq and we will return all the documents of the goods to you.

285 The copy of the facsimile from Alia bears a manuscript note 'Mark Emons', suggesting that it had been passed on to Emons.

286 ASIC submits that there is no evidence that either AWB or the Australian Wheat Board had previously dealt with Alia. This is consistent with the sentence in the facsimile from Alia¹⁸¹ saying, 'We would like to introduce to you our company...' Emons gave evidence that he recalls seeing this fax, but noted that:

We had classified it in the initial stages as what we used to call a wood duck,

¹⁸⁰ CB 2/695.

¹⁸¹ CB 2/695.

being something that looked like a duck but had no substance.¹⁸²

287 The email also supports the view that Emons did not discuss with Flugge, in London in June 1999, that payment of the trucking fee might be made through Ronly, but rather Ronly was mentioned in June 2000. The email is inconsistent with ASIC's case that Ronly and the inland transportation fee had been mentioned in June 1999 in discussions with Flugge.

288 On 27 October 1999 Alia sent a further facsimile to 'Australian Wheat Board', this time addressed to Emons.¹⁸³ It was in similar terms to the earlier facsimile. It repeated that Alia was one of the Jordanian establishments specialising in the field of overland and ocean freight transportation, a member of the syndicate of shipping agents in Jordan, and 'agents of the state company for Iraqi land Transport and Iraq.'

289 On 13 November 1999 Alia (which according to an email from Alia to Chris Whitwell (Whitwell) (marketing manager in IS&M) of 19 October 2004, was part owned by the Iraqi Ministry of Trade,¹⁸⁴ entered into an agreement with the Iraq State Company for Water Transport (ISCWT) to collect inland transportation fees on behalf of the ISCWT (the collection agreement).¹⁸⁵ The agreement provided:

- (a) Alia was to provide to the Basra branch of the ISCWT the following information before a vessel's arrival at Umm Qasr and the ISCWT would supply any new information about the following matters to Alia – vessel's name and nationality, supplier's name, beneficiary, carrier's name, tonnage, quantity and kind, and total transportation fees.
- (b) The ISCWT was to provide the following to Alia upon the vessel's arrival at port – arrival and berth date, completion of discharge date and departure date,

¹⁸² Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1716, T26–8.

¹⁸³ CB 2/711.

¹⁸⁴ CB 7/4623.

¹⁸⁵ CB 2/743–8.

tonnage, discharge port, and discharged quantity.

(c) Alia would deposit the full amount (less 1 per cent commission) of the transportation fee into the ISCWT's account at the Rafidain Bank in Jordan within five days of receipt.

(d) The services to be provided by Alia were described as being 'restricted to receiving amounts and depositing them into the ISCWT's account.'

290 ASIC submits that this agreement discloses that Alia had no transport obligations in respect of arriving goods. The only obligation Alia had under its agreement with the ISCWT was the provision of information about future shipments and the receipt and payment on to the ISCWT of the inland transportation fees payable in respect of those shipments.

291 ASIC says that although AWB was not aware of Alia's agreement with the ISCWT at this time, it was known that the IGB had said it would provide details of the name and account into which the inland transportation fee was to be paid, for payment back to Iraq.

292 ASIC contends that consistent with the collection agreement, Iraqi Ministerial records show that the amounts paid by AWB to Alia were received by Iraq, Alia acting as mere conduit for the payments. ASIC submits that those same records suggest that the majority of the hard currency thus obtained ended up with Iraq's Ministry of Finance.¹⁸⁶ ASIC says that these documents are also consistent with the information provided to Hogan suggesting that the purpose of the inland transportation fees was to benefit the Ministry of Finance.¹⁸⁷

293 ASIC submits that the reason AWB agreed to the payment of the IGB fees in this way

¹⁸⁶ CB 4/2394 (Arabic) CB 6/2397 (ASIC translation); CB 4/2415 (Arabic) CB 4/2417 (ASIC translation); CB 4/2419 (Arabic) CB 4/2421 (ASIC translation); CB 4/2468 at 7/4891 (Arabic) CB 4/2471 (ASIC translation); CB 5/2824 (Arabic) CB 2827 (ASIC translation); CB 5/3037 (Arabic) CB 5/3041 (ASIC translation).

¹⁸⁷ See paragraph 160 and following.

was in order to preserve its Iraq trade – management was imposing pressure to maintain sales to Iraq.¹⁸⁸ ASIC says that AWB knew that if it did not agree to the payment of inland transportation fees it would not secure sales to Iraq. Having agreed to sell wheat to Iraq on those terms, AWB also knew that – due to ‘Presidential decree’ – if it did not pay the IGB fees in respect of a shipment, the vessel would not be discharged, the vessel would be delayed and AWB would incur significant demurrage costs. ASIC submits that AWB was well aware of UN sanctions and their effect. ASIC says that AWB knew that the fees could not be paid directly. ASIC contends that a method of payment of the IGB fees that circumvented the UN sanctions and did not attract the attention of the UN had to be found. ASIC says that that method was the payment of these fees via shipowners and Ronly to Alia in Jordan.

294 As mentioned earlier, the evidence (canvassed below) suggests that the method of payment was perceived by some within AWB to be necessary to avoid US sanctions, not UN sanctions. and that AWB believed that the payment of the inland transportation fees had been approved by the UN.

More reporting within AWB

295 On 3 November 1999, Hogan in Cairo submitted to Emons a report for the benefit of Rogers’ forthcoming report to the Board. Emons forwarded that email to Marise Wilson, Officer’s personal assistant.¹⁸⁹ Under the heading ‘Iraq’ Hogan reported:

AWB is currently negotiating the Free in Truck clause that Iraq has included in all new contracts. Whilst AWB does not have an issue with the actual clause, there is some disagreement as to when the transport company should be paid and what tonnage. This is a concern for the AWB as Iraq is the only market contracted on final weight and quality after inspection by UN inspectors at Umm Qasr. (all other markets in the world are contracted on weight and quality final at load port). Subsequently, AWB do not wish to pay for transport costs upon Australian Load Port weight, as these invariably differ to the UN Inspectors discharge weights.

Two vessels have been loaded under the new contracts that include Free In Truck clauses, and the issue will be resolved in the near future.

¹⁸⁸ CB 3/1510-12.

¹⁸⁹ CB 2/717.

296 ASIC contends that while it does not appear that this putative report ever went to the Board, it is apparent that neither Emons nor Hogan was seeking to keep the trucking fee and FIT contract terms from senior management. As discussed below, this is not the case. In mid-2000, the board of AWB was informed of the payment of the inland transportation fees and was expressly informed by the managing director that the payments had been authorised by the UN.¹⁹⁰

297 Later, on 4 November 1999, Emons and Officer exchanged emails about payment to the trucking company.¹⁹¹ Officer emailed Emons, asking:

Where are we with the trucking fee issue? Even if we find a way through this issue do we take on any increased risk/exposure by contractually being responsible for trucking within Iraq?

298 Emons replied 30 minutes later:¹⁹²

To date IGB have not advised the trucking co. to whom payment should be made. We have been approached by a company in Jordan but our response has been to ask for confirmation from IGB before discussing further.

We are not responsible for trucking in Iraq only the payment. Payment to us occurs as per existing contract after UN inspectors cert is issued at discharge.

When I see Daoud [Zuhair] at the end of Nov I hope to clear a number of the details up.

299 ASIC contends that Emons' view is supported by the fact that in correspondence with the IGB or discussions with Zuhair it was never suggested that AWB had any obligation beyond merely paying the fee or that AWB was obliged to do anything further than it previously did before June 1999 under the simple CIF contracts.

300 On 18 November 1999, Emons spoke with Zuhair about payment of the first instalment of the inland transportation fee. Emons recorded the outcome of his conversation in an email, headed 'Iraq trucking fee', to Watson on 19 November

¹⁹⁰ See paragraph 922 and following.

¹⁹¹ CB 2/741.

¹⁹² CB 2/741 [emphasis added by ASIC].

1999;¹⁹³

More confusion as ever with the trucking fee and my Iraqi's.

I spoke twice last night with Zuhair. I explained that without the L/c amendments nothing was going to happen. He assures me that this will take place and Rex this morning tells me that two of the contract l/c's amendments have come through.

On the trucking fee, I am still having some problems with him. He understand that we can't pay Iraq direct but he says he wants to tell me personally when I see him how it should all operate. This all well and good but as I said to him we have a vessel arriving before we see him and the IGB will not discharge until the money is rec'ved.

He then came back to me and said for the first vessel only that we should pay 90% (USD 10.80) to:

ALIA for Transportation and General Trade Account No.

ARAB LAND BANK

..... JORDAN

I know this is a little to **direct** but he assures me that it is a one off and that the full details will be supplied when we meet him of the company that will be handling this matter in the future.

So if you can make it you can make the payment as above rather than the shipping company immediately and we can sort the detail when in Iraq.

301 On 26 November 1999, US\$453,600 was remitted to Alia pursuant to an internal AWB US dollar payment request dated 25 November 1999.¹⁹⁴ The payment request was signed by Officer and authorised by Laskie.

302 This was the first of many payment requests for trucking fees payable to Alia.¹⁹⁵ The direct payment method to Alia was one of three methods that AWB employed for paying trucking fees.

303 The second method AWB used to pay trucking fees was to make payments to

¹⁹³ CB 2/753.

¹⁹⁴ CB 2/755.

¹⁹⁵ See Exhibit P6 and other examples of payments at CB 2/801, 803, 1017, 1273, 1289, 1299, 1301, 1303, 1305, 1307, 1329, 1437.

shipowners. AWB entered into arrangements with several shipping companies whereby AWB would pay to them not only the cost of sea freight, but also the so-called inland transportation or trucking fee, which the shipping companies would then pay on to Alia. There are numerous AWB payment requests to different shipowners in respect of trucking fees.¹⁹⁶

304 The third method AWB used to pay trucking fees was to make payments to Ronly or a subsidiary of Ronly. There are numerous AWB payment requests to Tse Yu Hong Metal Limited (a subsidiary of Ronly).¹⁹⁷ This method started in around March 2000.

305 AWB continued to pay IGB fees, including through the conduit of Ronly, according to Emons, to 'disguise the fee.'¹⁹⁸ Officer said that the use of Ronly as an intermediary for trucking fees was discussed with more senior people within AWB.¹⁹⁹

306 ASIC contends that the use of Ronly as a conduit to pay the trucking fee was first discussed at a meeting between Flugge and Emons and others with Ronly at the IGC in June 1999. I do not accept that any such meeting took place.²⁰⁰

307 ASIC submits that the use of Ronly as an intermediary for trucking fees was discussed with senior people within AWB. Emons recalls initial discussions with Officer and later a discussion with Flugge.

308 The discussion between Emons and Flugge about Ronly occurred in around early March 2000. The discussion about the Ronly proposal involved the joint venture proposal between Ronly and AWB, the nature of what Ronly brought to AWB in terms of trading grain internationally and the ability of Ronly to be 'a conduit'. The trucking

¹⁹⁶ See CB 2/805, 807, 815, 817, 985, 993, 995, 997, 1019, 1021, 1023, 1027, 1029, 1257, 1271, 1287, 1291, 1307, 1439, 1441, 1443, 1445.

¹⁹⁷ CB 2/941, 943, 983, 1015, 1025, 1031, 1115, 1127, 1153.

¹⁹⁸ CB 2/911. See too CB 2/907-15.

¹⁹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1732, L27-30.

²⁰⁰ See discussion at paragraph 287.

fees were naturally part of the discussion. ASIC contends that it may have been more than one discussion and would have been face to face. ASIC says that it would have occurred on the sixth floor. Emons cannot recall Flugge's response to that Ronly proposal at this time.²⁰¹

309 Further, Officer's evidence from the Cole Inquiry, which was not challenged, is that he spoke with Flugge about the plan to make payment of the US\$12 through Ronly Holdings.²⁰² ASIC contends that Flugge's knowledge that Ronly was used to pay IGB fees is also referred to in later correspondence in September 2002²⁰³ (see 'Discussion between Flugge and Long in September 2002' below at paragraph 1837 and following).

310 As discussed previously, I do not accept the evidence of Emons on this issue.

311 On 7 March 2000, Emons sent an email to Nori Bali (Bali) of Ronly.²⁰⁴ Emons wrote:

Nori,

Just wanted to touch base with you. When Erol was in town last week Michael Watson had a brief discussion with him on Ronly handling the trucking fee and vessel freight for the AWB into Iraq.

If I can clarify:

1. We have received approval from the United Nations to ship to Iraq 900,000 tonnes in March, April and May.
2. A requirement in the tender document and in our contract price is the inclusion of a payment of USD15 per tonne for trucking in Iraq. I have confirmed this figure with the Iraqi official I deal with but he has not as yet confirmed how he wants to have it paid specifically.
3. This is the twist, under UN/ Australian policy no payment can be made directly to Iraq however our contracts have been endorsed by both parties to pay this trucking fee to a third party.

Under the last contracts we have instructed the shipping companies under the Charter party to make payment to a Jordanian trucking company. We did this to a) simplify the process from our point of view

²⁰¹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1732, L30 - T1733, L13.

²⁰² Cole transcript T2321, L39-41 CB 9/6648.5.

²⁰³ CB 4/2681.

²⁰⁴ CB 2/911.

but b) to divorce clearly from the FOB price any connection with a shipping/logistics charge should the contracts come under scrutiny. The only difference is under our own Time charters we have made the payment ourselves.

4. Now this has been going quite smoothly until recently when two of our companies ran into internal problems with making the payment. One was obviously an issue where its offshore senior management ran scared of getting caught up in sanctions etc. and everything that could entail for their business. The other companies problem stemmed from its banking route through Singapore where there are always serious concerns in that environment on money laundering and despite assurances from ourselves they obviously have more to lose than we can guess at.
5. Now why do we want to use Ronly ? It would be ideal from our point of view if we have a third party that handles the freight and trucking as an item. This not only saves us time but does disguise the fee.
6. Our proposal is this. We pass to Ronly the Charter parties from the ship owners. At Shipment Ronly invoices AWB for the freight and trucking fee to be paid after B/Lading date. Ronly pay the shipper [i.e. ship owner] and then approximately 15 days after B/L [bill of lading] pay 90% of the trucking fee to the transport CO in Jordan. Some 45 to 95 days later AWB is notified by the UN of the final weights. At this point of time the final payments are made by Ronly for the trucking fee to the relevant parties.
7. What's in it for Ronly? The exercise is one of administration but in simple terms there are funds available 10 to 15 days and a balance sitting for a further 30 plus days. On top of this no doubt you see to advantages of working with a partner!

Call me when you have a moment so we can talk, needless to say please be discreet with whom you discuss in AWB.

312 Emons' evidence was that the 'scrutiny' referred to in paragraph 3 was the scrutiny of the UN.²⁰⁵

313 ASIC says that the statement that 'our contracts have been endorsed by both parties to pay this trucking fee to a third party' is ambiguous. ASIC says that Emons' evidence suggests that the endorsement was that the contracts were signed by the IGB and AWB.²⁰⁶

314 ASIC says that there had certainly been no endorsement by Australia or the UN.

²⁰⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1730, L20.

²⁰⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1730, L8-9.

Although AWB's four earlier contracts in the second half of 1999 had contained a clause referring to the payment of 'discharge costs' to 'nominated Maritime Agents in Iraq', a clause in similar terms which had been included in the original draft of (at least) contract A4970 was deleted prior to the three contracts being signed by Emons.²⁰⁷ This was notwithstanding that the clause had been included in Emons' earlier facsimile of 20 January 2000 to the IGB²⁰⁸ confirming the terms of these sales and that payment of the fees was clearly part of AWB's agreement with IGB.

315 ASIC submits that Emons' email of 7 March 2000 to Bali²⁰⁹ makes plain that AWB:²¹⁰

- (a) recognised that the payments of the IGB fees were in breach of UN sanctions;
- (b) had agreed to Iraq's demands to pay the IGB fees to it;
- (c) recognised that the IGB 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;
- (d) had sought to distance itself from the payments, to 'disguise' the payments by paying them through shipowners and avoid UN scrutiny of the true contractual terms between AWB and the IGB;
- (e) set up the arrangement with Ronly in order to disguise the fee and the fact that AWB was paying the IGB fees to Iraq;

and also makes plain that:

- (f) 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.

²⁰⁷ Compare CB 6/4243 and CB 6/4245.

²⁰⁸ CB 2/822.

²⁰⁹ CB 2/911.

²¹⁰ PCS, [404].

316 I do not accept that Emons' knowledge can be attributed to AWB. As discussed below, at paragraph 1198 and following I have found Emons to be an unreliable witness and the evidence suggests that he was behaving dishonestly whilst at AWB.

317 The terms of the agreement that AWB concluded with Ronly were contained in a facsimile that Watson sent to Simone Jordon of Ronly the previous day, 6 March 2000:²¹¹

I refer to our discussions and thought for good order sake, that I would drop you a line to re-affirm the points of agreement that were reached

- Ronly or a company to be nominated to assist AWB in facilitating the payment of Inland Trucking fees within Iraq, to the nominated trucking company

- Trucking Fee to be remitted to the nominated trucking account upon receipt of trucking fee from AWB

- Total cargo approx. 1.5 million metric tons

- Shipment period March - July 00

- Where required, Ronly or a company to be nominated will also arrange to pay freight to Owners nominated by AWB, in the execution of AWB shipments to Iraq. Such freight to be remitted to Owners, upon receipt from such freight from AWB.

It is agreed Ronly or a company to be advised, will provide administration support and will issue required invoices to AWB upon sailing of each vessel for trucking and where required freight.

It is understood that Ronly or a company to be nominated will not be responsible for the payment of either trucking fees or freight unless same received from AWB.

It is agreed that AWB will pay a fee of USD 0.20 Per Metric Ton, to Ronly or a company to advised in the execution of the above contract.

I would ask that you issue me an invoice periodically for shipments effected to cover the above fee and that such should be kept separate to any trucking or freight invoices.

I trust that the above in line with your understanding of the agreement that we reached. If there are any questions or anything that I have left out, please do not hesitate to let me know.

If you are going to use the services of another company to perform the above, then please let me know, together with their banking details.

I will advise you in due course the banking details of the trucking company as they tend to change the banking details from time to time.

I expect that I will place a couple of our existing contracts with Owners via you or the company that will be used. However I will revert on this point in the near future. As discussed, if this happens, then we will need back to back c/ps on terms, freight rates etc and in order to efficiently manage the contracts, AWB would need a side letter to act as 'managers'.

As advised, we can discuss this later.

Thanks again for your assistance in this matter.

318 This facsimile was said by Watson to have been sent further to 'our discussions'. ASIC contends that there would therefore seem to have been discussions in which Watson participated. ASIC says that this is also consistent with what was said in Emons' email of 7 March 2000.²¹² ASIC submit that these discussions appear to have taken place during a visit by Erol Yahya to Melbourne in late February or early March 2000.

319 ASIC submits that there is no direct evidence of these meetings or what was said during them. In the absence of any correspondence from Ronly disputing what Watson had set out in his facsimile of 6 March 2000, I accept that that facsimile accurately recorded the terms of the agreement that had been reached.

320 ASIC submits that the use of Ronly as an intermediary for trucking fees was discussed with more senior people within AWB. ASIC refers to evidence of Emons that he recalls initial discussions with Officer and later a discussion with Flugge.²¹³ For reasons discussed below at paragraph 1209 and following, I am unable to accept the evidence of Emons on this issue.

321 ASIC submits these methods of paying the trucking fees were the subject of numerous internal discussions and emails within AWB. The use of Ronly was questioned from time to time, including in emails received by Geary,²¹⁴ and the costs for Ronly were

²¹² CB 2/911.

²¹³ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1732, L27-30.

²¹⁴ CB 2/1141, 1143.

invoiced to the National Pool.²¹⁵

322 ASIC submits that the reasons for AWB entering into the arrangements with Ronly and its nominee Tse Yu Hong Metal Limited were the same as the reasons for entering into its arrangement with the other shipowners, namely:

- (a) in an endeavour to distance itself from the payment of the inland transportation fees, knowing that those fees were being paid to Iraq and in breach of UN sanctions;
- (b) to 'disguise' the payments that it was making to Alia (and through it to Iraq) and the nature of those payments, by adding the IGB fees payable for a shipment to the ocean freight payable to the shipowner for the carriage of that shipment to Iraq and describing the total amount as 'freight', rather than disclosing the freight and IGB fees separately.²¹⁶

323 I am not satisfied that AWB knew that the payment of the inland transportation fees to Iraq was in breach of UN sanctions as alleged by ASIC. As discussed below, the generally held view in AWB was that the payment of the inland transport fees was approved by the UN. I also accept the evidence of Hogan that a difficulty with payment was the US sanctions. I accept that it is difficult to reconcile all the correspondence. My finding that Emons was probably dishonest and was using the payment of the inland transportation fees to enrich himself (of which AWB was ignorant) places difficulties in attributing his knowledge to AWB.

324 One of the vessels fixed under the arrangements that AWB concluded with Ronly in March 2000 was the *Amarantos*, which had been chartered under the contract of affreightment that AWB concluded with Atlantic and Orient Shipping Company on 3 February 2000 and into which Tse Yu Hong Metal Limited had been interposed. This was for the carriage of a shipment of wheat from Wallaroo (South Australia) to Iraq.

²¹⁵ CB 2/1331.

²¹⁶ CB 2/911.

325 On 10 April 2000, the *Amarantos* collided with the jetty in the harbour at Wallaroo, causing damage to the jetty and associated facilities. As a result of the collision a number of claims were made against the owners of the vessel, *Amarantos Shipping*, including by AWB.

326 The owners of the vessel, in turn, claimed an indemnity from *Atlantic and Orient Shipping Company*, to whom they had chartered the vessel, in respect of any liability that they might be found to have for the collision. Lawyers acting for *Atlantic and Orient Shipping Company* in turn notified Ronly – with whom *Atlantic and Orient Shipping Company* had a contract of affreightment dated 3 February 2000 under the ‘back to back’ arrangement described in the agreement between Ronly and AWB at paragraph 312 above²¹⁷ – that if the owners succeeded in their claim against *Atlantic and Orient Shipping Company*, they would be seeking to recover any liability from Ronly under the terms of their contract of affreightment.

327 In 10 June 2002, Yahya sent an email to Mark Rowland (Rowland) (by then a senior Ocean Freight Trader in AWB Chartering) seeking confirmation that AWB was aware of the claim by the owner of the *Amarantos* and would be dealing with it ‘under the indemnity and insurance arrangements between us relating to the Iraq business’.²¹⁸ This email was copied to Long. In the course of recounting the history leading up to this claim, Yahya wrote:

Since neither we nor Tse Yu Hong Metal Ltd had no direct involvement in this charter or shipment we/ Tse Yu Hong Metal are giving you immediate notice of this development. All aspects of this business were dealt by yourselves.

328 On 16 September 2002, Long sent a copy of a draft letter to Ronly by email to Geary inviting his comments.²¹⁹ In his email, Long set out the background including a summary of the collision and claim. He wrote:

Ronly were involved in paying inland trucking charges and chartering vessels

²¹⁷ CB 2/909.

²¹⁸ CB 4/2411.

²¹⁹ CB 4/2681; Geary, sch A [38].

for us because of alleged problems with the UN/IGB. AWB paid Ronly in advance (\$12 per tonne) and Ronly paid (via some shelf company) the Jordanian trucking company.

Mark Emons and Mike Watson set the deal up.

Based on the paper work we have from Ronly (our files are thin) there is not enough evidence to prove that AWB has liability or agreed to indemnify Ronly for acting as charterer. AWB paid ronly USD20 cents per tonne facilitation fee. Ronly argue the opposite but can't substantiate it to our satisfaction.

Nori has mentioned that Paul and Trevor are aware of the deal and sanctioned it.

Nori called T Flugge Fri night complaining about our position. TF called me and wants to distance himself.

All very complicated but bottom line is that unless you have a different view, will you endorse the current approach because Nori is likely to threaten legal action as well as scale up the hierarchy if he doesn't get what he wants from me.

329 Geary forwarded a copy of this email on to Ingleby that same day,²²⁰ with the following message:

Do you know anything about this? I have not looked at the file but based on this note I agree with Michael's position.

330 Ingleby replied to Geary later that evening:²²¹

I didn't know about these deals until parties left AWB. (usually done by IS&M and nigel) It could get messy but we have no choice than to pursue correct and ethical path'.

331 ASIC submits that the reference in this email to the 'correct and ethical path' in context was not a reference to what had happened concerning the payment of the IGB fees, but what was said in the context of Ronly's claim for an indemnity.

332 ASIC says that what is significant, for present purposes, is that the correspondence from Ronly in June 2002 and AWB's internal communications in September 2002 confirm what is also otherwise revealed by an analysis of AWB's agreement with

²²⁰ CB 4/2683.

²²¹ CB 4/2685.

Ronly²²² and the implementation of that agreement, namely:

- (a) that Ronly, and its nominee Tse Yu Hong Metal Limited, played no real role in the charter of the vessels where it was interposed;
- (b) that their only role was to receive and pay on to Alia on AWB's behalf the inland transportation fees payable in respect of AWB's shipments to Iraq;
- (c) that Ronly and its nominee Tse Yu Hong Metal Limited were, to this end front companies;
- (d) that AWB that approached Ronly in early 2000 for its assistance in this regard. This was in about February 2000 and at the same time Atlantic and Orient Shipping Company had withdrawn from its agreements with AWB to pay inland transportation fees to Alia on AWB's behalf;
- (e) that there was no genuine or sound commercial reason for AWB interposing Ronly into its then existing contracts of affreightment and arrangements with shipowners;
- (f) that one of the purposes of paying inland transportation fees via Ronly and its nominee Tse Yu Hong Metal Limited, was to 'disguise the fee' as Emons candidly stated in his email of 7 March 2000;
- (g) that AWB's arrangement with Ronly was entered into out of a concern within AWB as to 'whether payments which they were making for inland trucking in Iraq were in breach of UN sanctions against Iraq' or as Long described them in his 16 September 2002 email²²³ 'alleged problems with the UN/IGB';
- (h) there were no 'problems' with the UN or IGB in late 1999 or early 2000 which would justify AWB further complicating its payment processes by interposing Ronly and Tse Yu Hong Metal Limited into the payment chain, other than UN

²²² CB 2/909.

²²³ CB 4/2581.

sanctions, the consequences of their imposition and the inquiries that the OIP and DFAT were making in relation to the making of 'irregular payments' in breach of those sanctions.

333 I am not satisfied that the use of Ronly by AWB was due to AWB's knowledge that the payment of the inland trucking fees was in breach of UN sanctions against Iraq. As mentioned, the prevailing view in AWB was that the payment of the inland transportation fees had been approved by the UN. I am not satisfied that the use of Ronly by AWB was not perceived to be, at least due in part, to the US sanctions against transfer of funds to Iraq.

334 As a result of these arrangements, ASIC submits that AWB submitted to DFAT, and through it to the UN for approval for payment from the UN escrow account, contracts and associated documents which did not truly reflect the agreements reached between AWB and the IGB in some or all of the following respects:

- (a) the contracts submitted did not disclose:
 - (i) AWB's agreement to include in the wheat price an inland transportation (or trucking) fee which varied between the US\$12.00 and US\$51.15 per tonne so that such fee was paid to AWB from the escrow account;
 - (ii) AWB's agreement to pay such fee to Iraq or an Iraqi entity;
 - (iii) that the fee was a fixed fee for each phase determined by Iraq as a condition of tender;
 - (iv) that IGB had the obligation to discharge the wheat at Umm Qasr, and transport it to all governorates of Iraq;
 - (v) that the above fee was not related to any contractual obligation that AWB had with IGB for discharge or transport of wheat;
 - (vi) AWB's agreement to pay the fee to an account nominated by the IGB;

- (vii) that the fee would be paid to a third party to disguise the payment of the fee to an Iraqi entity;
 - (viii) in the case of contracts from November 2000, that the wheat price in the contracts also included an additional 10 per cent fee imposed by Iraq, to be recovered from the escrow account, and which was payable to Iraq by AWB;
 - (ix) AWB's agreement to pay this additional fee to Iraq or an Iraqi entity;
 - (x) AWB's agreement to pay such fee along with and as if it were part of the inland transportation fee;
 - (xi) in the case of contracts A1670 and A1680, that the price included the sum of US\$8.375 per tonne not related to the price of wheat but being the amount of an alleged debt to Tigris that AWB had agreed with IGB and Tigris would be recovered from the UN escrow account for payment by AWB to Tigris. The US\$8.375 per tonne included a sum of US\$500,000 (equivalent to US\$0.50 per tonne) to be retained by AWB as its commission for recovering the Tigris Debt;
 - (xii) in the case of contracts A1670 and A1680, that AWB had agreed to pay to Iraq via payments to Alia, in addition to the 'trucking' fee, including a 10 per cent service fee, an additional sum of US\$2.016 per tonne as payment of compensation for an iron filings contamination claim;
- (b) contrary to the terms of the contracts submitted, AWB did not have any obligation:
- (i) to discharge wheat at Umm Qasr or arrange or pay for such discharge;
 - (ii) to transport, or arrange or pay for transport of the wheat within Iraq;
 - (iii) and that under the terms of the agreement reached between AWB and IGB, those obligations remained at all times with IGB;

- (c) in the case of contracts A4653, A4654, A4655 and A4822, although the contracts submitted did refer to an obligation on AWB to pay 'discharge costs' of up to a maximum of 'USD12.00' (per tonne) 'to nominated Maritime Agents in Iraq':
- (i) that clause did not accurately state or reflect AWB's agreement with IGB to pay the inland transportation fee;
 - (ii) the fee that AWB had agreed to pay under its agreement with IGB was not, as represented by that clause, a variable cost related to the discharge of the vessels and payable to unidentified maritime agents in Iraq responsible for the discharge of the vessel's on AWB's behalf;

and

- (d) AWB applied to DFAT for permission to export from Australia to Iraq the wheat sold by it under those contracts.²²⁴

335 As mentioned earlier, although not pleaded expressly against Flugge or Geary, ASIC seeks to infer from facts that it says were 'well known' within AWB to assist in inferring that Flugge and Geary knew matters that are expressly pleaded that they knew. I have accepted that this approach is permissible. ASIC has not alleged, however, that all the matters referred to in the previous paragraph were well known within AWB. As to whether Flugge or Geary knew any of these matters, I will come to that when I deal with the specific allegations made against them.

Payments made directly to Alia

336 From July 2000, Charles Stott (Stott) had taken over from Officer as General Manager of IS&M and directed that trucking fees be paid directly to Alia.²²⁵

²²⁴ PCS, [421].

²²⁵ CB 2/1227-33, 1235 (AWB would continue to pay Ronly the US\$0.20 cents per tonne for performing the payment even though Ronly were not doing so.)

- 337 Stott sought to raise with the UN payment delays and discharge issues²²⁶ but never disclosed to the UN the issue of trucking fees, despite a draft letter being prepared by Hogan that would have done exactly that.²²⁷
- 338 ASIC says that the letter actually sent by Stott to the UN was heavily edited to suggest (a) that Jordanian trucking companies were responsible for arranging trucks at Umm Qasr, and (b) that AWB was contemplating entering into a contract with those companies to provide additional trucks.²²⁸
- 339 ASIC says that inland transport payments changed over time. There was a period of time when only 10 per cent payment was made up-front prior to discharge but this changed over time so that 100 per cent was paid prior to discharge.²²⁹
- 340 Nigel Edmonds-Wilson (Edmonds-Wilson) recalls the inland transport increasing. No one explained to him why other than understanding that Iraq was a difficult market. This was the only market that AWB (apparently) took on the risk of delivering to all governorates and it was unusual that there were inland transport payments involved.²³⁰
- 341 Edmonds-Wilson said that he does not recall or know how the inland transport component of the price came about.²³¹ Edmonds-Wilson tried to time the payment of the inland transport fees as close as possible to the relevant vessel being able to discharge at the port and he would refer to the Iraq discharge monitor document for this purpose.²³²

²²⁶ CB 2/1259.

²²⁷ Exhibit F13.

²²⁸ Exhibit P25.

²²⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T590, L25 – T591, L1; T591, L23–7.

²³⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T595, L7–29.

²³¹ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T609, L22–6.

²³² Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T615, L25 – T616, L2.

342 Between November 1999 and March 2003, AWB paid a total of approximately US\$223 million in IGB fees to the Government of Iraq, in a variety of internationally-traded currencies.²³³

343 Alia was nominated by the IGB as the company to receive the IGB fees, and such fees were to be paid into its nominated bank account in Jordan. AWB knew that it was not responsible for trucking grain within Iraq: it was simply required to pay the IGB fees to Alia.

344 ASIC says that prior to the fall of the Hussein Regime, AWB made no commercial arrangements with Alia or any other entity for the transportation within Iraq of the wheat sold to the IGB. ASIC says that this is to be contrasted with what occurred in late 2003, following the invasion of Iraq, when AWB was required by the Coalition Provisional Authority (CPA) and the World Food Programme (WFP) to fulfil its outstanding contracts with the IGB which had not been completed in the terms in which they appeared – such that AWB was thereby obliged to discharge and deliver the wheat to all governorates within Iraq – and concluded an Agency and Transport Services Agreement with Alia for this purpose (see ‘The need for AWB to “really deliver”’ below at paragraph 572 and following).

345 ASIC says that from the time it first paid IGB fees to Alia, AWB knew Alia was the conduit for the payment of those fees to Iraq and that a Jordanian company had been nominated to receive these payments because the UN sanctions prohibited the payment of hard currency to Iraq or an Iraqi entity directly. Alia received the IGB fees pursuant to its agreement with the ISCWT, which obliged Alia immediately to remit the fees (less a commission) to the ISCWT and under which Alia was not required to undertake or arrange any trucking services at all.

AWB continued paying IGB fees despite the Canadian complaint

346 ASIC submits that following AWB’s initial agreement and implementation of

²³³ Exhibit P06 (refer to cumulative total column on the right).

payments of the IGB fees, there was closer external and internal scrutiny of AWB's conduct in relation to the OFFP and the payments of the IGB fees in the period between early 2000 and early 2001. ASIC contends that despite this scrutiny and concerns raised about the integrity and legality of these payments, AWB continued to pay the IGB fees.

347 On 10 December 1999, Flugge wrote to Australian Minister for Trade Mark Vaile, noting Flugge's recent meeting with Iraqi Minister Saleh and the strength of AWB's trade with Iraq; the letter also refers to the impact of UN sanctions on Iraq, 'discussions on trade and future trade between Australia and Iraq' and that 'Australia's position in relation to wheat was very strong and that future trade would continue.' On the question of other potential exports from Australia to Iraq, Flugge stated:²³⁴

Whilst I recognise this is a difficult political issue, I believe that it may be in the interests of Australia, and particularly agriculture, for the Government to give further consideration to our overall position in relation to Iraq. There is no doubt that sanctions as currently structured are having a very serious and long term impact on the population of Iraq.

348 In early 2000, the Canadian Government complained to the UN about AWB's payment of transportation fees to the IGB. This complaint ultimately led to a meeting in Washington attended by Flugge at which an Australian trade commissioner raised the complaint with Flugge. This event constitutes a major element of ASIC's pleaded case on Flugge's knowledge. I deal with this event in detail below at paragraph 1412 and following.

A change in the contract wording

349 On 20 January 2000, Emons confirmed the terms of the agreement and sale of three new contracts with the IGB, each for 300,000 tonnes of wheat – A4970, A4971 and A4972.²³⁵ The agreed price was stated to be a 'CIF free in truck' price. Paragraph 5 of Emons' facsimile included, under the heading 'Shipment', a provision in the following

²³⁴ CB 2/811.

²³⁵ CB 2/881 (fax confirming details), CB 2/885, 887 (contract A4970), CB 2/891, 893 (contract A4971), CB 2/897, 899 (contract A4972).

terms:

The cargo will be discharged free into truck to all silos within all Governates of Iraq at the average rate of 3000 metric tonnes per weather working day of 24 consecutive hours. The discharge cost shall be paid by Seller's to the nominated maritime agents in Iraq. This clause is subject to UN approval of the Iraq Distribution Plan.

350 The short-form contracts that were eventually signed in February 2000 for each of contracts A4970, A4971 and A4972,²³⁶ were not in terms identical to the initial contracts entered into that provided for the inland transportation fees.

351 In particular, the words 'The discharge cost will be a maximum of US\$15.00 and shall be paid by Sellers to the nominated Maritime Agents in Iraq. This clause is subject to UN approval of the Iraq distribution', which had appeared in the short-form contracts for the earlier Phase VI sales, save only for a change in the amount of the discharge fee, had been deleted from the versions of the short-form contracts that were eventually signed and submitted to the UN for approval.²³⁷

352 Thus, the agreement between AWB and the IGB, that the wheat would be sold:

CIF Free on Truck to all silos within all governates of Iraq ... A trucking fee of USD 15 per tonne will be paid ... As per previous contracts, this payment will be made as per your instruction to the Transport company nominated by yourself

became

The cargo will be discharged Free into Truck to all silos within all Governates of Iraq ... The CIF Free in Truck price per tonne of 1000 kilos is United States of America Dollars as follows: US\$ 163.00 per tonne.

in the contracts submitted to the UN for approval.

353 ASIC says that the short-form contracts AWB submitted to the UN did not reflect the terms of the agreement that AWB had concluded with the IGB.

354 ASIC submits that it is obvious that the agreement to pay the fee was omitted from

²³⁶ CB 2/885, 891, 897.

²³⁷ Compare CB 7/4243 (draft) with CB 7/4245 (final).

contracts to be submitted to the Department of Foreign Affairs and Trade and the UN in order to prevent discovery of payment of the fee. ASIC says that a conscious decision must have been made within AWB to deceive the Department of Foreign Affairs and Trade and the UN.

355 ASIC contends that there can be no sensible justification for the change in the terms of the AWB written contract to delete the reference to 'a trucking fee of US\$15.00 per tonne' in the short-form contracts to be submitted to the UN, whilst between AWB and the IGB the obligation to pay that sum remained, other than a desire to hide from the UN the fact of payment of significant sums in US dollars to an Iraqi entity and to avoid drawing attention to the fact that such sum was included in the contract price that would be paid from the UN escrow account. That was the reason the change was made.

356 Despite the deletion of the reference to discharge costs from the AWB short-form contracts, there was nevertheless still an agreement by AWB to pay an inland transportation fee in relation to the shipments under contracts A4970, A4971 and A4972. That fee was US\$15 per tonne, as provided for in the draft short-form contract.

357 It is not contended by ASIC that these facts were 'well known within AWB' or that Flugge or Geary knew these facts.

358 Emons confirmed that AWB would pay the 'trucking fee of USD 15' in a facsimile to the Director General of IGB, Yousif Abdul-Rahman (Abdul-Rahman) on 9 February 2000:²³⁸

To confirm our conversation of yesterday. AWB Ltd agree with the terms of the contract that a trucking fee of USD 15 per tonne will be paid on the three contracts of 300,000 tonnes each. As per previous contracts, this payment will be made as per your instruction to the Transport company nominated by yourself.

359 Emons recalled a discussion with Abdul-Rahman in which there was discussion about

²³⁸ CB 2/903.

the increase in the trucking fee to US\$15.00 per tonne – Abdul-Rahman said that was the new fee. He did not say why it had increased.²³⁹

360 AWB Chartering paid inland transportation fees of US\$15.00 per tonne on each of the shipments made in fulfilment of contracts A4970, A4971 and A4972. For each shipment, the full amount of the fee due, calculated by reference to the tonnage of wheat loaded, was paid by AWB Chartering prior to each vessel's arrival at Umm Qasr. A total of US\$19,542,397.96 was paid between April and September 2000 in respect of the inland transportation fees for these shipments.²⁴⁰

361 AWB Chartering was in turn reimbursed the cost of these fees by the AWB Pool. This was through the 'freight' the pool paid to AWB Chartering for the carriage of each shipment to Iraq. The AWB Pool in turn recovered the cost of the fees through the proceeds of the letters of credit drawn on the UN escrow account, which were paid following the discharge of the wheat from the vessels at Umm Qasr.

362 All the inland transportation fees paid by AWB in respect of each of the shipments made under these three contracts were paid to Alia. For some shipments, the payments were made by AWB Chartering to Alia directly. For others, the payment was made indirectly, through shipowners and Ronly.²⁴¹

Flugge meeting with Alistair Nicholas in Washington

363 A meeting occurred in Washington DC on or about 9 March 2000. I will return to this meeting when I consider Flugge's knowledge of the payment of the trucking fees as it is central to the allegations of breach of duty made against him. It is necessary to touch on this meeting at this stage, to continue with the chronological discussion of AWB's

²³⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1729, L11-17.

²⁴⁰ See Exhibit P6. This figure is obtained by adding the amounts paid in relation to contracts A4970, A4971 and A4972, all of which were between April and September 2000. For the payment of \$3,852,910 made on 9 May 2000 (see CB 2/1015), the amount payable in reference to the MV Nostos T which is on a different contract, equal to \$48,381 MT x \$15/MT = \$725,715 is not included in the total figure.

²⁴¹ See Exhibit P6.

conduct in paying trucking fees to Iraq.

364 In summary, a meeting was held at the Australian embassy in Washington DC attended by Snowball (AWB's New York representative), Andrew McConville (McConville) (AWB's Government Relations Officer), Flugge and Alistair Nicholas (Nicholas) from Austrade. ASIC alleges that at this meeting Flugge was made aware by Nicholas of a complaint by another wheat trading country that AWB was making inappropriate payments to the IGB and that Flugge said that he would look into the issue and report back to Nicholas.

Emons' discussion with Flugge in March/April 2000

365 As indicated below at paragraph 1198 and following. I am not prepared to accept Emons' evidence unless corroborated by other evidence. In this instance, his conversation with Flugge is recorded in an email sent by Emons. There is no other evidence to corroborate what Emons claims Flugge said.

366 ASIC submits that in around late March 2000 or early April 2000, Emons had a discussion with Flugge in which Flugge told Emons that he was happy for Emons to continue paying the inland transport fee and that AWB should be accommodating to the Iraqis so that its business in Iraq did not come under threat.

367 This part of the discussion is recorded in an email dated 4 April 2000 sent by Emons to Watson,²⁴² in which he wrote:

Mike

Couple of issues before we take off for Iraq at the weekend.

1. We need to clarify when we get to Baghdad that the fee on the new contract is USD 15 and that the method of payment remains the same to Alia etc and in what amounts. This is an increase on the last phase which was USD12 you will recall. I suspect we will be confronted with proposals that will be complicated but we will cross that bridge when we get to it. *For your information I had a discussion with Trevor Flugge last week to discuss some of the finer points of the trucking fee. He is happy for us to carry on in fact he is determined that we should be accommodating to the Iraqi's so that our business does not come under threat from our US or CWB*

²⁴² CB 2/945 [emphasis added by ASIC].

friends.

2. With the above in mind we need to take with us a list of vessels paid so far and vessels scheduled to load. I have asked [Mr Owens] for a UN payment schedule for Friday before we depart.

368 I am not satisfied that Flugge said what Emons attributes to Flugge in the email.

369 In March or April 2000, Emons arranged a meeting with Abdul-Rahman, but he was not available to meet with Emons on the dates that had been proposed. On 7 April 2000, Emons sent a facsimile to IGB advising of his decision to defer his proposed meeting for that reason, although Emons stated he was nevertheless still planning to meet with the transport company in Jordan.²⁴³ Emons then wrote:

For good order we had wished to discuss the following issues:

1. 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 its sensitivity* however if you would prefer *we can discuss with the UN as to the appropriate method for 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.
2. We had also wished to discuss the demand by IGB for the inclusion of delivery to Iraq Governates and additional quality requirements over and above those agreed at the time of time of contract negotiation. If this remains a demand of IGB in the Letter of Credit then AWB will be obligated to hold IGB liable for insurance costs and other relevant costs for such a clause and as such we seek a relevant increase in contract price. Please confirm by return that this is in order. If this is not forthcoming all shipments must be halted as IGB will be considered to be in default of contract terms as previously agreed. We would hope that this does not become an issue as it has not previously been a hindrance to our trade.

370 ASIC submits that it can readily be inferred from the pains AWB had otherwise taken to disguise its payment of the fees that this was, in effect, a veiled threat by Emons and AWB to go to the UN about trucking fees if the IGB was not more helpful in

²⁴³ CB 2/981 [emphasis added by ASIC].

contract negotiations.

371 ASIC says that by this time, there can be no suggestion that AWB:

- (a) believed that the IGB fees had been approved by the UN;
- (b) believed that the IGB fees were a payment to a legitimate transport company for transport services;
- (c) did not know that the IGB fees were a payment to Iraq; and
- (d) did not believe that the IGB fees were prohibited by UN sanctions.

372 For the reasons discussed at paragraphs 910 and following, I do not accept that these matters were well known within AWB. As to the specific allegations relating to Flugge and Geary I deal with them when I address the specific pleadings against them.

373 Emons met with the Iraqi Minister of Trade in mid-April 2000. During that meeting, the Minister said he was appreciative of AWB's handling of contractual and quality issues compared to its Canadian counterpart and that Canada had taken a negative stance against Iraq since its inclusion on the Security Council. This meeting is recorded in an email from Emons to Joanne Martin copied to various AWB employees including Flugge – 'Minister was appreciative of AWB handling contractual and quality issues as compared with CWB'.²⁴⁴

A protective agency agreement with Alia

374 At around this time, AWB and Alia entered into a protective agency agreement by which Alia assisted AWB with expediting the discharge of wheat at Umm Qasr on behalf of AWB.²⁴⁵

375 The letter of appointment provided that Alia was to be paid US\$9,000.00 per shipment inclusive of all assistance, fees, services, communications and tasks. This fee was to

²⁴⁴ CB 2/999.

²⁴⁵ CB 2/989.

be paid in two instalments. The first instalment of US\$6,000 was to be paid upon the vessel's departure from the load port and against relevant invoice from Alia. The second instalment of US\$3,000 was to be paid upon receipt of all amounts due to AWB against the vessel.

376 This was the only written agreement between AWB and Alia prior to October 2003. Alia issued a number of invoices for protective agency fees (which were very small in amount)²⁴⁶ but never issued invoices for trucking fees or services.

377 AWB's focus was on speeding up the process of discharge and getting payment from the UN escrow account as quickly as possible. During this time, demurrage was a constant issue discussed within AWB and AWBI given the real costs it was imposing.²⁴⁷

378 Alia's appointment as AWB's protective agent was from 17 April 2000.²⁴⁸ It was not for a fixed period. The letter of appointment provided that Alia's appointment could be terminated by either party upon two month's written notice.

379 ASIC submits that AWB thought it appropriate to document its appointment of Alia as a protective agent and the terms of its arrangement with Alia (including Alia's obligations thereunder), notwithstanding that the amount payable to Alia as protective agent was of the order of a few cents per tonne of the wheat shipped under each shipment. ASIC says that this is to be contrasted with the absence of any similar agreement and the complete lack of any documentation at all, in relation to the services associated with the markedly more substantial inland transportation fees that AWB was also paying to Alia at this time.

380 ASIC submits that the absence of any such agreement and of any documents recording or evidencing such an agreement makes plain that:

²⁴⁶ CB 2/1053.

²⁴⁷ CB 2/1005, 1033, 1037, 1039, 1083, 1095, 1103, 1107, 1129, 1159, 1197, 1207, 1209, 1263, 1267, 1275, 1279, 1283.

- (a) AWB had no agreement with Alia pursuant to which Alia was to provide transportation services to AWB in respect of its cargoes and for which it received the inland transportation fees paid to it;
- (b) those within AWB did not consider that there was any such agreement between AWB and Alia;
- (c) the inland transportation fees paid by AWB to Alia were not a payment pursuant to any such agreement between AWB and Alia; and
- (d) the inland transportation fees paid by AWB to Alia were not a payment in return for the provision by Alia of services (in particular transportation services) to AWB.

381 These facts are not alleged to be 'well known' within AWB. As to whether or not Flugge or Geary knew these matters, I deal with those issues when I address the allegations against them.

382 ASIC argues that if there had been an agreement between AWB and Alia to provide transportation services within Iraq under the Hussein Regime, or if those at AWB had genuinely thought that AWB had such an agreement with AWB and that the inland transportation fees were paid in return for the provision of such services by Alia to AWB under such an agreement, that agreement would have been documented, as AWB did with the protective agency agreement in April 2000, and as AWB did in October 2003 when AWB was forced by the CPA and WFP to honour the bargain apparent in the terms of its written contracts and arrange for the inland transportation of the wheat within Iraq.

383 ASIC contends that this circumstance, namely the absence of any documentation that would support any claim by AWB that it had an agreement with Alia to transport wheat within Iraq, is corroborative of AWB's understanding of the relationship,

exemplified in Emons' email to Officer on 4 November 1999:²⁴⁹

To date IGB have not advised the trucking co to whom payment should be made. We have been approached by a company in Jordan but our response has been to ask for confirmation from IGB before discussing further.

We are not responsible for trucking in Iraq only the payment. Payment to us occurs as per existing contract after UN inspectors cert is issued at discharge.

When I see Zuhair at the end of Nov I hope to clear a number of the details up.

384 On 29 May 2000, Watson and Emons sent an email to Officer reporting on a meeting with 'Transport Co/Protective Agent and also Iraqi Trade Commissioner.'²⁵⁰ It was forwarded to Geary the following day.²⁵¹ The email noted the then current position and action plan in the following terms:

Current

There is no formal agreement between Pool/Chartering, for Iraq

Chartering has worked on the terms of the MOU and IGB/AWB agreed terms and conditions as per the UN Contract. UN Contract does not allow for payment of demurrage/despach, i.e. no transfer of funds, with exception of trucking fees, as agreed in the contract and approved by UN security council

MOU provides for 3000 mt discharge rate per vessel

- Current discharge rate does not meet the terms of the MOU
- AWB has been approached by IGB to provide 'after sales service'

Current Action Plan

- Determine amount and severity of quality issues
- Determine best possible performance of discharge rates at Umm Qasr
- Determine if any further equipment required to assist discharge rates
- Determine what 'after sales service required' i.e. equipment/cash (Board approval may be required for this)
- Present options to IGB to
 - (a) slow present shipping period (up to August)

²⁴⁹ CB 2/741.

²⁵⁰ CB 2/1041.

²⁵¹ CB 2/1043.

(b) IGB to contribute towards current projected demurrage expense.

385 ASIC submits that it seems from this email that Watson was suggesting that the approval of contracts which referred specifically to a 'discharge cost of up to US\$12.00' by the UN was an indication that the payment of IGB fees referable to those contracts had thereby been approved. ASIC says that the email is silent as to whether the mechanism for payment had been approved and whether payment of such a fee in US dollars to the Iraqis had been approved. ASIC says that neither had been approved. Further ASIC says that the recipient of the email, Officer, knew that the payment of IGB fees to Iraq had not been approved by the UN, or was at least a 'grey area'. ASIC says that so too did Geary.

386 Emons discussed with Othman Al-Absi on 29 May 2000 that AWB was experiencing high costs for demurrage – the board had given instructions to the executive to resolve it with haste and Watson and Emons were despatched to Iraq to see the people responsible.

387 Emons discussed the subject of trucking with Othman Al-Absi because of the lack of trucks being available to take grain being discharged. Othman Al-Absi offered suggestions. They discussed with all the parties the materials required to improve discharge and the transportation grain away from Umm Qasr. It was a wide-ranging discussion about the minutiae of how to discharge a vessel. The discussion about trucks was that the trucks available were limited because of the sanctions in place that reduced the amount of parts available to repair broken trucks. Emons and Watson highlighted the fees being paid for trucking and Othman Al-Absi's response was 'Of course you are right but we will do what we can.'²⁵²

388 ASIC submits that this meeting and email shows that it was the Iraqis who controlled the trucks not Alia. ASIC says that Hogan never saw any railway transportation system in Iraq and it was never discussed.²⁵³

²⁵² Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1750, L4-29.

²⁵³ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1075, L12-18.

389 ASIC says that there were no discussions within AWB about how the payment of the transportation fees and after sale service fees fit into the UN distribution plan.²⁵⁴

390 Emons says he reported these matters discussed with Al-Absi to Officer, pool management and anybody else concerned with demurrage matter including the finance department. Emons said that the matter would be of interest to the executive.²⁵⁵ I am unable to accept Emons evidence for the reasons previously referred to.

Introduction of an 'after sales service' fee

391 On 30 May 2000, Geary (and others) received an email from Marise Wilson entitled 'Iraq' that forwarded an email from Watson (on behalf of himself and Emons), sent from Jordan, relating to meetings to be held the following day with, amongst others, Zuhair and Abdul-Rahman of the IGB.²⁵⁶ Watson's email noted:²⁵⁷

- (a) Abdul-Rahman is a member of the ruling family in Iraq, and that his appointment may allow 'greater control of manipulation of moneys within the trade.'
- (b) Vessels from Canada have been rejected 'for alleged contamination by e-coli. It has been suggested that this was due to Canadian Govt action on the UN security council.'
- (c) The Iraqi Minister had assured that all four berths at Umm Qasr would be made available for AWB ships.

392 The email then noted:

²⁵⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T934, L9; T1100, L16-21; T1101, L18 - T1102, L3.

²⁵⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1751, L1-8.

²⁵⁶ CB 2/1045, 1049.

²⁵⁷ Geary, sch [12].

UN Contract does not allow for payment of demurrage/despatch ie no transfer of funds, with exception of trucking fees, as agreed in the contract and approved by UN security council. ... AWB has been approached by IGB to provide 'after sales service'

Current action plan:

Determine what 'after sales service required' i.e equipment /cash (Board approval may be required for this).

393 This email supports the view that Watson was of the belief that the UN had approved the payment of the inland transportation fees.

394 Emons was instructed by members of the executive, including Officer and Mr Tighe, to resolve the issue of demurrage including a proposal to the IGB to hold part or all of the trucking fees to recover the cost of demurrage.²⁵⁸

395 On 31 May 2000, Emons and Watson had a meeting with officials of IGB. The meeting was recorded in a file note dated 13 June 2000 prepared by Emons, which notes that the purpose of the meeting was to resolve demurrage issues at Umm Qasr and to discuss the next phase of the OFFP. The memo records that:²⁵⁹

During discussion with IGB the AWB proposed that a method of recovering the cost of demurrage would be to hold part or all of the trucking fee or as an alternative there could be a reduction for future contracts. Discussion to a degree took place however it was clear that the option of AWB holding part or all of the trucking fee would not be acceptable to the Minister (and therefore the Regime). It became clear that there was some confusion in the IGB as to the amount of trucking due, with explanations that the rate on the AWB contracts was different to that charged to some Russians, Thai and Algerian companies. Comment was made that the Minister had proposed to increase the trucking fee to USD 18 per tonne for phase 8 contracts but at the time of the meeting no approval had been received from the President.

The former Director General for IGB and now advisor to the Minister Salah Dr Zuhair joined us for lunch. He had been well briefed prior to joining us from his immediate comments on the discharge problems. He opened with the comment that although the AWB was suffering some immediate problems which was recognised by Iraq we had enjoyed periods of considerable earnings of dispatch. His comment on Trucking cost, made privately away from the main group as we departed the restaurant, was that he had advised the Minister to consider reducing costs but if this did occur there could be a

²⁵⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1752, L20-4.

²⁵⁹ CB 2/1055.

considerable increase in the costs of the 'after sales service' required.

396 ASIC submits that it is apparent from this document that it was well understood by each of Watson and Emons that the so called 'trucking fee' was a guise for fees payable to Iraq. The document speaks of compensation to AWB for future delays in discharge being met by 'reduction of trucking fees or increases in prices.' ASIC says that the former option would not be possible if the trucking fees were the true cost of trucking. Nor would it be possible if the fee was a genuine fee negotiated with and paid to the supposed trucking company in Jordan, Alia.

397 I am not sure what Emons believed. I have found that he was an unreliable witness and I have no confidence in the accuracy of anything he wrote unless independently corroborated. As to Watson, I am not satisfied that Watson did not believe, as many others at AWB did, that the fees had been approved by the UN and were used to meet transportation costs.

398 Similarly ASIC says that, Emons' note that Zuhair's 'comment on Trucking cost ... was that he had advised the Minister to consider reducing costs but if this did occur there could be a considerable increase in the costs of the "after sales service" required' is explicable only on the basis of an understanding that each of the 'trucking fees' and 'after sales service costs' were methods of paying funds or providing goods to Iraq.

399 ASIC says that Emons' references (within the extract from his file note quoted above) to the confusion in IGB as to the amount of the trucking fees due by AWB, to the potentially different rates charged to Russian, Thai and Algerian companies from the fees paid by AWB and to the purposed increase in the trucking fee which was at that time still awaiting the approval of the President further demonstrate that the IGB fees were an Iraqi levy not related to the cost of transport.

400 Other internal correspondence at this time record AWB's attempts to deal with demurrage costs including reducing trucking fees payable to Iraq.²⁶⁰ This was a real

²⁶⁰ CB 2/1057, 1061.

cost to the National Pool.

401 On 31 May 2000, Geary forwarded to Scales and Stuart Richardson (Richardson) an email from Watson which stated in effect, among other things, that:²⁶¹

- (a) AWB was to appoint a protective agent in Iraq to handle administrative and logistical issues at Umm Qasr. This was at the suggestion of IGB.
- (b) AWB had been approached by the IGB to provide 'after sales service'.
- (c) It was to be determined what 'after sales service' was required - equipment or cash were listed as likely possibilities and it was noted that board approval may be required.²⁶²

402 In June 2000 both Emons and Officer left AWB. The evidence suggests that Emons was sacked. The evidence did not establish whether or not this was due dishonest conduct.

403 On 6 June 2000, Geary attended a meeting of the Small Executive Management Group during which there was discussion of (amongst other things):

- the *NEAT* litigation, which related to an unsuccessful challenge to AWB's power to control bulk wheat exports from Australia;
- AWB's submission to the Australian government regarding the retention of the Single Desk; and
- the desirability of Geary (amongst others) representing AWB at hearings relating to the Single Desk.

The matters discussed at the meeting and Geary's attendance at the meeting are

²⁶¹ CB 2/1049, Geary, Further Particulars (FP) of the Further Amended Statement of Claim (FASOC) against Geary (filed in court on 12 October 2015), [1].

²⁶² CB 2/1055.

recorded in draft minutes dated 6 June 2000.²⁶³ The *NEAT* litigation and issues concerning the single desk arrangements were regularly discussed in meetings of the Small Executive Management Group and the Executive Leadership Group.²⁶⁴

404 On 9 June 2000, Watson sent an email to Geary and others setting out details of contracts, freight rates, trucking fees. There is a table attached to the email that shows the inland transport fees of US\$12.00 increasing to US\$15.00 in relation to some shipments under the OFFP.²⁶⁵

405 On 13 June 2000, Geary attended a meeting of the Small Executive Management Group during which there was discussion of (amongst other things):

- a workshop to discuss the *NEAT* litigation;
- AWB’s submission to the Australian government regarding the retention of the Single Desk; and
- demurrage and future sales in Iraq.

The matters discussed at the meeting and Geary’s attendance at the meeting are recorded in minutes dated 13 June 2000.²⁶⁶

406 On 26 June 2000 Carol Gordon, AWB’s general manager of human resources, drafted a note entitled “Urgent attention for discussion with the chairman.”²⁶⁷ That document states, in reference to new bribery and corruption legislation introduced in 1999:

Payments made to government officials by way of bribery prior to this date cannot be retrospectively investigated ... We have set up a private agency arrangement in most difficult countries (e.g., Pakistan Iran, etc), to get around the issue. This gives us an additional barrier between us and any potentially

²⁶³ CB 2/1083.

²⁶⁴ Geary, FP [2].

²⁶⁵ CB 2/1087, 1089, 1091, Geary, sch [13].

²⁶⁶ Geary, FP [3].

²⁶⁷ CB 2/1078-1.

'corrupt' payments.

The document discusses agency payments in Pakistan and continues:

... The only other people remaining with AWB that apparently have knowledge of these issues are Mark Emons and Trevor Flugge. Mark is on annual leave, I am not able to contact him, therefore, Trevor is our only source of verification.

407 ASIC submits that it should be inferred that Flugge, at a minimum, was considered by others within AWB to be a person who might have had knowledge of irregular payments made by Emons and/or Officer in connection with AWB's international wheat trade. ASIC says that plainly it was not thought remarkable that the Chairman should have knowledge of such 'coal face' issues. ASIC submits that this is consistent with other evidence indicating that at times Flugge worked closely with Emons and Officer,²⁶⁸ and was involved in discussions of irregular trading arrangements (such as the trucking fees).

408 ASIC contends that this document is also important for what it discloses of AWB's culture at the time. Keeping in mind that this memorandum was written by the general manager of human resources (and not, for example, front-line sales staff), and is expressly marked "for discussion with Chairman", it suggests that the prevailing attitude within AWB was that foreign bribery and corruption was an 'issue' for AWB to 'get around', and that corrupt payments could be made as long as this was done through third parties, to create a 'barrier' between the payment and AWB. ASIC submits that three years later, this attitude still prevailed – AWB's in-house counsel brazenly advised that improper payments to Iraq could be made if they were broken into smaller amounts and channelled through a third party.²⁶⁹

409 ASIC submits that in this environment, it is unremarkable that the Chairman of AWB should have discussed with IS&M employees the means by which the payment of the trucking fees could be made, and their proposed payment through a third party

²⁶⁸ See for example P39 CB 10/8532, [6].

²⁶⁹ CB 5/3166.

(Ronly), and have endorsed such behaviour.²⁷⁰

410 I am not satisfied that the implications that ASIC seeks to infer can be drawn. In any event, I am not comfortably satisfied of the allegations that ASIC makes concerning Mr Flugge. As discussed below at paragraph 1280 and following, I am satisfied that Mr Flugge knew of the payment of the inland transportation fees (as did the board of AWB) but I find that he, like many others, believed that the payments had been approved by the UN.

411 On 29 June 2000, Hogan sent an email to Borlase, Watson, Snowball and others entitled 'Iraq', which identifies issues to discuss before travelling to Iraq.²⁷¹ An issue raised under the heading 'Snowy' is:

Free on Truck contract – what is the NY mission position on this arrangement??
I am assuming that the UNSCR 986 has agreed to this condition as it is in the contracts.

412 There was no response to Hogan's question.²⁷²

413 On 7 July 2000, Borlase sent Hogan a copy of the Iraq Brief June 2000. The brief set out the substance of Resolution 986, contracts AWB had entered into the IGB since 1996, references to demurrage and that the IGB was a long term supporter of Australian wheat.²⁷³

414 On or about 10 July 2000, Geary and Scales received an email from Peter Jones (Jones) in which Jones lists a number of unresolved issues in relation to the Iraq market, including 'What is Ronly Holdings [sic] involvement in the process...'²⁷⁴ The email attaches a document entitled 'Iraq Brief June 2000' which materially sets out the

²⁷⁰ PCS, [846]-[849].

²⁷¹ CB 2/1125.

²⁷² Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T952, L3.

²⁷³ CB 2/1133, 1135.

²⁷⁴ CB 2/1141.

background to the OFFP and the effect of UN Resolution 986 (including that the resolution permits Iraq to purchase humanitarian goods). The document also states in relation to the purported inland transportation fee:²⁷⁵

Mechanism of payment for trucking fee. In existing contracts the fee is \$15.00 per tonne. IGB have indicated the fee will be reduced to \$14.00 for future business. *Current mechanism of payment is via transport company/s in Jordan.*

415 The email and the attached market brief confirmed that the inland transportation fee was a payment to Iraq. This email not only raised important issues concerning the operation of the Pool (for which Geary was then responsible) but also sought from the addressees their short-term and long-term strategies for resolving 'current contract issues' which Jones thought needed urgent resolution.

416 ASIC says that it is unlikely that Geary would have ignored so explicit a request for information. ASIC says that the terms of the email were clear. The emphasised passage quoted earlier did not refer to Alia setting the 'trucking fee' but characterised Alia as being only the 'current mechanism' for the payment of that fee. In this context, the reference to IGB foreshadowing a reduction in the IGB fees plainly indicated that it was IGB who in fact determined the amount of that fee.

417 I leave until I deal with the allegations against Geary to deal with any inferences that is alleged should be drawn against him.

418 On 12 July 2000, Geary received an email from Graham Owen of AWB the material effect of which was to identify various problems in the receipt of payment by AWB from the UN escrow account and make suggestions as to how those problems could be addressed.²⁷⁶ In the email, Owen noted that AWB had to pay for inland transport on a vessel by vessel basis, and that payment for wheat sold to Iraq was contingent upon UN authentication. On 13 July 2000, Geary received a reply from Snowball to

²⁷⁵ CB 2/1148; Geary, sch [14] [emphasis added by ASIC].

²⁷⁶ CB 2/1149.

Owen's email, which included the text of Owen's email.²⁷⁷

419 The next day, Snowball replied to Owen (copying the original email), copied to others including Geary, indicating that he would work on suggestions to improve the payment process with the UN and BNP.²⁷⁸

420 In around early July 2000, the IGB put out a wheat tender. The tender was on a 'CIF F.O.T to Silo to all governerates [sic] of Iraq' basis, and stated that the cost for discharge and land transport would be US\$14.00 per metric tonne to be paid to the land transport company.²⁷⁹ A handwritten notation of 'A0265/66/67' suggests the tender is in relation to contracts A0265, A0266 and A0267.

421 On 16 July 2000, AWB and IGB entered into contracts A0265 (200,000 tonnes), A0266 (400,000 tonnes) and A0267 (400,000 tonnes) each of which included the CIF Free in Truck clause.²⁸⁰

422 Details of the sale were provided by Hogan to Geary and others in an Iraq trip report.²⁸¹ There is a reference to trucking at US\$14.00 per tonne.

423 On 18 July 2000, (and throughout 2000) Geary attended a meeting of the Executive Management Group during which there was discussion of (amongst other things) the single desk and demurrage.²⁸²

424 On or about 19 July 2000, Geary received an email from Hogan attaching a document titled 'Iraq Trip Report' prepared by Hogan. The report listed the price components

²⁷⁷ Geary, sch [15].

²⁷⁸ CB 2/1155.

²⁷⁹ CB 2/1163.

²⁸⁰ A0265: CB 2/1167; A0266 (first is clear but signed only by AWB; second is fuzzy but signed by both): CB 2/1169, 1171; A0267: CB 2/1173; IGB long-form contracts: CB 2/1175, 1185; AWB export sales notes: CB 2/1191, 1193, 1195.

²⁸¹ CB 2/1211, 1213.

²⁸² CB 2/1197.

of a recent wheat sale contract with Iraq, including a 'trucking' fee of US\$14.00 per tonne.

425 On 19 July 2000, Geary sent an email to Stott thanking him for the brief and stating that it was 'a very good result as the Pool's bottom line was achieved and the negotiating team have given us more confidence to move forward with additional sales. We have received enquiries for more sales to Iraq via the Russian Trading houses however will need further details from International Sales before proceeding i.e. final quality specs, contractual terms etc.'²⁸³

426 On 31 July 2000, Stott sent an email to Snowball (copied to others within AWB) in which he wrote:

We need to have a chat about Iraq. We have a number of contractual problems that need to be sorted and many of these involve the UN. For example:

...

- Iraq does not guarantee discharge rates at UMM Qasr, nor do they pay demurrage/dispatch at discharge port. The argument is that it is a US\$ transaction which is not allowed by the UN. The affect is, that the Iraq's discharge our vessels at low rates and we get hit with massive demurrage bills. Solution, change contract to guaranteed discharge rate with Iraq being obliged to pay Dem and earn dispatch. AWB to keep the dem/despatch account for Iraq and settle with owners on behalf of Iraq', surplus funds if and when available to be refunded Iraq.

- payment mechanism is very slow, we need to find out why and get it sped up, it currently cost around US\$3 per tonne to finance the shipments, we pay cash for freight on shipment, but do not receive proceeds until approximately 3 months after bill of lading date. The Iraq's claim the UN is slow, the UN claim it is BNP. AWB needs to fix it because at the moment the Australian Wheat growers is financing the UN system.²⁸⁴

427 ASIC argues that the first dot point makes clear that Stott was aware of restrictions on the payment of moneys to Iraq.

428 ASIC contends that the observation in relation to AWB having to finance the freight on shipment until it was paid from the proceeds of the sale of the wheat applied

²⁸³ CB 2/1207, Geary, FP [5].

²⁸⁴ CB 2/1259.

equally to the inland transportation fees that AWB was at that time paying before the cargo had been discharged, and which AWB or the AWB Pool was having to fund until such time as the proceeds of the sale of the shipment were received under the letter of credit drawn on the UN escrow account.

429 Advice was sought from DFAT in relation to the demurrage issue. In relation to that topic, after identifying the various UN Security Council resolutions that control the ability to make payments to Iraq and summarising their effect, Ms Gabrielle Simm (Simm) of DFAT provided the following advice on AWB's proposal:

8. The AWB states that it currently incurs substantial demurrage bills due to delays in unloading wheat shipments at the Iraqi port of Umm Qaser. It proposes establishing a type of trust account, controlled by the AWB and held for the benefit of Iraq, into which the AWB would pay despatch (a bonus where shipments are unloaded ahead of time) and presumably, although it does not state this, demurrage (a fine when shipments are unloaded late). The AWB proposes to use these funds to provide grain handling equipment and technical training to Iraq.

9. The proposal to establish a type of trust account for Iraq controlled by the AWB would breach UN sanctions. Money paid to Iraq must be paid into an escrow account established by SCR 707 and 712 or in accordance with SCR 986. The sale or supply of grain handling equipment is prima facie prohibited by SCR 661 OP 3(a) and (b) and would need to be approved by the 661 sanctions committee.

10. It may be possible to negotiate with the UN to introduce some form of incentive for timely unloading of shipments into the contracts for provision of wheat to Iraq. One way would be to approach the UN to make incentive payments out of the escrow account, rather than setting up a new trust account controlled by the AWB, which would breach current UN sanctions.²⁸⁵

430 Simm summarised her advice on this issue in the following terms:

14. The AWB's proposal to establish a trust account for Iraq as an incentive to unload shipments more quickly breaches current UN sanctions against Iraq. It may be possible to discuss with the UN Treasury other methods of encouraging Iraq to unload wheat shipments more quickly without breaching the sanctions regime, for example, an incentive payments scheme operating within the escrow account.

431 As at August 2000, the advice from DFAT to AWB was that AWB could not reintroduce liability for demurrage and despatch under its contracts with IGB and

manage those payments by a scheme along the lines proposed by Stott in his email of 31 July 2000. To do so would contravene UN sanctions. If demurrage/despatch was to be payable as between AWB and IGB, then it would have to be either operated through the UN escrow account or dealt with in some other way.

432 On 2 August 2002, Geary received an email from David Johnson (Johnson) which noted that AWB had just received an email stating that two AWB vessels currently on berth in Iraq had ceased discharging because iron powder was found in the hatches and rejected another vessel due to the presence of a dead rat.²⁸⁶

433 On 2 August 2002, Geary received an email from Long, the material effect of which was that AWB was sending an AWB delegation to Iraq including Flugge, Andrew Lindberg (Lindberg) managing director and chief executive officer of AWB, and Long to discuss the Iron Filings Claim.²⁸⁷

434 On 5 August 2002, Geary received an email from Johnson, in which Johnson noted that the Northern Duchess and the Tuo Hai (two of the vessels allegedly contaminated with iron powder) had been moved off berth until the AWB delegation arrived for discussions.²⁸⁸

435 On 7 August 2002, Geary received an email from Stott, which was a forward of an email from Mr Davidson-Kelly. Part of the email from Mr Davidson-Kelly read:

Would your delegation be willing to deliver a letter from me to the Trade Minister, asking him to stimulate action re the loan repayment? Obviously they would only deliver it if things were going well!

The forwarding email from Stott stated:

As for the letter see no harm in carrying the letter for Norman but suspect that the atmospheric are not going to be conducive to it being tabled.²⁸⁹

²⁸⁶ CB 4/2553, Geary, FP [9].

²⁸⁷ Geary, sch A [34].

²⁸⁸ CB 4/2557; Geary, FP [10].

²⁸⁹ ABL.0005.003.0236, Geary, FP [11].

436 On 7 August 2002, Geary received an email from Johnson which noted that a further AWB vessel was reported to have iron powder contamination, and that the three rejected vessels could be unloaded if the grain was sieved at a cost of US\$7.00 per tonne.²⁹⁰

437 On 12 September 2000, Geary received an email from Hogan which set out a breakdown of the pricing of contracts A0265, A0266 and A0267 showing that the contract price included a 'trucking' fee of US\$14.00.²⁹¹

438 On 21 September 2000, Ingleby emailed various executives, including Tim Goodacre (Goodacre), Stott, Geary and Watson, confirming that the new arrangements for AWB Chartering would be agreed and confirmed the next day.²⁹² Ingleby suggested that this was urgent because:

... we seem to find new ways for chartering to lose money each month – this month Yemen demurrage (0.5m) and Iraq trucking (0.5m) – are we sure these are to chartering's account ??²⁹³

439 On 23 September 2000, Mr Cowan (of chartering) responded to Ingleby stating:

Michael Watson has argued, at length, that the trucking fee was not for our account.

Mark Emons & Nigel O. wanted to disguise AWB payments into Iraq for trucking fees

This was achieved by chartering taking a forward contract with Ronly to combine the freight

and trucking payments.

The new regime has not supported this agreement and Chartering have incurred the cost to buy out of the deal.²⁹⁴

²⁹⁰ AWB.044.005.0128, Geary, FP [12].

²⁹¹ CB 2/1309-10. Geary, sch [17].

²⁹² CB 2/1321.

²⁹³ Geary, sch [18].

²⁹⁴ CB 2/1323.

440 Later that day on 23 September 2000, Stott replied to Ingleby, including Geary as an addressee. This response included the statement:

I am advised by David [Cowan] that the USD 300,000 (AUD500k) payment to Ronly relates to the US 0.20cents per tonne fee that we agreed to pay for Ronly making Iraq freight and land transport payments on behalf of AWB...This is an AWBI expense.²⁹⁵

Increase in IGB fees by 150 per cent

441 In October 2000, Hogan and Stott travelled to Iraq and met with Abdul-Rahman and Zuhair. The meeting is described in a draft trip report submitted by Hogan to Stott by email on 21 October 2000.²⁹⁶

442 Hogan's draft trip report reported on (among other things) a proposed increase in the IGB fees:²⁹⁷

New Business: Phase 9:

Iraq will be increasing the trucking fee to USD 35.00 for shipments to Umm Qaser and 5% of contract price for other ports.

Phase 9 negotiations will take place in late December or early January.

443 ASIC contends that there was no mention of any reason or justification for the proposed increase of 150 per cent. ASIC says that it was not related to the actual cost of transport, because it was not referable to where the cargo was going and, in the case of goods from places other than Umm Qasr, the amount payable related to the price or value of the goods and not the cost of handling or transporting them.

444 ASIC says that as it turned out, the increase in the IGB fees took effect sooner than foreshadowed by this note. Contract A0430, a Phase VIII contract concluded on 2 November 2000, IGB fees of US\$25.00 per tonne.²⁹⁸ Moreover, by Phase IX the IGB fees payable had increased to an amount greater than US\$35.00 per tonne. ASIC says

²⁹⁵ CB 2/1325, Geary, sch [19].

²⁹⁶ CB 2/1451, 1453.

²⁹⁷ CB 2/1461.

²⁹⁸ CB 2/1493, 1501.

that there was no mention in Hogan's draft report that Stott protested at the proposed increase in the trucking fee to US\$35.00. ASIC says that could only be because he was aware that the sum for the trucking fee was included in an inflated price of wheat and would be recovered by AWB from the UN escrow account.

445 Hogan's trip report²⁹⁹ also reported on a complaint about payment of IGB fees:

IGB presented AWB with a list of vessels that have only had 90% of trucking fee paid. The total tonnage that IGB claim has only been paid 90% is 998,423 = USD11.98 million (@USD12) = USD1.198 outstanding. This figure is based on trucking fee of USD12.00 per tonne (which needs to be verified against all contracts)

Action:

AWB to investigate payments against contracts since the inclusion of the trucking fee.

446 ASIC contends that it is significant that both the complaint that payments of the IGB fees were still outstanding and the list of those outstanding payments were being raised at that time by the IGB and not by Alia, to whom the payments were being made. ASIC says that this suggests that the IGB fees were being received in Iraq.

447 In around August 2000, Hogan became aware that Ronly was involved in the payment of transport fees to shipping companies.³⁰⁰ Hogan was not told why Ronly or a Ronly nominated company was an intermediary for transport costs.³⁰¹

448 On 7 October 2000, in response to a request for information from Geary, Snowball sent an email to Scales copied to Geary and others entitled 'Re: Iraq' which summarised the UN stance under the OFFP, namely that the UN would not arbitrate/influence the terms and conditions of the contract as long as there was no threat of the oil money being used for things like purchasing weapons – the UN secretariat was responsible

²⁹⁹ CB 2/1451, 1453, 1457.

³⁰⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T956, L2-20; T1043, L9-12 (xxn Dharmananda).

³⁰¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T957, L7.

for ensuring 'the goods Iraq purchases are for humanitarian food/medicine and that there are funds from the sale of oil to pay for the goods.'³⁰²

449 On 20 October 2000, Flugge wrote to The Honourable Mark Vaile MP, Minister for Trade, setting out the importance of the 'very important' Iraqi market to AWB, noting that trade with Iraq occurred subject to UN Resolutions, and explaining that the Australian government's attitude to Iraq at the time could impact AWB's wheat exports.³⁰³

450 On 22 October 2000, Stott sent an email to Goodacre, copied to Hogan, attaching a document entitled 'Iraq Update October 2000'. This update covered issues including demurrage, delay in payments, trucking delays and issues with the UN procedures.³⁰⁴ Under the heading 'Trucking', the update states:

AWB's shipping agents reported that discharge had been reduced due to a lack of trucks. The minister and IGB refute that is a shortage of trucks.

451 On 23 October 2000, Geary received an email from Scales of AWB, which forwarded an email that Stott had sent on 23 October 2000 in which Stott noted that during his recent visit to Baghdad, the IGB had asserted that the 'trucking fee' in respect of particular shipments of wheat had not been paid in full and that the IGB claimed that US\$1.198 million was outstanding. The email stated that 'this figure is based on trucking fee of USD12.00 per tonne (which needs to verified against all contracts)' [sic].³⁰⁵

452 Stott stated that AWB needed to compile an itemised list of the names of vessels and the quantum of trucking costs yet to be paid to the IGB. 'The IGB wants this settled quickly...'³⁰⁶ Further emails were sent internally discussing whether payments were

³⁰² CB 2/1447. Geary, sch A [20].

³⁰³ CB 2/1463, 1465.

³⁰⁴ CB 2/1467, 1469.

³⁰⁵ Geary, sch [22].

³⁰⁶ CB 2/1471.

outstanding.³⁰⁷

453 On 24 October 2000, Geary (and others) received an email from Scales entitled 'Iraq questions' that stated '5. what is the agreement with IGB on no. of trucks available to AWB and has the cost been locked in?'³⁰⁸

454 ASIC submits that these emails, many of which were received by Geary, confirmed that Iraq was responsible for trucking, not Alia and was the recipient of the IGB fees.

455 On 25 October 2000, the IGB sent an email to Stott seeking quotes to supply '300,000MT of hard wheat and a further 300,000MT of soft wheat, price to include new trucking fees of US\$25.00 per tonne paid in Euro or any acceptable European currency.'³⁰⁹

456 Also on 25 October 2000, Hogan sent an email to Watson, in which he wrote:³¹⁰

Further to C.S [Charles Stott] note – can you please provide an update on the 90% and 10% payment of trucking fee.

Attached is a list of vessels which IGB claim have only been paid 90%.

Can you confirm amounts paid by AWB against each vessel and who we paid – i.e. trucking Co. directly or via Ronly accounts.

Also how are we able to check that final balance 10% is paid? Do AWB pay 100% up front (or 90%) and 10% balance?

457 On 26 October 2000, Watson replied to Hogan's email of 25 October 2000:³¹¹

thanks for the list of vessels, that IGB claiming not received the balance of 10pct trucking fees

Having checked our records, can advise that 100 pct of trucking fees for all vessels have been paid to IGB's nominated trucking company

³⁰⁷ CB 2/1473, 1475, 1477, 1479, 1481, 1483, 1485.

³⁰⁸ CB 2/1487. Geary, sch [23].

³⁰⁹ CB 2/1489, 1491.

³¹⁰ CB 2/1479.

³¹¹ CB 2/1481 [emphasis added by ASIC].

Trucking company has also confirmed they have received 100 pct trucking fees and have paid IGB.

458 ASIC says that the emphasised words again make 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. ASIC submit that it was widely known within AWB that these fees were paid to the IGB.

459 On 30 October 2000, Hogan sent a fax to the IGB offering to supply wheat on the basis of negotiations in USD currency to be converted to Euro upon agreement; and that “transport charge is USD25.00 per tonne, via Umm Qaser to all Governorates, Iraq.”³¹²

460 ASIC says that Hogan noticed in around October 2000 that the inland transport charge was US\$25.00 per metric tonne as it was different to the US\$35.00 AWB had been told the month earlier. ASIC says that there was no explanation for these price changes. ASIC submits that no questions were asked about these price changes.³¹³

461 Hogan recalled first being informed about that 10 per cent would be added to the price which was called an after sales service fee on 1 November 2000 during contract negotiations on the telephone late in the evening with Abdul-Rahman. Abdul-Rahman said ‘we’ve changed it to USD25 and adding on this after sales service fee.’³¹⁴ Hogan discussed with Stott the after sales service fee and what the IGB was implementing and AWB proceeded with the business.³¹⁵

462 On 2 November 2000, AWB entered contract No. A0430 with the IGB to supply 300,000 tonnes of wheat.³¹⁶ This sale was confirmed by an internal email from Hogan to

³¹² CB 2/1493.

³¹³ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T964, L23 - T965, L1.

³¹⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T966, L20-8; T967, L11-12.

³¹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T966, L30 - T967, L5.

³¹⁶ AWB short form: CB 2/1495; IGB long-form: CB 2/1497.

various people on 2 November 2000. In that email,³¹⁷ it is stated that:

10% will be added to px and included into trucking fee – i.e. IGB will confirm USD214.50 and T/Free will be USD44.50 ... this has been approved by UN (as per IGB – I will get this in writing).

- 463 The 10 per cent addition came to be referred to as the 10 per cent after sales service fee. ASIC submits that Hogan did not seek or obtain confirmation from anybody about what the position was with the UN in connection with the Free in Truck arrangements.³¹⁸
- 464 ASIC says that the differences in the prices for the two contracts in February 2001³¹⁹ arose because of the application of the after sales service fee.³²⁰
- 465 The AWB short-form contract³²¹ contained no reference to any ‘discharge cost’ or inland transportation fee or to any obligation on the part of AWB to pay either. It also contained no reference to the additional 10 per cent after sales service fee that had been imposed by the IGB, to any obligation to pay that fee, or its inclusion within the inland transportation fee.
- 466 The IGB produced a long-form contract in respect of this sale.³²² It also contained no mention of the inland transportation fee, of the additional 10 per cent, of the inclusion of that additional 10 per cent in the inland transportation fee, of AWB’s agreement to pay these fees, or of the inclusion of the inland transportation fee including this additional 10 per cent as a component of the price payable by the IGB to AWB.

³¹⁷ CB 2/1501.

³¹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T952, L8.

³¹⁹ A0553 (CB 3/1553), A0552 (CB 3/1555), Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T969, L3–28.

³²⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T969, L29 – T970, L2.

³²¹ CB 2/1495.

³²² CB 2/1497.

Arthur Andersen report

467 In late 2000, AWB obtained a report from accounting firm Arthur Andersen which had undertaken an investigation and reported on integrity risks in connection with IS&M. The Arthur Andersen report dated December 2000³²³ expressed its overall conclusion as:³²⁴

The concerns initially raised by AWB management were supported by the identification of red flags/risk factors for illegal and improper acts. A number of the red flags were shown to be explainable and reasonable, however, other red flags remain significant risks to AWB. The control of these risks is important to the organisation and to the protection of its employees.

The Integrity Risk Review has uncovered a number of areas that could be improved. There are opportunities to create a better culture within the organisation that will reduce the likelihood of the incidence of integrity risks.

The ethics of AWB staff is critical to the reputation and integrity risks of AWB. Particular higher risk areas such as the marketing of products, shipping and finance were assessed at a high level through this review. We found incidents that created ethical questions such as the offer of gifts, entertainment and money were encountered by your employees. We found that the incidents while not frequent did cause concern to your staff. Reduction of these risks can be achieved through education, improved communication, a consistent AWB policy and the enforcement of that policy. Other methods can be implemented to review and prevent incidents such as rotation of staff, audits, awareness of ethical issues and dilemmas that may be encountered.

1.6 Key Recommendations

It is recommended that AWB:

- Conduct an assessment of the ethical culture at AWB.
- Create a transparent environment where employees are encouraged to report incidents, risks and improper conduct;
- Construct controls that will prevent and deter illegal or improper conduct;
- Educate staff in relation to risk, controls and expectations of AWB.

468 In its detailed findings concerning Emons, Arthur Andersen wrote:³²⁵

Iraq – Inland Trucking:

During our review we found a number of email records that related to Iraq.

³²³ Exhibit P26.

³²⁴ Exhibit P26 page 7.

³²⁵ Exhibit P26, page 11, also at CB 1510.12.

These records contained indicators of integrity risks or red flags. We conducted a review of the Iraq dealings. The main aspect of these findings is the state of mind, knowledge and involvement of AWB employees.

Mr Watson informed us that approximately two years ago a UN tender for 'Free on Truck' was in place. IGB (Iraq Grain Board) would pay the trucking fee to AWB together with the C and F value. AWB would remit the trucking fee to the Jordanian trucking company transporting the grain.

AWB received information that apparently originated from the AWB New York Office that the UN were asking about the payment to the trucking company. The information was that the Canadians had asked for an inquiry into the arrangements.

Mr Watson informed us that this raised concerns at AWB about future sales to Iraq. There was AWB management pressure to maintain the sales to Iraq. He advised that Mr Emons and Officer wanted to find ways to avoid attracting the attention of the UN.

We were informed by Mr Aucher and Owen of Trade Finance that they were approached by Mr Emons to assist in structuring payments. They declined to have anything to do with it.

The next solution to the situation was to have the shipping company's owner make the payments to the trucking company on behalf of AWB. Mr Watson approached some ship companies such as SANKO who refused to conduct the payment. He stated that they advised him that they did not wish to break UN laws. One company asked why AWB did not wish to make the payments themselves. Mr Watson then approached another company who did make the payments. This company made two payments to the Jordanian trucking company. They withdrew from making any other payments to the trucking company after inquiries were made by the Singapore Monetary Authority for suspicion of money laundering. AWB were asked to support the transactions with a letter.

Ronly then provided the mechanism to make the payments to the trucking company. Two methods were utilised. The first was that AWB make two payments, one to Ronly for the trucking fees and the second to the ship owner for the freight. The second method was to make a single payment to Ronly. Ronly would then make two payments one to the ship owner and the other to the Jordanian trucking company. Mr Watson authorised the payments to Ronly. These payments were made through a Liechtenstein company. Mr Watson said that there was concern that payments made by Ronly in the UK would attract UN interest. Ronly for its part in the transactions received a payment per metric tonne (20 cents). We were informed that Ronly held the full amounts of these payments in their accounts for 20 days or more.

Mr Emons was the one who spoke to Mr Watson about the structure of the payments in the first instance. It was Officer who instructed him to conduct the payments through the shipping companies and then through Ronly. Mr Watson arranged the trucking payments as part of the freight.

The payment of the freight is paid at 90% until the confirmation of the letter of credit came through then the final 10% is paid. There has recently been an issue with the payments as to whether AWB has paid the full amount. Iraq has

claimed that only 90% has been paid. Mr Watson informed us that the Iraq systems are poor. The death of the Iraqi official responsible for the grain contracts, a person known as Zuhair, may have affected the Iraq knowledge of the payments.

There are a number of red flags that the employees were faced with in relation to these payments. This type of arrangement could be misinterpreted as a money laundering process. There were a number of clear warning signs in relation to these transactions that were not fully explored by AWB in legal or commercial terms. For example the issue of trying to use ship owners to make payments on behalf of AWB potentially damaged the reputation of AWB as would the attempt to disguise the transactions.

The current management have removed this payment process through Ronly. There has been a recent increase in the trucking cost to \$45MT. This appears to be high. There may be a risk that this money is being diverted to other purposes. There may be a risk to AWB of excessive trucking fees.

469 In reporting related to Watson, Arthur Andersen noted:³²⁶

Michael Watson stated that the extra payments were commissions to the best of his knowledge. That the 'friend in the middle east' is probably Zuhair. Zuhair dealt with Mr Emons. Zuhair was the one who instructed which trucking company to be used. At an airport lounge one time Mr Emons received a mobile phone call and said that it had been Zuhair who had asked if extra payments could be made. Mark said that he told him that he could not make those payments.

470 ASIC contends that a reading of these passages makes clear at least the following:

- (a) The culture of AWB and its employees required review and attention so far as ethical dealing was concerned.
- (b) Payment of the IGB fees in Iraq was a concern. The concern arose for a number of reasons:
 - (i) There had been an inquiry from the UN about AWB's payment of IGB fees.
 - (ii) AWB had sought to hide or disguise the payment of the IGB fees.
 - (iii) There had been AWB management pressure to maintain sales to Iraq. Avoidance of UN scrutiny of IGB fees was necessary if such sales were

to be maintained.

- (iv) Entities requested by AWB to make payments of IGB fees on its behalf had declined because of fears such payments may have been in breach of UN sanctions or may have constituted money laundering.
- (v) Increases in IGB fees appeared excessive, with the risk that some portion of the fees may be diverted to purposes other than trucking.

471 ASIC says that notwithstanding the red flags in the Arthur Andersen report, AWB continued to enter into contracts with the IGB and pay trucking fees directly to Alia and via shipping companies.

472 ASIC says that 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. AWB management failed properly to address the risks raised in the Arthur Andersen report.

473 Geary says that ASIC tendered no evidence to show that the Arthur Andersen report was seen by the board of AWB. Further, Flugge submits that the Arthur Andersen report forms no part of ASIC's pleaded case.

474 The departure of Watson, Officer and Emons, which had already occurred by the time the final report came to be discussed in February 2001, was apparently regarded as removing risks associated with the 'ethics and culture' of AWB employees, which Arthur Andersen had recommended be assessed. ASIC contends that until Project Rose inquired into some of these matters in June 2003, there was no inquiry into the culture at AWB, why AWB employees had thought it necessary to disguise payments of trucking fees, the circumstances relating to the payment of trucking fees to a Jordanian company, the reason for the significant increase in trucking fees, or why AWB agreed to pay such increased fees.

475 Flugge submitted that ASIC are not entitled to rely on the Arthur Anderson report as it was not pleaded against Flugge. In particular, Flugge submits that in the course of

oral closing submissions, it was suggested that Flugge ought to have called for the Arthur Andersen report in relation to the Integrity Risk Review of conduct within the IS&M group. Flugge says that there are several insuperable difficulties with this submission:

- (a) The Arthur Andersen report is not the subject of any pleading by ASIC. This of itself is fatal.
- (b) Not one director called by ASIC gave any evidence about having seen the report until the time of the Cole Inquiry. The Arthur Andersen report was not the subject of opening.
- (c) As the allegation was not raised, there was no cross-examination about the matter. It was not even in the Court Book when the case was opened.

476 For all of these reasons, Flugge submits that the submissions concerning the Arthur Andersen report should be disregarded. ASIC has not, in any event, identified a single board minute at which that report was referred to.

February 2001 contracts

477 A short-form contract was prepared within AWB for each of contracts A0552³²⁷ and A0553.³²⁸ Both short-form contracts were dated 2 February 2001 and signed on behalf of AWB by Hogan.

478 Both contracts were substantially in the same terms as AWB's last contract with the IGB, namely contract A0430. The price was described in each contract as a 'CIF Free in Truck' price and the shipment clause provided for the cargo to be discharged 'Free into Truck to all silos within all Governorates of Iraq'.

479 ASIC submits that neither of these short-form contracts referred to AWB's obligation to pay either the inland transportation fees, or additional 10 per cent after sales service fee, or to the amount of those fees. Neither short-form contract

³²⁷ CB 3/1541.

³²⁸ CB 3/1547.

disclosed that the amount of the inland transportation fee payable included the additional 10 per cent after sales service fee.

480 Long-form contracts were prepared by IGB for each of contracts A0552³²⁹ and A0553.³³⁰ Both long-form contracts were in the same form as the long-form contracts that had been prepared by IGB in respect of its earlier purchases from the AWB under the OFFP. Neither long-form contract contained any reference to the inland transportation fees, to the 10 per cent additional fee, to its inclusion within the inland transportation fee, to AWB's obligation to pay either fee, to the amount of either of those fees or to the inclusion of these fees as components of the price at which the wheat was sold under these contracts.

481 By two facsimiles addressed to the Abdul-Rahman dated 2 February 2001, Hogan confirmed the terms of these two contracts.³³¹

482 The facsimile for contract A0552 was in the following terms:³³²

AWB is pleased to confirm the sale of Australian Wheat to Iraq. Please note the following specific terms as agreed;

1. AWB will pay USD 14.00 PMT in equivalent agreed currency for partial payment of transport fee prior to the vessel arriving in Umm Qaser. Balance of USD30.80 PMT will be paid as final payment of transport fee within 1 week of receipt of UN payment being received by Sellers. Total transport fee payable is USD 44.80 PMT in equivalent agreed currency.
2. Contract to be converted into agreed currency on the 5th of February 2001.

February 2001 trip report

483 On 7 February 2001, email groups including 'International-All' (which included Geary as the GM of International) and 'Marketing-All' (which Hogan thinks included Geary)

³²⁹ CB 3/1543.

³³⁰ CB 3/1549.

³³¹ CB 3/1553, 1555.

³³² CB 3/1555.

and Goode, Flugge's personal assistant, were sent an email from Borlase of AWB attaching a document entitled 'Iraq Trip Report' prepared by Hogan and Borlase.³³³ The trip report referred to the increase in the ITF and the introduction of the 10 per cent after sales service fee by the Iraqis:³³⁴

Trucking Fee/Services Fee - The trucking fee is now USD25.00 pmt all Governates [sic] of Iraq with a 10% service fee on the entire FIT value of the contract. We believe the increase in trucking fee and addition of the service charge is a mechanism of extracting more dollars from the escrow account. AWB have agreed to remit the trucking fee in a foreign currency other than US Dollars (most likely in DM) in 2 instalments...

484 The report also noted in connection with Canadian wheat:³³⁵

300k of Canadian wheat has completed discharge against a previous phase contract. We believe this completes contracts that CWB ceased shipping last February due to rejection of 3 vessels on a quality basis. The quality problems have not totally ceased for CWB as they have a vessel "Sea Angel" that arrived at Umm Qasr on 31st December 2000 and only completed on 2nd February 2001. The vessel was rejected for small quantities of bin burnt grain.

IGB gave us an indication the Canadians are keen to pick up business against with IGB. They have offered to do some repairs to the silos and port facilities at Umm Qasr.

In previous business CWB or Canadian Government have refused to offer on a FIT basis choosing only to offer on a CIF Umm Qasr basis. This has obviously irritated Iraq, providing AWB with excellent opportunities to take 80-85% of the business over the last 12 months. CWB have agreed to soften this approach by offering the business to the trade passing on the responsibility of FIT and associated payment mechanisms. A list of 8 companies CWB will deal with has been supplied to IGB.

485 According to Hogan, the email address "AWB International All" meant the pool or AWB International including Geary, "International marketing" meant each of the marketing desks and chartering and Jane Goode was either Murray's assistant or Flugge's assistant.³³⁶

³³³ CB 3/1557 (email); CB 3/1559 (report).

³³⁴ CB 3/1562.

³³⁵ CB 3/1560.

³³⁶ Transcript of hearing, *ASIC v Geary & Flugge* T970, L16 - T971, L14; Geary, sch A [25].

486 In February 2001, Hogan concluded that the Iraqis and the AWB were milking the inland transportation fee.³³⁷ Hogan spoke to Stott about his concerns with the increase in trucking fees and the after sales service fees and was told to continue with how they were doing business. Hogan gave evidence that no-one raised the issue with him at any point.³³⁸

487 ASIC alleges that Flugge received notice of this report. This is pleaded by ASIC and dealt with below at paragraph 1627 below and following when I deal with Flugge's knowledge.

488 ASIC says that the February 2001 trip report was widely circulated within AWB. ASIC submits that it can therefore be concluded that, from February 2001, it was widely known within AWB that:

- (a) the increase in the trucking fee and addition of the 10 per cent service fee was considered to be a mechanism for extracting money from the UN escrow account;
- (b) the trucking fee, which included the 10 per cent after sales service fee, was to be received by Iraq; and
- (c) the trucking fee, which included the 10 per cent after sales service fee, was to be used by Iraq for purposes other than trucking.

489 Moreover, ASIC says that the wide circulation of the trip report, and the many people within AWB who by now had been privy to communications concerning the IGB fees, puts paid to any suggestion that might be made that the payment of the IGB fees was a frolic by a small number of AWB employees.

490 ASIC says that the trip report makes clear that AWB was gaining 80 to 85 per cent of the Iraq market through its willingness to engage in conduct that another national

³³⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1098, T30 – T1099, L2.

³³⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T972, L25 – T973, L22.

wheat board had found unpalatable.

491 Following the Iraq trip report, AWB continued to pay trucking fees to Alia and enter into contracts with Iraq which incorporated the trucking fees into the wheat price in the period from early 2001 to March 2003.

Iraq imposed port fees

492 On 23 March 2001, Rowland, a chartering officer with AWB, sent an email to Snowball (in AWB's US office) raising a query regarding the introduction of a levy of 50 cents per tonne to be paid in cash to Port Agents prior to the discharge of a vessel:³³⁹

Tim we have recvd the foll msg from Iraq State Port Agents whom hve introduced a levy of USD 0.50 cents p/mt to be paid in cash to them prior to a vessel being able to take berth and discharge. This charge has only just been introduced and the Iraqi's are making it retrospective to the 11/3/01.

All vessel's that call Iraq have been paying USD 1500.00 in cash to the Iraqi port state agents for normal port agency but this charge is a cargo based charge in addition to the USD 1500.00 per vessel.

Dom is of the opinion 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.

Can you please confirm this is correct and that this charge is in effect illegal under the current sanctions.

Foll is excerpt of msg recvd from Iraqi Port Agents re this charge. QTE

FM: ISCWT Basrah

RE: Agency fees at Umm Qasr port

In order to cover agencies expenses and services for vsls calling Umm Qasr port flwg amount to be paid as from 11/3/2001

1 – USD of 50 (fifty cent) per m/t or cbm which is greater 2 – USD 10 (ten) per container 20 or 40 and car

above amount to cover agency expenses as well as tally clarks

3 – USD 1500 for each call to cover communication and transportation and all other services mentioned in para (1) and (2) above if vsl not paid a/m amount

then will not be allowed to enter and berth Umm Qasr.

Also the vsl's not paid a/m charges they have to paid same imdtly and since 11/3/2001 pls confirm.

Best rgds. ISCWT-Basrah [sic]

493 Snowball made a note of the conversation that he had with Bronte Moules (Moules) from the Australian Mission in New York, on 26 March 2001.³⁴⁰ According to Snowball's note, he was informed by Moules that:

Iraq can charge port fees (not a sanctions issue) but only pay in Iraq (dinars) currency. Technically in breach of sanctions, but sanctions committee have been aware. Was a recent case where it was tried to include in [unsure of word] a sanction committee rejected it.

- putting contracts on hold if large amounts of money being handed over.

Any US dollar to Iraq government is a definite no but sympathy for the situation and the sanctions committee will look at it - could take one - two weeks.

Just got the new 1.0 mmt approval

→ will DFAT Canberra know.

494 Following his conversation with Moules, Snowball responded to Rowland's email in an email dated 25 March 2001.³⁴¹

As we discussed on Friday, Bronte Moules from the Australian Mission to the UN will be following this up directly with the UN on Monday. Bronte had heard of a similar USD/mt charge that Iraq has been trying to place on other bulk imports. Bronte seemed to think that the current USD1500 flat fee for normal port agency fees does not violate current sanctions procedures, but the USD0.50/mt would.

I will let you know as soon as possible.

495 On 27 March 2001, Snowball sent an email to Rowland which outlined the advice he had received from Moules the preceding day:³⁴²

Mark

³⁴⁰ CB 3/1584.1.

³⁴¹ CB 3/1584.3.

³⁴² CB 3/1584.3 [emphasis added by ASIC].

Bronte Moules came back to me today with the following:

Iraq has the ability to charge port fees, but payment of these fees need to be in Iraq currency. *Any payments in USD to Iraq are breaching sanctions.* The USD1500 the vessel has been paying on past shipments is therefore technically in breach of sanctions. The sanctions committee has actually been aware that these types of payments have been happening but have been turning a blind eye if the amounts are not excessive. If the USD amounts are quite large, there has been cases where the sanctions committee has put contracts on hold, even if the amounts are included in the actual contract. The only way around this is to pay in Iraq currency, not USD, but this is obviously quite difficult.

The sanctions committee are aware of the problem we have with the USD0.50/mt charge and they have promised to look into it. This would be expected to take 1-2 weeks.

496 ASIC submits that in addition to the to the proposed port fees, the only relevant discussions that AWB had with DFAT and the UN concerned payment delays and discharge times arising from the OFFP procedures.

May/June 2001 contract

497 In May 2001, Hogan travelled to Iraq with Jones (general manager of chartering) and Rowland. On this trip Hogan met with Varoojan, a representative of Alia, at his home office in Basrah. Varoojan told Hogan that Alia had nothing to do with trucking and that it was really a conduit for the passing of money to the ISCWT in return for which it received a small commission. Hogan made a note of this in his workbook.³⁴³

498 In June 2001, Hogan negotiated with Abdul-Rahman a contract for the sale to IGB of a further one million tonnes of wheat. This was concluded as a sale under Phase IX of the OFFP.

499 The sale was completed in Baghdad on 6 June 2001. The sale was split into two contracts, namely contract A0784 and A0785. Each contract was for 500,000 tonnes. The sale was confirmed in a facsimile from Hogan to IGB dated 7 June 2001,³⁴⁴ which set out the relevant terms. There were slight differences between these two contracts in relation to the quality of the wheat sold and price. Otherwise the terms of the two

³⁴³ CB 3/1617.

³⁴⁴ CB 3/1651.

contracts were essentially the same. Although the price for which the wheat was sold was initially negotiated in US dollars, it was subsequently converted into and expressed in euros.

500 An inland transportation fee was payable by AWB under each of the contracts comprising this sale. The amount of the inland transportation fee differed slightly between each contract. For shipments under contract A0784, a fee of US\$46.70 or €55.17 per tonne was payable by AWB,³⁴⁵ and under contract A0785, the fee payable was US\$46.90 or €55.40 per tonne.³⁴⁶ The inland transportation fee payable under each contract included an allowance of US\$0.50 per tonne for port fees.³⁴⁷ Under both contracts, the inland transportation fee was '100% payable before vessel discharge.'

501 A short-form contract was prepared within AWB for each of contracts A0784³⁴⁸ and A0785.³⁴⁹ Both short-form contracts were dated 6 June 2001 and signed on behalf of AWB by Hogan.

502 Both contracts were substantially in the same terms as AWB's preceding two contracts with IGB, namely contracts A0552 and A0553. The price was described in each contract as a 'CIF Free in Truck' price and the shipment clause provided for the cargo to be discharged 'Free into Truck to all silos within all Governorates of Iraq.'

503 Neither of these short-form contracts referred to AWB's obligation to pay the inland transportation fees, or additional 10 per cent after sales service fee in respect of shipments made under that contract, or to the amount of those fees. Neither of the short-form contracts for contracts A0784 or A0785 disclosed that the amount of the inland transportation fee payable by AWB included the additional 10 per cent after

³⁴⁵ CB 3/1651.

³⁴⁶ CB 3/1652.

³⁴⁷ CB 3/1655.

³⁴⁸ CB 3/1663.

³⁴⁹ CB 6/1665.

sales service fee.

AWB agrees to pay port fees

504 On 7 June 2001, Hogan circulated an email to the 'Market Info' email group advising of this sale.³⁵⁰ This included reference to the inland transportation fees of US\$46.90 per tonne and US\$46.70 per tonne payable in respect of shipments under each contract, including within those fees 'US\$0.50 per tonne port fees.'

505 On 12 June 2001, Hogan sent a report regarding his recently completed trip to Iraq to the 'Market Info' email group, copied to Owen, Aucher, Cracknell, Werner and McMullen.³⁵¹ In relation to the inland transportation fees, Hogan reported:³⁵²

Performance Bond

Minister is under pressure over our split payments for Inland transport. Working on way, whereby we would pay one vessel in full and roll these funds. This will keep a security balance and no performance bond will be required.

New contract is 100% payment for inland transport before discharge.

*** The USD0.50 fee (which Umm Qasr Port tried to apply earlier this year) is now built into Inland transport fee.

Crane Hire

IGB have confirmed that the crane hire is included in inland transport fee and any request for cranes to be put through them.

Advised on way out of Iraq that despite requests for additional cranes to expedite discharge, none have been provided.

We need to continually pressure IGB to provide additional cranes and monitor this through Alia.

506 On 13 June 2001, Geary received an email from Snowball that forwarded the email sent by Hogan sent on 12 June 2001.³⁵³

³⁵⁰ CB 3/1655.

³⁵¹ CB 3/1657.

³⁵² CB 3/1660.

³⁵³ Geary, sch A [26].

507 On 25 July 2001, Geary received an email from Snowball reporting a meeting between AWB and representatives of the UN on 20 July 2001. The email reported that the participants had discussed payment arrangements under the OFFP, that AWB had recently been working to overcome UN errors in assigning vessels to contract numbers, and that the UN representatives had encouraged AWB to contact the UN directly, or via the Australian Mission, to discuss any issues relating to the OFFP.³⁵⁴

508 ASIC submits that the US\$0.50 per tonne fee, which AWB had protested so frequently could not be paid to Iraq because of UN sanctions which prohibited payments of US dollars to Iraq, was included in the sum paid to Alia, as an 'inland transport fee.'

Holding back fees from Iraq

509 On 10 September 2001, Hogan sent an email to Ingleby and Goodacre, which was copied to Long, Lister, Johnson and Aucher and Scales. It concerned the loading of a vessel without a Letter of Credit being in place, and stated in part:³⁵⁵

AWB can hold back 2nd payment inland Transport payments (USD16 million at Sept 30) – hence if by this date L/C is not on our counter, we withhold these second payments from the IGB.

510 ASIC contends that the clear implication from this passage was that the inland transport payments were ultimately to be paid to IGB. ASIC submits that no one within AWB raised what Alia's response might be to not being paid.

511 On 13 September 2001, Hogan copied to Scales and Long a second email on the subject. The third paragraph of that email stated:³⁵⁶

AWB holding 2nd payments due to Iraq for Inland Transport= USD4.5 million. By 22nd September, this amount will be USD 8.864 million (which almost covers Anassa). Inland transport payments will be held until L/C is on our counters.

³⁵⁴ Geary, sch A [27].

³⁵⁵ CB 3/1977.

³⁵⁶ CB 3/1981.

512 ASIC contends that these emails make no sense at all if, in fact, the payments referred to were actually passed to Alia for services rendered to it.

513 On 30 October 2001, AWB Chartering received an email from Austral Chartering seeking AWB's comments on certain requests which Austral had received from the owner of a ship under charter to AWB.³⁵⁷

514 The first request was:

When Charterer is going to pay inland transportation charge & 10% commission to ISCWT (Iraqi State Company for Water Transport). This full amount should be paid in advance before ship's arrival at Umm Qasr pilot station (ETA 4th Nov) for ship's berthing turn.

Who is charterer's agent or partner in Iraq who will coordinate with all concerned parties in Iraq including payment of above amount.

515 The final request was:

Agent insist that Tally fees to be paid to state agent as port regulation USD 0.5 PMT = TTL USD 24,472.50 BY US.

But governing C/P stipulated that no D/A at discharging port with exception of max disbursement paid by cash by master up to USD 2,000.²³⁷

516 Gatto (AWB Chartering) forwarded a copy of Austral's email on to Hogan with a request that he please advise.³⁵⁸

517 On 12 November 2001, Gatto received an email from Anchor Cross shipbrokers, passing on the following message that the owners of a ship under charter to AWB had received from their agent in Iraq:³⁵⁹

Re: Inland transport/A.S.S/agency fee

Kindly note that our office in Basrah informed us today that m/s, ISCWT informed them that the inland transport charges as well as the A.S.S. charges

³⁵⁷ CB 3/2098.

³⁵⁸ CB 3/2098.

³⁵⁹ CB 3/2110.

and agency fees on cargo of USD. 0.50 per ton hv not been paid yet. Thus pls arrange with the concerned parties for same fm yr side at yr earliest convenience and advise [sic].

518 Gatto forwarded a copy of that email on to Edmonds-Wilson, Hogan, Lees and Long (with a copy to Rowland and Michael Raftopoulos (Raftopoulos)) that same day.³⁶⁰

December 2001 contracts

519 On or about 12 December 2001, the IGB sent a wheat tender to AWB Limited which included a condition as to price that 'CIF free out Umm Qaser on Truck to warehouses at all governorates of Iraq cost of discharge at Umm Qaser and land transport will be equivalent to USD 26.50 per metric ton to be paid in exchangeable currency to the Water Transport Company ...'³⁶¹

520 On 20 December 2001, Hogan confirmed with the IGB the details of two new contracts, A1111 and A1112, which included inland transportation costs of €55.17 and €55.40 payable prior to discharge.³⁶²

521 Details of these contracts were circulated internally within AWB the next day (but not to Geary or Flugge in this instance).³⁶³ Details of this contract were also sent to Lindberg who congratulated Hogan on the result.³⁶⁴ The IGB responded to Hogan's email above confirming acceptance of AWB's offer.³⁶⁵

522 A short-form contract was prepared within AWB for each of contracts A1111 and A1112.³⁶⁶ Both short-form contracts were dated 20 December 2001 and signed on

³⁶⁰ CB 3/2110.

³⁶¹ CB 2/2131.

³⁶² CB 3/2135.

³⁶³ CB 3/2137.

³⁶⁴ CB 3/2139.

³⁶⁵ CB 3/2141.

³⁶⁶ AWB short-form contracts: CB 3/2143, 2145 – note that the long-form contracts were not signed until 17 January 2002 (below).

behalf of AWB by Hogan.

- 523 Both contracts were substantially in the same terms as AWB's preceding two contracts with IGB. In both contracts, the price was described as a 'CIF Free in Truck' price and the shipment clause provided for the cargo to be discharged 'Free into Truck to all silos within all Governorates of Iraq.'
- 524 ASIC says that neither of these short-form contracts referred to AWB's obligation to pay inland transportation fees or the additional 10 per cent after sales service fee, included any reference to the amount of the inland transportation fee, or made plain that that fee included the additional 10 per cent after sales service fee.
- 525 The trucking fee and the amount of that fee (in particular as a component of the price for which the wheat was sold under each contract) were recorded on the cover of each of Lister's files for these two contracts.³⁶⁷

Attempt to renegotiate and trade-off IGB fees

- 526 On or about 31 December 2001, the IGB faxed an email to Hogan seeking to (re-fix Contracts A1111 and A1112 in USD.³⁶⁸
- 527 Hogan replied on 2 January 2002.³⁶⁹ After reiterating reasons why AWB could not agree to IGB's request, Hogan did offer a possible compromise, namely by indicating that AWB would agree to the contract price stipulated in IGB's email of 31 December 2001 if IGB agreed to certain changes to the terms of the contract between them, not only in respect of these contracts but also for future contracts.
- 528 The changes Hogan proposed were:
- (a) a guaranteed rate of discharge with demurrage and despatch payable and to be settled at the completion of each shipment 'by an adjustment to the final inland

³⁶⁷ CB 3/2147, 2149.

³⁶⁸ CB 3/2167.

³⁶⁹ CB 3/2169.

- transport payment;'
- (b) that the IGB accept the additional war risk premium to be for IGB's account (as buyer). Once again Hogan proposed that this 'be settled by an adjustment to the final inland transport payment;'
 - (c) splitting the inland transport payments in the same way that had been agreed in relation to contracts A0552 and A0553 (namely into two instalments, the first being US\$14.00 and the balance payable within seven days of receipt of funds from the UN);
 - (d) that the IGB agree to the conversion of the new US dollar prices at the same exchange rate that AWB had already hedged the sale concluded on 20 December 2001.

529 ASIC submits that it is plain that AWB saw the 'inland transport payment' as a method of adjusting contracted payments or disputes between AWB and IGB, whilst sanctions prevented the normal payment of moneys by or to Iraq. ASIC says that these proposals only made sense if it was well understood that Iraq was the beneficiary of the inland transport fees.

530 A draft of a letter was prepared by Hogan and sent to Deborah Burley (Burley), Flugge's personal assistant, for Flugge's signature, as AWB was very keen to get final agreement from Iraq.³⁷⁰ Prior to the final version being sent, Hogan and Flugge discussed a draft of the letter. Hogan confirmed in an email to Burley that he amended the letter following his discussions with Flugge.³⁷¹

531 On 16 January 2002, Hogan emailed to Burley a draft letter to Minister Saleh from Flugge with a request she fax the letter to Flugge for Flugge's signature.³⁷² Burley

³⁷⁰ CB 3/2185, 2187.

³⁷¹ CB 3/2189, 2191.

³⁷² CB 3/2185, 2187.

gave evidence that it was very common for people to send draft letters to her for Flugge's attention.³⁷³ The request to fax the letter for Flugge's signature referred to in the email from Hogan to Burley of 16 January 2002 accorded with what Burley recalled occurring in practice.³⁷⁴ Flugge signed the letter to Minister Saleh dated 16 January 2002.³⁷⁵

532 On 17 January 2002, Minister Saleh of the IGB confirmed with AWB the terms of contracts A1111 and A1112 at the originally agreed prices. Long reported this by email to Flugge, copied to other AWB employees including Geary.³⁷⁶ In this email, Flugge was thanked for his key role and his close relationship with the Iraqi Trade Minister.

533 On or shortly after 17 January 2002, long-form contracts were prepared by the IGB for each of contracts A1111 and A1112. Both of these long-form contracts were in the same form as the long-form contracts that had been prepared by IGB in respect of its earlier purchases from AWB under the OFFP. The price was described in each long-form contract as a 'CIF F.O.T. TO SILO TO ALL GOVERNMENT RATES VIA UMM QUSER PORT.'³⁷⁷

534 Neither of these long-form contracts contained any reference to the inland transportation fees, 10 per cent additional fee, AWB's obligation to pay either fee, the amount of those fees, or the inclusion of these fees as components of the price at which the wheat was sold under either contract. Each of these long-form contracts was also signed by Hogan on behalf of AWB. AWB and IGB signed the 'long-form' contracts corresponding with A1111 and A1112.³⁷⁸

³⁷³ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T1994, L20-1.

³⁷⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T1994, L25.

³⁷⁵ CB 3/2183.

³⁷⁶ CB 3/2193.

³⁷⁷ CB 3/2196.

³⁷⁸ CB 3/2195-2200.

535 On 18 January 2002, Long sent an email to Geary headed 'Iraq Contract' the material effect of which was that Iraq had accepted the originally agreed contract price for the recently negotiated one million tonne contract, that this had saved Australian wheat growers AU\$10 million, and that this was a significant achievement for AWB.³⁷⁹

536 On 22 January 2002, Hogan of AWB submitted signed contracts with the Iraqi Grains Board (A1111 and A1112) to Don Cuddihy (Cuddihy) of DFAT. ASIC says that these contracts or the accompanying facsimile did not disclose the existence or amount of the inland transport fees.³⁸⁰

537 Geary authorised numerous payments requests to Alia for inland transportation fees³⁸¹ between February 2002 to February 2003 as follows:³⁸²

CONTRACT	DATE OF PAYMENT	AMOUNT
A0784/ A0785	18.02.02	€4,423,260.00
A0784/ A0785 / A1112	28.03.02	€7,700,743.08
A1111	30.08.02	€2,867,827.63
A1111	18.09.02	€5,539,629.63
A1441	18.12.02	€4,395,912.00
A1441	30.01.03	€2,037,840.00
A1441	24.02.03	€2,037,840.00

538 As mentioned above, Flugge ceased office as Chairman of AWB in March 2002, when he failed to win re-election to the board.

539 On 17 May 2002, James Molan of AWB sent an email to Geary the material effect of which was that:³⁸³

(a) the UN Security Council had passed revised sanctions extending the OFFP for

³⁷⁹ Geary, sch A [28].

³⁸⁰ CB 3/2205-13.

³⁸¹ CB 4/2247, 2249, 2295, 3191.

³⁸² Geary, sch A [31].

³⁸³ CB 4/2349; Geary, sch A [30].

another 180 days; and

- (b) the new sanctions, although making it easier for food and medicine to be imported by Iraq, still require AWB to go through the UN in relation to AWB's sales or imports to Iraq.

June 2002 contracts

540 On or about 23 June 2002, AWB and the IGB entered into Contract No A1441 for the sale of 500,000 tonnes of wheat at a price of €237.55 per tonne. A short-form contract dated 23 June 2002 was prepared within AWB for this sale.³⁸⁴ It was signed on behalf of AWB by Hogan. The short-form contract was in substantially the same terms as AWB's preceding contracts with IGB. ASIC says that as with its previous contracts, the price was described in each contract as a 'CIF Free in Truck' price and the shipment clause provided for the cargo to be discharged 'Free into Truck to all silos within all Governorates of Iraq.'

541 As with AWB's previous short-form contracts, the contract did not refer to AWB's obligation to pay inland transportation fees or the additional 10 per cent after sales service fee. It did not include any reference to the amount of the inland transportation fee. It did not disclose that the inland transportation fee included the additional 10 per cent after sales service fee. ASIC says that this was notwithstanding the express reference to both the inland transportation fee, and the amount of that fee (US\$47.75PMT=€48.53PMT), in Hogan's facsimile to IGB of 2 July 2002 confirming the sale.³⁸⁵

542 A long-form contract was prepared by IGB.³⁸⁶ It was dated 15 July 2002 and in the same form as the long-form contracts that had been prepared by IGB in respect of its previous purchases from AWB under the OFFP. The price was described in this long-

³⁸⁴ CB 3/2205-13.

³⁸⁵ CB 4/2455.

³⁸⁶ CB 4/2515-18.

form contract as a 'CIF F.O.T. TO SILO TO ALL GOVERNORATES OF IRAQ VIA UMM QUSER PORT.' The long-form contract did not contain any reference to the inland transportation fees, the 10 per cent additional fee, AWB's obligation to pay either fee, the amount of those fees, or the inclusion of these fees as components of the price for which the wheat was sold under this contract.

543 As for previous contracts, Edmonds-Wilson prepared a spreadsheet for IGB fees paid in connection with contract A1441.³⁸⁷

Other documents evidencing IGB fees alleged wrongdoing

544 ASIC submits that Christopher Whitwell (Whitwell) knew that the inland transport fees going to Iraq were being paid.³⁸⁸

545 ASIC says that other documents tendered by ASIC concern the following:

- (a) demands for payment of trucking fees from Alia, the ISCWT or the Iraq Grains Board.³⁸⁹ There were constant notices from the IGB, the ISWCT or Alia to pay inland transport charges;³⁹⁰
- (b) banking documents establishing a foreign currency account with the Commonwealth Bank;³⁹¹
- (c) attempts by AWB to hold back payments due to Iraq for inland transport until a letter of credit is in place;³⁹²

³⁸⁷ CB 4/2435.

³⁸⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1613, L21-5 (xxn Hill).

³⁸⁹ CB 3/1633, 1635, 1675, 2123, 4/2317, 2319, 2321, 2399, 2439, 2441, 2443, 2465, 2629, 5/3049, 3223, 3225, 3235.

³⁹⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T981, L23-7; T1012, L30 - T1013, L2.

³⁹¹ CB 3/1925, 1927, 1929, 1931, 1933.

³⁹² CB 3/1977, 1981.

(d) internal emails documenting the threat to and value of the Iraq trade.³⁹³

Post-war conduct of AWB in connection with the IGB fees

546 On 20 March 2003, the USA and allies invaded Iraq.

547 When this occurred, AWB sought to continue selling wheat to Iraq that was now under the administration of the CPA. Iraq represented an important market that was then in jeopardy as a result of the invasion.

Attempted recovery of fees

548 AWB also sought to recover inland transportation fees paid by AWB to Alia in relation to the Pearl of Fujairah.³⁹⁴ Whitwell said that the vessel had not been discharged but the fees had been paid to Alia. Whitwell gave evidence that AWB asked for the fees but Alia said that Alia no longer held them as they were passed onto Iraq.³⁹⁵

549 An AWB 'Iraq Situation Report' dated 20 March 2003³⁹⁶ recorded that an email had been sent to IGB:

... outlining current situation re Pearl of Fujairah. IGB reacted with understanding, thanks for our efforts and a request to do anything we can to

³⁹³ CB 4/2451, 2529, 2531, 2533.

³⁹⁴ CB 5/3259, 3263, 3265, 3267, (email re-sent due to typo) CB 5/3269, 3271, 3275, 3281, 3283). On 21 March 2003, Whitwell sent a fax to Alia requesting that Alia repay the amounts paid in relation to Pearl of Fujairah totalling €2,468,235.80 on 14 March 2003 (CB 5/3289, 3291, 3293); in May 2003, Whitwell travelled with Edmonds-Wilson to Jordan and Iran (trip report - CB 5/3377). During the trip, Whitwell met with Al-Absi and Alia's Chairman, Sheik Hussain Al-Khawam (Al-Khawam). They discussed a number of business matters relating to the transportation of wheat in Iraq and the matter of €2.5 million inland transportation fees paid in advance for the Pearl of Fujairah wheat shipment which AWB sought to recover because the shipment was not unloaded CB 6/3391); on 17 June 2003, Geary (and others including Lindberg, Ingleby and Stott) received an email from Kate Robertson (on behalf of Whitwell) entitled 'Iraq Brief plus trip Report' that attached a document entitled 'Jordan/Iran Trip Report' prepared by Whitwell and Edmonds-Wilson (CB 6/3489 - email, CB 3491 - Iraq discharge update CB 6/3495 - trip report). The trip report stated: ... the matter of the EUR2.5m inland transport paid for the MV Pearl of Fujairah was brought up ... as soon as someone with authority to sign the appropriate documentation from the Iraqi side, the money would be returned to Alia and then to the company in question.

³⁹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1577, L26 - T1578, L6; T1578, L24-5.

³⁹⁶ CB 5/3263.

solve the problem.

550 The report also noted some 'Action Points for the Day', including the following:

Andromeda to be instructed to complete discharge Sallalah and wait at Oman for further instructions at appropriate time

...

Explore situation with regard to inland transport paid to Alia on P of Fujairah – recover

551 The same day, Long sent an email to Lindberg, Stott, Ingleby, Johnstone and James Cooper (Cooper), AWB General Counsel, and to Scales and Jessica Lyons (Lyons), corporate in-house counsel employed by AWB, which read:³⁹⁷

Please refer to the final point under Action Points for the Day:

'Explore situation with regard to inland transport paid to Alia Transport Jordan re Pearl of Fujairah – recover'

This issue should have been discussed.

Under the terms of the contract we prepay Alia Transport Jordan for discharge and inland transport to the Governates of Iraq.

We paid value date 14 March to Alia EURO 2.468 million for Pearl of Fujairah.

We are requesting these monies be returned and will include Alia's response in next update.

If in the worst case, they do not repay these monies, AWBI are holding a provision in the Pool Model for USD 5m for quality issues as part of the USD 25 million total provision. Actual payments due (NOT PAID) as part of this provision are USD 2.016m for the iron filing claim and USD 100k for sand compensation on Peter S, totalling USD 2.116m.

We would also include this amount as part of our total claim on UN/Govt's.

552 ASIC contends that Long's proposal assumed that withholding moneys due to IGB could legitimately exert pressure on Alia to repay the inland transportation fees paid on the Pearl of Fujairah. ASIC says that that assumption made sense only if Alia was a conduit for the funds to IGB.

553 ASIC submits that Geary received many of these communications concerning the

recovery of transportation fees paid in respect of the Pearl of Fujairah.

554 AWB calculated the estimated pool costs if contracts A1441, A1670 and A1680 were not executed, estimating the cost to be US\$114,815,520.00.³⁹⁸

555 In May 2003, Whitwell and Edmonds-Wilson travelled to Jordan and Iran to discuss further business in those countries. Whilst in Jordan, they took the opportunity to meet representatives from Alia.

556 Following their trip Edmonds-Wilson prepared a trip report which included a report of their meeting with Alia. The report included:³⁹⁹

Importantly, the matter of the EUR2.5m inland transport paid for the MV Pearl of Fujairah was brought up with both Othman and the Chairman. Both Othman and the Chairman said the matter had previously been tabled between Alia and Mr Yousif. Alia said that as soon as someone with authority to sign the appropriate documentation from the Iraqi side, the money would be returned to Alia and then to the company in question (this affected about 10 companies other than AWB).

Alia had the appropriate documentation showing the money had been remitted so we will now have to wait until the hierarchy in Iraq is up and running to chase. The Chairman had much faith and trust that the \$\$ owing would be returned in due course and said he would do everything possible to access the funds from the frozen account asap. Alia had recently sent a letter to Iraq (around 20/03) re-funds that had been paid but services not provided and therefore needed to be returned.

The report was approved by Whitwell and forwarded to Lindberg, Geary, Ingleby, Stott, Fuller and Scales.

557 ASIC says that the report recorded an admission by Alia that the money it was receiving on account of inland trucking fees was being paid to the IGB.

558 ASIC submits that a reader of the trip report would have appreciated that the inland transport fees had been 'remitted' to IGB. ASIC says that there is no evidence that the ELG collectively or any of its members responded to this aspect of the report, notwithstanding that it suggested a breach of sanctions and that Alia was, in

³⁹⁸ CB 5/3295, 3297.

³⁹⁹ CB 5/3377.

substance, a front company for IGB.

559 On 28 March 2003, the United Nations Security Council adopted Resolution 1472 (2003)⁴⁰⁰ (Resolution 1472) implementing temporary measures for monitoring imports into Iraq following the removal of UN staff.

Flugge in Iraq in 2003

560 Despite Flugge losing his position on the board of AWB in 2002, in 2003 the Australian government appointed Flugge as the Australian co-leader for agriculture in Iraq to the Provisional Authority. As a consequence, Ric Wells (Wells), a senior career officer with DFAT (and former Australian ambassador to France) accompanied Flugge on a trip to Iraq in 2003 to introduce Flugge to the Provisional Authority. Wells prepared a report in relation to that trip including his discussions with Flugge.⁴⁰¹ Wells said in evidence that he recorded a discussion he had about AWB's trade with Iraq in his memo of 7 May 2003 as follows:⁴⁰²

American officials intend to identify those Iraqi officials, particularly in the Trade Ministry, who abused and profited from the Oil for Food program. We received no indication that the US sees the OFF wheat sales to Iraq as falling into this category, although we understand that AWB contracts include 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. Iraq would otherwise have had no funding for freight. We understand that the UN was aware of this arrangement.

561 Wells said that the section beginning 'although' was based on his understanding from his discussion he had with Flugge whilst in Iraq.⁴⁰³

562 Previously on 5 May 2003, Wells had prepared a draft of his report on his trip to Iraq with Flugge that did not include that passage. Wells sent a copy of his draft to Scott

⁴⁰⁰ CB 1/83; S/Res/1472 (2003).

⁴⁰¹ Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T 2059, L27; T2060, L2; CB 5/3338-40.

⁴⁰² CB 5/3339.

⁴⁰³ Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2063.

Dawson (Dawson), the then deputy director of AusAid, seeking his comments at 6.38 pm on 5 May 2003.⁴⁰⁴ Between 2002 and 2004, Dawson was deputy director-general of AusAid.⁴⁰⁵ Prior to the Iraq war in 2003, Dawson had no dealings with anyone at AWB. After the Iraq war, he supervised an agricultural reconstruction team including ex or current representatives of AWB.⁴⁰⁶ Dawson had dealings with Flugge in Canberra.

563 As it happened, Dawson had had a conversation with Flugge on the morning of 5 May 2003, when Flugge told Dawson about the trucking fees paid by AWB to Iraqi officials. The conversation with Flugge was a telephone conversation in the nature of a regular catch up. Flugge told Dawson what the agricultural team was doing and in the course of that conversation Flugge made some comments to Dawson about the grain contracts under the OFFP.⁴⁰⁷ Dawson made a note of this conversation in an email and sent it to Wells. Upon receipt of Dawson's email, Wells then amended his draft report to include the passage that I have quoted above at 560, beginning 'although'.

564 Dawson's note of the conversation with Flugge which he recorded in his email to Wells was as follows:⁴⁰⁸

Flugge told me by phone this morning (5 May 2003) that those American officials examining the OFF contracts will find that AWB contracts include a variation to normal grain contracts. According to Flugge the AWB contracts include a component for land freight, for which AWB was paid under the OFF and from which AWB then made payments to Iraqi representatives to organise freight. Flugge said it was necessary to include this provision, because otherwise Iraqi officials would have had not funding to pay for freight. Flugge said the UN was aware of this arrangement. I leave to you to determine whether it would be sensible to include some additional words along these lines in the last paragraph of your draft minute.

⁴⁰⁴ CB 5/3335 (bottom email in chain). The minute was emailed from Wells to Thawley, Tehan, King and others on 7 May 2003 (CB 5/3337).

⁴⁰⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T1972, L16-17.

⁴⁰⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T1972, L21-31.

⁴⁰⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T1973, L29 - T1974, L4.

⁴⁰⁸ CB 5/3335.

565 In May 2003, Long was appointed by the Australian government to assist with the rebuilding of Iraq. He spent approximately five months assisting within the CPA. His codename whilst in Iraq became known throughout AWB as 'Proton'.⁴⁰⁹

US Wheat Associates' complaint and Project Rose

566 On 3 June 2003 the President of US Wheat Associates, Alan Tracy (Tracy), wrote to Colin Powell (Powell), the then US Secretary of State:⁴¹⁰

The recent announcement on the renegotiating of contracts under the Iraq Oil-For-Food (OFF) program raises several important issues for the United States. We are particularly concerned as to whether old wheat contracts with the Australian Wheat Board (AWB) are or have been included in this exercise.

Will these renegotiated contracts be at current market prices or at earlier prices that were undoubtedly inflated? Earlier OFF wheat contracts with prices inflated by millions of dollars per shipload have provided foundation to the rumors that some of the excess may have gone into accounts of Saddam Hussein's family.

Will there be competitive bidding on the renegotiated contracts such as wheat or will one's previous position as a supplier determine who gets the business?

Will there be transparency on the renegotiated contracts including information on the prices and quality of the commodities? Making this information public will encourage competition and help insure that prices are in line with the commodity provided.

The U.S is providing most of the funding for the WFP [World Food Programme] feeding effort, so possible price gouging for Australian wheat – regardless of whether it's through OFF or WFP – is appalling. We certainly support all efforts to see that the Iraqis do not go hungry, but there is no reason for the U.S. to pony up funding if the Australians continue to overcharge for such a basic commodity. The U.S. must require open bidding and complete transparency in the process.

We urge that you direct your staff involved in WFP and OFF contract approvals to be alert to these issues and to inform themselves on the going prices for these commodities.

This US Wheat Associates letter and similar statements were published in the US and Australian press.

567 Project Rose was an internal review set up by the CEO to look at operations and

⁴⁰⁹ CB 6/3391, 3471; Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1581, L19–22.

⁴¹⁰ CB 6/3441.

interactions with the Iraq market and the OFFP and it came as a result of continued speculation by the US or Canadians in relation to the AWB's activities in Iraq.⁴¹¹ Project Rose was an investigative project to enquire and determine whether there was truth involved in allegations of impropriety by AWB as a company or by AWB officers in the processes and regulations regarding export of wheat to Iraq under the UN OFFP⁴¹² and investigate the validity of allegations and accusations emanating from North America.⁴¹³

568 Chris Quennell (Quennell), from Blake Dawson Waldron, solicitors (BDW), was engaged to conduct a factual review and then to advise AWB on the legal consequences of the facts that had been found.

569 On 12 June 2003, two presentations were made by Quennell, who had been engaged to conduct Project Rose. At that time, the ELG comprised the nine most senior managers in AWB, namely, Lindberg, Fuller, Ingleby, Gillingham, Kennedy, Geary, Stott, Sharpe and Scales.

570 The first presentation discussed the content of a complaint made by the US Wheat Associates dated 6 June 2003.⁴¹⁴ During that presentation, reference was made to:

- (a) allegations that AWB contracts with the IGB were inflated; and
- (b) allegations that some of the funds from these contracts may have gone to Saddam Hussein's family.

571 The second presentation was entitled 'Iraq issues (internal trucking arrangements) - 12 June 2003.'⁴¹⁵ During the presentation, reference was made to the following:

⁴¹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1528, L28 - T1529, L3.

⁴¹² Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1474, L22-7 (Moffet).

⁴¹³ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1475, L28 - T1476, L6 (Moffet).

⁴¹⁴ CB 6/3445.

⁴¹⁵ CB 6/3453.

- (a) legal issues arising from post October 1999 contracts;
- (b) that AWB was initially reluctant to agree to pay trucking fees but ultimately agreed to pay inland transportation fees to Alia;
- (c) the increase in the inland transportation fees as time has gone on;
- (d) s 70(2) *Criminal Code Act 1995* (Cth) relating to influencing public officials; and
- (e) UN Resolutions 661 and 986.

ASIC submits that save that Geary was a member of the ELG, there is no direct evidence that Geary was in attendance at one or both presentations (although as a member it should be inferred that at a minimum he personally received the papers anyway).

The need for AWB to 'really deliver'

572 An ELG Report dated 12 June 2003 was prepared by Whitwell which referred to the OFFP being extended until November, and that AWB would complete funded contracts A1441 and A1680 but that there were issues with the funding of A1670.⁴¹⁶

573 That same day, Geary and others were sent an email from Long entitled 'Proton' which forwarded a memorandum of instruction from Cpt Blake Puckett about the processing of OFFP contracts in which there is reference to a kickback or surcharge of 10 per cent. The email stated that they needed to know whether a kickback or after sales service fee was involved.⁴¹⁷ A further copy of this instruction was forwarded by Whitwell to Geary under covering email on 13 June 2003.⁴¹⁸ In a separate response to Stott, to which Geary was copied, Whitwell stated that contract A1670 was in group 3, approved but not funded.⁴¹⁹

⁴¹⁶ CB 6/3465.

⁴¹⁷ CB 6/3471.

⁴¹⁸ CB6/3473.

⁴¹⁹ CB 6/3479.

574 On 24 July 2003, Geary (and others including Stott, Ingleby and Lindberg) were sent an email from Long entitled '500k' concerning, amongst other matters, the arrangements for the delivery of wheat within Iraq. Long wrote:⁴²⁰

Would appreciate some help in thinking through an appropriate authentication/delivery procedure for wheat...umm qasr is fine but if we allow say aqaba and tartous for bulk cargo..., would we be in a position to arrange trucking to silo within 2 hours each of basrah, kirhuk, Baghdad and zagho? What would the inland transport be and would we be willing to do it? What does Alia say and can they deliver? ... can we arrange inland transport to all governorates if it goes to umm qasr, ie really deliver on the cnf all governorates [?] I think you can see the dilemma.

575 The same day, Geary and others were sent Whitwell's comments on Long's email.⁴²¹

576 Under the renegotiated contracts A1670 and A1680, AWB was responsible for the discharge and transportation of its grain from the discharge port to all governorates in Iraq. AWB commenced making inquiries with various companies about stevedoring and trucking services.

577 Whitwell contacted Al-Absi and Alia said they could deliver and a transport agreement was drafted.⁴²²

578 On 12 September 2003, Whitwell sent an email to Geary and others referring to AWB's new obligations under the WFP to arrange private transportation from port to final delivery, and for the price to be reduced by 10 per cent.⁴²³

579 This was confirmed by facsimile dated 17 September 2003 from WFP to AWB⁴²⁴ in which the WFP attached the terms of the contract amendment as agreed between AWB and WFP. The facsimile advised that the WFP had been requested by the CPA to

⁴²⁰ Geary, sch A [58]; CB 6/3541.

⁴²¹ CB 6/3543.

⁴²² Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1586, L7-12.

⁴²³ CB 6/3683.

⁴²⁴ CB 6/3685.

'deduct the after sales service fee of 10 per cent on this contract'. The WFP also reiterated its revised price. It wrote:⁴²⁵

... The terms for the renegotiation have been provided by the CPA and operational issues concerning the actual deliveries will be [handled] by MoT. You might want to discuss some of the issues raised with these parties

580 In September 2003, the WFP renegotiated the contract price for contract A1670. The reason for the amendments sought by the WFP was to remove the 10 per cent after sales service fee that had been included in the calculation of the original contract price.⁴²⁶ The reduction in 10 per cent was a blanket policy decision from Washington applying to all of the OFFP contracts. AWB and the CPA negotiated a further amendment to contract A1670, in particular an increase in the contract price to support the accelerated delivery of approximately 220,000 tonnes under the contract.

581 ASIC submits that at the time of this renegotiation, AWB did not disclose to the WFP that the original contract price for this contract had also included an allowance of US\$8.375 per tonne in repayment of the Tigris Debt (discussed below). ASIC says that AWB and the CPA negotiated a further amendment to contract A1670, in particular an increase in the contract price to support the accelerated delivery of approximately 220,000 tonnes under the contract.

582 Whitwell drafted a memorandum dated 22 September 2003, entitled: 'Iraq Update.' Under the heading 'Operational Update', he noted:⁴²⁷

... Discussions have begun with WFP on the balance of both contracts 840,000 mt. We have received a request to reduce contract value by 10 pct to – Euro CIF All governorates Iraq. Working through Operational issues with them and discussing adjusted price.

583 On 24 September 2003, following a telephone conversation the previous day, Whitwell sent a facsimile to the WFP offering a revised price per tonne CIF Free on Trucks to

⁴²⁵ CB 6/3685.

⁴²⁶ CB 10/8718.5.

⁴²⁷ CB 6/3693.

silo all governorates Iraq shipped to the port of Umm Qasr or Aqaba sellers option, in respect of the balance of contract A1680.⁴²⁸

584 In that facsimile, AWB also asked if it was possible to build in an option for sellers to deliver on a CIF free out Aqaba or Umm Qasr basis and if so, what would be the revised unit price and relevant authentication procedure.

585 On 25 September 2003, the WFP sent a fax to AWB⁴²⁹ which commenced:

Please find attached a copy of the Contract Amendment, as agreed between your company and the United Nations World Food Programme.

WFP advised that the contract validity for contract A1680 was pending approval from the OIP, and that issues relating to the letter of credit should be directed to BNP.

586 The same day, a facsimile was sent by Whitwell to the WFP, enclosing 'signed format for amendment for onward presentation to OIP'.⁴³⁰ The amendment to the contract provided for a revised price CIF free on trucks to silo all governorates Iraq shipped to the Port of Umm Qasr. The effect of this amendment was to make contract A1680 again a CIF free in truck contract. The revised price departed from the earlier amendment which was a CIF free out price.

587 This revised price was a decrease of €25.49 per tonne on the price under the original contract. It represented a reduction in the 10 per cent after sales service component of the price. AWB was still, in effect, receiving as part of the proceeds of sale €25.84 per tonne of the original inland transportation fee that had also been included as part of the price under the original contract, although AWB now had to make arrangements for and pay for the discharge inland carriage of these cargoes.

588 On 25 September 2003, further faxes were sent between the WFP and Whitwell

⁴²⁸ CB 6/3696.1.

⁴²⁹ CB 6/3697.

⁴³⁰ CB 6/3698.1, 3699.

attaching the signed contract amendments and indicating that contracts 1201376 (A1670) and 1300016 (A1680) were pending approval from the OIP.⁴³¹

589 AWB was eventually able to fulfil contract A1680 fully. This was after AWB had agreed to amendments to the price and terms of delivery of the wheat under contract A1680 in April and September 2003. ASIC submits that at no time during its renegotiations with the WFP in either April or September 2003 did AWB disclose to the WFP that the original contract price included an allowance of US\$8.375 in repayment of the Tigris Debt.

Inland transport agreement with Alia

590 On 26 September 2003, Whitwell responded to an email sent by Darryl Hockey (Hockey) of AWB, and in that email, amongst other matters, Whitwell stated that ‘on the inland transport I will get onto that this weekend.’⁴³²

591 Following further negotiations between Whitwell and Alia, on 21 October 2003, an ‘Agency and Transport Services Agreement’ was signed by Whitwell, on behalf of AWB Services Limited, and Othman Al Absi, on behalf of Alia.⁴³³

592 Whitwell hadn’t seen any earlier written agreement.⁴³⁴ The agreement imposed obligations on Alia to provide services with care, skill and diligence and required Alia to provide a warranty that it had the necessary skills and training to perform the services the subject of the contract. The agreement required Alia to provide an assurance that its vehicles would be in good working order and suitable for the

⁴³¹ CB 6/3703, 3704.1, 3705.

⁴³² CB 6/3713.

⁴³³ On 21 August 2003, Alia emailed Whitwell and provided a sample contract which was signed with a Vietnamese company for AWB’s consideration, which was for transport services from Umm Qasr (CB 1/3671). Whitwell forwarded this to Fahy and Edmonds-Wilson (CB 6/3677). In October 2003, AWB decided to proceed with engaging Alia for land transport services within Iraq from October 2003 and after some negotiation between the parties, AWB and Alia entered into an agency and inland transport agreement on around 21 October 2003 (CB 6/3927, 3929, 3931, 3933, 3935, 3951, 3953, 3955, signed contract CB 6/3973). Other than these no agreements, no other written contract existed between AWB and Alia.

⁴³⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1586, L29 – T1587, L10.

transport of grain.

593 Under the terms of the Agency and Transport Services Agreement that AWB eventually concluded with Alia in October 2003, Alia agreed to arrange for insurance of the shipments during their transportation in Iraq, including on behalf of AWB. Clause 11 of that agreement provided:

11. Insurance

The Contractor [Alia] must effect and maintain for the entire Term the Insurance Policies in the joint names of the Contractor and AWBS and for their respective rights and interests.

The Insurance Policies must be effected with an insurer approved by AWBS and must be on terms satisfactory to AWBS. Without limitation, the Insurance Policies must include the Required Insurance Conditions.

In the event that the Contractor sub-contracts any of its obligation under this agreement, it must ensure that each of its sub-contractors effects insurance policies of the same type as the Insurance Policies containing the Required Insurance Conditions and in the joint names of the sub-contractor and AWBS for their respective rights and interests and that such insurance policies are maintained for the entire Term.

The Contractor must from time to time upon request by AWBS provide such documentary evidence as AWBS requires (including certificates of currency) to evidence the Contractor's compliance with the requirements of this clause.

594 Clause 16 of this agreement recorded the acknowledgement by Alia that under the terms of this agreement, it may be liable to AWB and AWBI in relation to loss or damage that they sustain as a consequence of loss or damage to the wheat.

595 Similar provisions were also included in AWB's subsequent Agency and Transport Services Agreement dated 8 July 2004.⁴³⁵

596 ASIC submits that prior to this time, it should be inferred that there was no contract in existence between AWB and Alia and Alia did not take out any insurance for AWB in relation to the transport of wheat within Iraq. ASIC says that prior to October 2003, aside from services provided under the protective agency agreement, all Alia did in relation to AWB was to receive inland transportation fees (including the after sales

⁴³⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1586, L29 – T1587, L10.

service fees) and remit them, less its commission, to the ISCWT.

Chris Quennell's discussion with Flugge on 30 April 2004

597 On 30 April 2004, Quennell and Cooper had a telephone conference with Flugge. Prior to the conference Flugge was provided with a number of documents by email from Quennell.⁴³⁶

598 I deal with this conference in detail below at paragraph 1667 and following as it forms part of the pleaded case concerning Flugge's knowledge.

599 On 19 October 2004, Alia confirmed that it was 49 per cent owned by the Iraqi Trade Ministry.⁴³⁷

600 On 2 March 2005, Flugge was interviewed by investigators from the UN Independent Inquiry Committee and admitted that he had been aware that AWB contracts with Iraq had included a transport component.⁴³⁸

Sir Anthony Mason advice

601 On 27 October 2005, AWB sought and obtained an expert opinion of Sir Anthony Mason in relation to AWB's payment of inland transportation fees under the OFFP.⁴³⁹

602 Sir Anthony's opinion was that the evidence before him did not 'establish or suggest that AWB or its officers, more particularly its senior executives, knew that the fees were unreasonable or that the fees were being illicitly channelled to the Iraqi Government or were not being applied to the provision of inland transportation.' Sir Anthony expressly declined to express a view on whether AWB's payments to Alia contravened UN sanctions on the material before him.

⁴³⁶ CB 6/4233, 4235, 4237, 4239, 4241, 4243, 4245.

⁴³⁷ CB 7/4623.

⁴³⁸ CB7/ 4737 - IIC summary, CB 7/4741 - notes of Mr Cooper.

⁴³⁹ Exhibit F35.

ASIC conclusion in relation to the IGB fees wrongdoing

603 ASIC submits that it should be inferred from the evidence in connection with the introduction of the IGB fees that:

- (a) from June 1999, the IGB required AWB to pay inland trucking fees and later after sales service fees which were in international denominations and in increasing amounts (IGB fees);
- (b) AWB agreed to and in fact paid the IGB fees from November 1999 directly to Alia and through shipping companies and through Ronly and a number of AWB employees knew this;
- (c) the IGB fees were being paid to Iraq and a number of AWB employees knew this;
- (d) AWB devised strategies to pay the IGB fees so that they would disguised the fact that AWB was paying the IGB fees;
- (e) AWB's obligation was to pay the IGB fees, not to arrange transportation of wheat supplied to Iraq;
- (f) in and from late 1999, AWB employees who had knowledge of the IGB fees had concerns about the 'greyness' of the transport payments and despite an assurance by Zuhair and that early contracts had been approved that there had been no written confirmation that the UN had approved the fees;
- (g) it would have been a simple matter for AWB to inform the UN and seek clarification regarding the fees, but no-one ever did and no-one within AWB was ever asked to do so;
- (h) alternatively, if AWB thought that it was genuinely paying for inland transport then it could have sought approval of a separate trucking contract from the UN but again it didn't do this;
- (i) instead, AWB relied on the fact that the UN had not asked any questions about

early contracts containing a vague reference to US\$12.00 payable to maritime agents as carte blanche to continue the inland transport payments in increasing amounts and different denominations, notwithstanding the 'greyness' of doing so;

- (j) the distribution plan did not require or allow side-payments of trucking fees, and indeed trucking costs that required hard currency (e.g. imports of spare parts for Mercedes and Renault trucks) were separately provided for under the distribution plan.

604 None of these alleged facts are alleged to involve Flugge or Geary.

605 ASIC submits that it should be inferred from the evidence between 2000 and 2005 that:

- (a) AWB sought to withhold payments of IGB fees to Iraq to recover demurrage losses;
- (b) from late 2000, Iraq incorporated a 10 per cent after sales service fee into the IGB fees payable by AWB;
- (c) views were expressed and disseminated within AWB from February 2001 that the increase in the trucking fees and the after sales service fees were a means of AWB and the IGB 'milking' or extracting more money from the UN escrow account;
- (d) Iraq entities directly and through Alia made demands for payment of outstanding IGB fees from time to time, making clear that Iraq was the ultimate recipient of the fees;
- (e) prior to October 2003, Alia's only role was to help AWB as protective agent at the port of Umm Qasr and to remit IGB fees to Iraq.

606 None of these allegations specifically relate to Flugge or Geary save insofar as ASIC allege that certain facts were 'well known' or 'widely known' within AWB.

607 ASIC argues that the only reasonable and plausible conclusion from these facts is that in paying the IGB fees to Iraq and recovering these fees from the UN escrow account, AWB was engaging in the very conduct the UN Resolutions had called on member states to prevent; and moreover that by 2000 at the latest, no real effort was being made to keep this conduct secret within AWB: to the contrary.

608 In so far as these allegations relate to Flugge and Geary I deal with them when considering the pleaded case against them.

Harm to AWB

609 A major issue in dispute with Flugge is whether the public revelation of AWB's wrongdoing was likely to cause and did in fact cause substantial and enduring harm to AWB.

610 In moving from a statutory wheat board in 1999 to a publicly listed company in 2001, AWB retained the Single Desk statutory monopoly and also created and implemented a broad code of conduct and corporate governance policies emphasising ethical behaviour and highlighting reputational risks to AWB (see 'AWB Code of Conduct and corporate governance' at paragraph 234 and following).

611 ASIC says that AWB saw Iraq as a high risk, high reward market with a unique trading environment because of the need to operate within the OFFP and the scrutiny that entailed. In June 1999, Iraq introduced a requirement that suppliers pay a trucking fee. This was unique to AWB's markets.

612 ASIC alleges that despite the known risks of trading with Iraq under UN sanctions, and the need to engage in ethical behaviour, as discussed above, AWB committed serious wrongdoing in connection with the OFFP.

613 As the alleged misconduct came to light, and as inquiries were undertaken reviewing AWB's conduct, and litigation was brought against AWB, AWB suffered harm in the form of reputational damage, costs in defending the allegations and associated litigation, restructuring, damage to its share price, loss of the Single Desk, as discussed

below.

The revelation of AWB's misconduct

Independent Inquiry Committee into the UN OFFP (Volcker Inquiry)

614 On 27 October 2005, the Volcker Inquiry published a report entitled 'Manipulation of the Oil-for-Food Programme by the Iraqi Regime' (Volcker report).⁴⁴⁰ The report included findings that AWB was the biggest source of kickbacks to the Iraqi government, and that AWB paid 'trucking charges' totalling AU\$300 million to Alia, of which Alia kept a small percentage and passed the majority of the payments to the Iraqi Government.

615 ASIC contends that while there had been earlier allegations of misconduct by AWB, this was the first evidence-based revelation of AWB's conduct under the OFFP.

616 ASIC submits that in and of itself, the Volcker report caused relatively little harm to AWB,⁴⁴¹ principally because the report did not allege that AWB *knowingly* paid hard currency to Iraq, and AWB was, for the time being, able to maintain a public line that it had been duped by Alia and the IGB and let down by the UN – see for example AWB's public announcements immediately prior to and following the release of the Volcker report which state, *inter alia*:

– Public announcement of 27 October 2005:⁴⁴²

AWB did not knowingly pay or enter into any arrangements to pay monies to the former regime.

AWB relied on the UN to supervise and regulate the OFF Program.

The payment of trucking fees occurred entirely in circumstances condoned by the responsible UN Committee...[which] continued to approve contracts which contained inland transport terms.

⁴⁴⁰ CB 7/4895 extract dealing with IGB fees in food contracts.

⁴⁴¹ The main direct harm was that AWB was temporarily suspended from participating in US government programmes. That suspension was reinstated following the Cole Inquiry – see paragraph 632 below.

⁴⁴² Public Announcement 2005 – 160 'UN Oil for Food Program' at CB 7/4953-4.

Clearly the UN did not adequately oversee the OFF Program.

– Public announcement of 28 October 2005:⁴⁴³

The Board and management of AWB welcomes the finding of the IIC that AWB was not knowingly involved in schemes implemented by the former Iraqi regime to circumvent the UN Oil For Food Program.

Notwithstanding the thorough and rigorous investigation conducted by the IIC, it has not found that AWB knew of the matters now alleged. This has confirmed AWB's position ... that it did not know, and could not know, what Alia did with the money AWB paid to it by way of transport fees.

We were surprised to learn of the fact that Alia did not provide a trucking service... It is of serious concern to now learn that fees the company paid for the inland transportation of its wheat in Iraq were channelled to the former regime.

617 ASIC says that the main effect of the Volcker report (as far as AWB was concerned) was that it led to the announcement by the Australian government of its own inquiry into the conduct of AWB and other companies in connection with the OFFP.

The Cole Inquiry

618 In November 2005, the Australian government established an Inquiry, chaired by Commissioner Terence Cole, to investigate whether Australian companies and their officers breached Australian laws through their participation in the OFFP (Cole Inquiry).⁴⁴⁴

619 Mr Andrew Sisson (Sisson), opined in his expert report⁴⁴⁵ that from the commencement of the Cole Inquiry's public hearings on 16 January 2006, it was clear that evidence emerging from those hearings changed public perceptions of AWB's behaviour during the OFFP.

620 Sisson notes that the AWB share price commenced falling on the day the Inquiry's public hearings opened. Sisson states that press commentary was negative from the

⁴⁴³ Public Announcement 2005 – 161 'UN Oil for Food Program' at CB 7/4958.

⁴⁴⁴ CB 7/4961, 4963.

⁴⁴⁵ Commencing at CB 10/8331.

outset. Sisson identified the following relevant extracts from the *Australian Financial Review*:⁴⁴⁶

17/01/06: Counsel assisting the inquiry, John Agius SC, said he already had enough evidence to show that AWB must have known it was breaching United Nations sanctions when it made \$US220 million of payments over three years to trucking company directly controlled by the Iraqi government.

18/01/06: But if what has come to light so far stands the test of later evidence and scrutiny, standards of governance and probity at a AWB fall well short what should be expected of a leading Australian company, let alone one with a monopoly blessed by government. Mr. Lindberg conceded evidence he gave last year to the United Nations inquiry into the food-for-oil scandal might have been wrong. 'I know more now that I knew then' he said.

19/01/06: AWB chief executive Andrew Lindberg faced sharp attacks on his credibility from Counsel assisting the enquiry John Agius SC over a paragraph in an internal AWB brief briefing note in May 2003.

20/01/06: (Mr Lindberg) conceded that in 2004 AWB had misled the UN and that he had misled his own board over the real nature of a \$US7 million payment made to oil company Tigris Petroleum.

21/01/06: Chains of emails and faxes the Volcker inquiry never saw have now been subpoenaed by the Sydney inquiry and produced to show that senior AWB executives in fact knew very well where the money was ending up, in what Commissioner Terence Cole who is chairing the inquiry described as an 'end justifies the means' culture.

621 Sisson also identified relevant statements issued by the company in relation to the Cole Inquiry and its ramifications during the period of the initial public hearings, as listed below:⁴⁴⁷

18/01/06: Some of the material facts surrounding AWB's involvement in the United Nations Oil for Food Program are as follows [followed by 15 dot points.]⁴⁴⁸

18/01/06: AWB Limited advises that the (previous announcement) was unauthorised for release.⁴⁴⁹

24/01/06: Regretfully, AWB's reputation has been significantly damaged as a result of the Company's participation in the United Nations Oil for Food

⁴⁴⁶ CB 10/8334-5.

⁴⁴⁷ CB 10/8335.

⁴⁴⁸ CB 8/5092.

⁴⁴⁹ CB 8/5095.

Program and subsequent media coverage.” “To respond to allegations or the evidence prior to the completion of the Inquiry would be inappropriate.⁴⁵⁰

09/02/06: The Managing director of AWB limited, Mr Andrew Lindberg, has tendered his resignation, which has been accepted by the Board, to be effective on April 30, 2006. Lindberg has relinquished his executive responsibilities, effective immediately.⁴⁵¹

13/02/06: AWB has been notified by the Iraq Grain Board that it has decided to suspend its business relationship with AWB until the Cole Inquiry is completed.⁴⁵²

16/02/06: The Government will send a delegation to Iraq to discuss the current Iraqi tender. The delegation will be led by the Deputy Prime Minister and Trade Minister, the Hon Mark Vaile MP, the Executive Chairman of AWB Limited, Mr Brendan Stewart, as well as representatives of Australian wheat growers.

23/02/06: From the Annual General Meeting ‘It’s a very difficult time for the company. However, shareholders need to understand that despite the negative publicity, the AWB Limited business is fundamentally strong and continues to perform well. AWB’s reputation has been damaged as a result of its participation in the oil for food program. The Board and I very much regret that.’ ‘The Board is absolutely committed to managing change and restoring AWB’s reputation and will take whatever action is necessary to restore the company’s good name.’ ‘I trust you will understand that it is inappropriate to comment on any matters which are the subject of evidence before the Inquiry.’⁴⁵³

622 Sisson opines that there was pronounced price weakness later in the year, concentrated on the period 07/07/06 to 17/10/06 when the price fell from \$4.32 to \$2.46, a move of -43 per cent, whereas comparator share market indices rose. Sisson examined that period to see whether further revelations from the Cole Inquiry contributed to that weakness (the Cole Inquiry continued to sit intensively until 13/4/06 and on a further 10 days later in the year prior to delivering its report on 27/11/06).⁴⁵⁴

450 CB 8/5099.

451 CB 8/5113.

452 CB 8/5116.

453 CB 8/5118.

454 CB 10/8338.

623 Sisson identified a 'second round effect' in this later period of earlier revelations of AWB's conduct in connection with the UN OFFP. In Sisson's opinion, an AFR article of 09/10/06 captures this effect:⁴⁵⁵

The sharks are circling - not only could AWB face possible criminal and tax proceedings when commissioner Terence Cole reports in November, but resentment and clamour for change among Australian wheat growers is reaching critical mass.

Support from the government, especially the Nationals, for AWB's right to hold the wheat single desk has also waned as evidence heard at the Cole Inquiry indicated the company could face charges of financing terrorism, tax evasion and deception of Commonwealth officers.

Early on in the inquiry, the majority of wheat growers remained supportive of AWB's hold on the single desk including its veto power on bulk export applications which effectively hamstrung its regulator, the Wheat Export Authority. That sentiment has diminished as drought conditions across the country have dragged down crop forecasts by more than half.

Growers are watching their livelihoods being blown away by the drought and to say there is mounting grower resentment of AWB's antics in Iraq would be an understatement' one industry insider told The Australian Financial Review.

624 Sisson also refers to an AFR article of 13 October 2006 which provided evidence of the continuing negative ramifications for AWB of matters previously revealed at the Cole Inquiry:⁴⁵⁶

Support for AWB's wheat export monopoly continued to crumble yesterday as the West Australian Liberal Party and the state's largest grower group called for reform.

This is a blow to AWB, which has long counted the West Australian Farmers Federation as one of its strongest supporters.

625 Sisson opines that the prolonged fallout of the revelations at the Cole Inquiry in January and February 2006 may have contributed to the share price fall in the July to October 2006 period (in combination with the reduced harvest forecast owing to the ongoing drought).⁴⁵⁷

⁴⁵⁵ CB 10/8338.

⁴⁵⁶ CB 10/8338.

⁴⁵⁷ CB 10/8339.

626 In the 2006 Annual Report, the Chairman's report noted the impact of the Cole Inquiry on AWB, the company's regret for its conduct under the OFFP, and the initiatives put in place to review governance structures and international marketing activities.⁴⁵⁸

627 On 24 November 2006, Commissioner Cole handed down his final report which was tabled in Parliament on 27 November 2006.

Harm occasioned to AWB as a result of the revelations

628 AWB suffered the following harms as a result of the revelation of its conduct during the OFFP.

Suspension of purchases by Iraq

629 On 13 February 2006, the new Iraqi Government announced a temporary suspension of purchases of AWB wheat whilst the Cole Inquiry investigations were occurring.⁴⁵⁹ At that time Iraq was AWB's second largest export market, having received 1,335,000 tonnes of AWB wheat in the previous year.⁴⁶⁰

United States Department of Agriculture (USDA) debarment

630 On 10 November 2005, the United States Department of Agriculture (USDA) gave notice of the suspension of AWB (USA) Limited from participating in US federal government programs in light of the serious allegations that AWB had made illicit payments in connection with its participation in the OFFP as raised by the Volker Inquiry.⁴⁶¹

631 That suspension was (temporarily) lifted following representations by the Australian Government. On 28 November 2005, Lindberg wrote to the Deputy Prime Minister

⁴⁵⁸ CB 8/5421, 5246.

⁴⁵⁹ CB 7/4987 - 2004/2005 National Pool Performance Report, CB 5115 - AWB statement to the ASX from the Executive Chairman of AWB.

⁴⁶⁰ CB 8/5046.

⁴⁶¹ CB 7/4967.

thanking '(him) and (his) staff for helping to reverse the decisions of the USDA to suspend, and consider the debarment of, AWB (USA) [Limited] from US federal government programs. The suspension and potential debarment from use in US federal export credit programs presented significant problems for AWB.'⁴⁶²

632 ASIC submits that those 'significant problems' returned shortly after Commissioner Cole handed down his report. On 20 December 2006, after 'reviewing the findings of the [Cole Report], as well as the documentary evidence and other material referred to and incorporated by reference into the Report' and 'taking into account the attempts by AWB Limited, its directors, officers, employees and affiliates to conceal those actions',⁴⁶³ the USDA announced the immediate suspension and proposed debarment of AWB and its affiliates.⁴⁶⁴

633 The USDA suspension remained in place until AWB and its affiliates were ultimately debarred on 20 December 2007, for a period of a further two years, from participating in programs of the United States Government.⁴⁶⁵

634 The USDA debarment was expressly on the basis of AWB's conduct in connection with the OFFP (which ASIC contends was substantially the same as that alleged in the present proceeding as the 'IGB fees wrongdoing'), including, ASIC submits, the conduct of Flugge and Geary.

Redundancies

635 There was a series of changes to the management team during and after the Cole Inquiry.⁴⁶⁶

⁴⁶² CB 7/4983 [emphasis added by ASIC].

⁴⁶³ CB 5648, first paragraph.

⁴⁶⁴ CB 8/5647.

⁴⁶⁵ CB 8/5653.

⁴⁶⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1537, L16–22.

- 636 AWB's 2006 annual report refers to the appointment of 'a new management team led by Managing director Mr Gordon Davis' as part of its response to the Cole Inquiry.⁴⁶⁷ Similarly, AWB's report on its full year results for the financial year ended 30 September 2006 refers to the implementation of steps including 'renewal of the senior management team.'⁴⁶⁸
- 637 In the 2006 Annual Report, the Managing director in his report notes that the year has been 'challenging' and required 'significant changes to management.'⁴⁶⁹
- 638 In an ASX briefing dated 22 November 2006, Managing director Gordon Davis discussed the process of management renewal, including the appointment of members of a new Executive Leadership Group, and improving financial performance in the wake of the Cole Inquiry.⁴⁷⁰
- 639 At least the following members of the AWB senior management team resigned or were made redundant during the course of the Cole Inquiry:
- (a) Lindberg resigned on 9 February 2006, effective immediately.⁴⁷¹ An agreement was reached between AWB and Lindberg as to his severance benefits on 28 April 2006;⁴⁷²
 - (b) Ingleby was made redundant on 30 October 2006;⁴⁷³

⁴⁶⁷ CB 8/5246.

⁴⁶⁸ CB 8/5459 – Public Announcement 2006 – 99 Full Year Results – ended 30 September 2006 (Detailed), (at CB 8/5461, point 5).

⁴⁶⁹ CB 8/5241, 5247.

⁴⁷⁰ CB 8/5479, 5486.

⁴⁷¹ CB 8/5113 – AWB Release to ASX.

⁴⁷² CB 8/5135.

⁴⁷³ CB 8/5338 – 2006 Annual Report.

- (c) Geary was made redundant on 3 November 2006;⁴⁷⁴
- (d) General Manager and Company Secretary Richard Fuller (Fuller) resigned on 15 July 2006;⁴⁷⁵
- (e) General Manager and General Counsel, Cooper resigned on 15 April 2006;⁴⁷⁶
- (f) Stott resigned on 15 June 2006;⁴⁷⁷
- (h) General Manager Jill Gillingham (Gillingham) resigned on 31 August 2006.⁴⁷⁸

Restructuring

640 On 27 July 2006, AWB released to the ASX an announcement by the Board of AWB that AWB would be restructured to strengthen corporate governance and accountability. The announcement noted that the restructure would increase the autonomy and transparency of AWBI, while retaining the grower and shareholder benefits of an integrated Single Desk system.⁴⁷⁹

Costs of redundancies and restructuring

641 In the financial year ending 30 September 2006, AWB incurred \$10.2 million in costs associated with redundancies and restructuring.⁴⁸⁰

642 In the financial year ending 30 September 2007, AWB incurred \$21.9 million in costs

⁴⁷⁴ CB 8/5338.

⁴⁷⁵ CB 8/5338.

⁴⁷⁶ CB 8/5338.

⁴⁷⁷ CB 8/5338, 5203 – Settlement agreement.

⁴⁷⁸ CB 8/5338.

⁴⁷⁹ CB 8/5217.

⁴⁸⁰ CB 8/5459 – Public Announcement 2006 – 99 – Full Year Results – ended 30 September 2006 (Detailed) (at CB 8/5463, Significant items, item 3).

associated with redundancies and restructuring.⁴⁸¹

Litigation relating to AWB's conduct under the OFFP

643 Between January 2007 and February 2013, AWB was at all times the defendant in at least one and as many as seven class actions seeking damages in relation to its conduct under the OFFP. The litigation and settlement of those proceedings collectively cost AWB many tens of millions of dollars over the period 2007–2010 (see ‘Costs associated with the Cole Inquiry and litigation’ below).

644 Details of the proceedings brought against AWB are as follows:

- (a) On 25 January 2007, AWB was served with a class action complaint filed by Karim and others. AWB stated that it would vigorously defend the proceeding.⁴⁸² On 14 September 2007, AWB indicated that it would shortly lodge a motion to dismiss this class action.⁴⁸³ On 1 October 2008, AWB stated that the Karim class action had been dismissed.⁴⁸⁴ On 23 October 2008, the plaintiffs appealed against the decision to dismiss the class action.⁴⁸⁵ On 2 October 2009, the US Court of Appeal dismissed the appeal by Karim and others.⁴⁸⁶
- (b) On 13 April 2007, Maurice Blackburn Cashman instituted class action proceedings on behalf of shareholders of AWB (the Watson class action). The estimated quantum of the claim when filed was in the order of \$25 million.⁴⁸⁷

481 CB 8/5970, 5745.

482 CB 8/5673.

483 CB 8/5853.

484 CB 9/6267.

485 CB 9/6269.

486 CB 9/6381, 6405.

487 CB 8/5699.

On 24 April 2007, the shareholder claim was formally served on AWB.⁴⁸⁸ By 14 September 2007, AWB had lodged its defence in this proceeding.⁴⁸⁹ In February 2010, AWB and the plaintiffs agreed to settle the shareholder class action. An AWB media release dated 15 February 2010 states that ‘Under the terms of the proposed settlement, AWB will make a payment of \$39.5 million inclusive of the applicants’ legal costs.’⁴⁹⁰

- (c) On approximately 17 April 2007, 21 May 2007 and 19 June 2007, three separate class action complaints against AWB were filed in the US on behalf of US farmers.⁴⁹¹ The three proceedings were later consolidated.⁴⁹² On 14 September 2007, AWB advised that it had lodged a motion to dismiss the consolidated class action.⁴⁹³ On 25 February 2008, AWB’s motion to dismiss the complaint was granted by the Court.⁴⁹⁴ On 27 March 2008, AWB issued a media release noting that the class action had been dismissed.⁴⁹⁵
- (d) On approximately 14 September 2007, a further class action was filed against AWB Limited by victims of the Hussein regime.⁴⁹⁶ On 26 September 2008, this class action was dismissed.⁴⁹⁷
- (e) On approximately 1 July 2008, the Iraqi government filed a civil lawsuit in the

⁴⁸⁸ CB 8/5703.

⁴⁸⁹ CB 8/5853.

⁴⁹⁰ CB 9/6385, 6387 – Full year results period ended 30 September 2010.

⁴⁹¹ (CB 8/5701: nominal plaintiffs Boyd and Switzer; CB 8/5705: nominal plaintiff Erb; CB 8/5807: nominal plaintiff Brothers).

⁴⁹² CB 8/5974.

⁴⁹³ CB 8/5853.

⁴⁹⁴ CB 9/6220.

⁴⁹⁵ CB 9/6071.

⁴⁹⁶ CB 8/5853.

⁴⁹⁷ CB 9/6101.

US District Court for the Southern District of New York against 94 companies who participated in the OFFP. AWB was one of the 94 companies mentioned in the civil lawsuit.⁴⁹⁸ On approximately 8 May 2009, an extension of time was granted by the US District Court in New York to serve a summons and complaint on AWB. AWB was subsequently properly served.⁴⁹⁹ On 6 February 2013, the proceedings in the United States District Court, S.D. New York 'The Republic of Iraq, including as Prens Patriae on behalf of the citizens of the Republic of Iraq (Plaintiff) v ABB AG, et al (Defendants)' were dismissed.⁵⁰⁰

Costs associated with the Cole Inquiry and litigation

- 645 In the financial year ended 30 September 2006, AWB incurred \$23.7 million in costs associated with the Cole Inquiry.⁵⁰¹
- 646 In the financial year ended 30 September 2007, AWB incurred a further \$6.6 million costs in relation to the Cole Inquiry and subsequent litigation (described as 'costs associated with legacy issues').⁵⁰²
- 647 In the financial year ended 30 September 2008, AWB incurred a further \$13.4 million of costs in relation to 'legacy issues', (described as 'legal costs associated with the Cole Inquiry and class actions').⁵⁰³

⁴⁹⁸ CB 9/6099.

⁴⁹⁹ CB 9/6271.

⁵⁰⁰ CB 9/6595.

⁵⁰¹ CB 8/5489 – Public Announcement 2006 – 100 – Full Year Results – ended 30 September 2006 (Presentation) (at CB 8/5500, Significant items, PBTA impact (\$m)); CB 8/5683 - Public Announcements 2007 – 13 – 2007 Annual General Meeting – Chairman's Address (at CB 8/5687); CB 8/5459 - Public Announcement 2006 – 99 – Full Year Results – ended 30 September 2006 (Detailed) (at CB 8/5463, Significant items, item 2); CB 8/5377 - AWB Limited Consolidated Financial Report for the Year Ended 30 September 2006 (at CB 8/5383, Significant items, item 2).

⁵⁰² CB 8/5967 – Full Year Results for the year ended 30 September 2007 (in table at CB 8/5970); CB 8/6027 – Full Year Results 21 November 2007 (Presentation) (at CB 8/6037).

⁵⁰³ CB 9/6231, 6234.

648 In the financial year ending 30 September 2009, AWB incurred a further \$18.6 million of costs in relation to 'legacy issues' described as 'legal costs associated with the Oil for Food Inquiry and class actions.'⁵⁰⁴

649 In the financial year ending 30 September 2010, AWB incurred a further \$8.5 million of costs in relation to 'legacy issues' described as 'legal costs associated with the Oil for Food Inquiry and class actions.' In that financial year AWB also incurred the additional \$39.5 million cost of settling the Watson (AWB shareholder) class action.⁵⁰⁵

Engagement of KPMG and PWC to conduct reviews of AWB

650 ASIC submits that in order to weather the Cole Inquiry, AWB had to be able to show that it had engaged independent auditors and advisers.⁵⁰⁶ On 9 February 2006, KPMG was engaged by AWB Limited to review its corporate governance practices and internal reporting structures, and a report was produced in November 2006.⁵⁰⁷ PWC was also engaged at this time to review all risk parameters. The reviews conducted particularly focused on IS&M.

651 AWB's engagement of KPMG (to review corporate governance) and PWC (to review internal controls) in response to the Cole Inquiry is recorded in an ASX release of 29 November 2006 in response to the Cole Report.⁵⁰⁸

652 In the 2006 Annual Report, the Managing Director's report refers to measures taken to reform AWB's culture and the KPMG review of governance.⁵⁰⁹

⁵⁰⁴ CB 9/6429 – These costs are not separately itemised in the 2009 financial statements – figure taken from the '2009' comparator column of the FY2010 'Significant Items' table.

⁵⁰⁵ CB 9/6429, 6400.

⁵⁰⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1536, L11–20.

⁵⁰⁷ CB 8/5113, 5117 – AWB release to ASX of address of Executive Chairman prepared for the 2006 Annual General Meeting.

⁵⁰⁸ CB 9/5601. A 'cultural change program engaging over 600 staff' is also referred to in Public Announcement 2006-99 (CB 5461, point 5).

⁵⁰⁹ CB 8/5241, 5247.

653 On 27 September 2006, AWB released to the ASX an Update on New Governance Arrangements for AWB International.⁵¹⁰

654 The Board resolved to implement remaining initiatives by February 2008.⁵¹¹

Significant decline in share price and market capitalisation

655 Sisson gave evidence that in his expert opinion, there was overwhelming evidence that the approximate 36 per cent fall in the share price between 13 January 2006 and 22 February 2006 was due to a very large extent to the Cole Inquiry revelations. Sisson stated that the share price at the conclusion of the relevant period, 1 February 2007, was \$3.16, and opined that in the remainder of that period post 22 February 2006, there were other factors that together with the continuing fallout from the Cole Inquiry caused the price to fluctuate.⁵¹²

656 AWB's share price never recovered. On 24 August 2010, the AWB Board unanimously recommended that shareholders vote in favour of a scheme whereby Agrium Inc. (Agrium) (a Canadian company) would acquire all of the issued capital of AWB at \$1.50 per share.⁵¹³ Following approvals by the Australian Foreign Investment Review Board⁵¹⁴ and the Supreme Court of Victoria,⁵¹⁵ the 100 per cent takeover was completed on 3 December 2010.⁵¹⁶

Reduction in AWB's credit rating and market position

657 On 4 April 2006, Standard & Poor's Ratings Services affirmed its 'BBB' long-term

⁵¹⁰ CB 8/5229.

⁵¹¹ CB 8/5101 – Engagement letter and CB 5855 2007 AWB Annual Report at CB 8/5872.

⁵¹² CB 10/8331.

⁵¹³ CB 9/6413.

⁵¹⁴ CB 9/6509.

⁵¹⁵ CB 9/6511.

⁵¹⁶ CB 9/6513, 6515.

corporate credit rating on AWB and revised the outlook from stable to negative.⁵¹⁷

658 On 27 November 2006, Standard & Poor's Ratings Services placed AWB and AWB Harvest Finance on CreditWatch Negative following the release of the Cole Report.⁵¹⁸

659 On 1 December 2006, Standard & Poor's issued a press release noting that AWB had been removed from the S&P/ASX 100.⁵¹⁹

660 On 10 January 2007, Standard & Poor's affirmed the corporate credit rating of AWB, noted it was no longer on CreditWatch and that the outlook for AWB was negative.⁵²⁰ The report noted that its rating remained under pressure, reflecting the uncertainty regarding the Australian government's deliberations on the future of the Single Desk.

661 On 11 January 2007, Standard & Poor's affirmed the corporate credit rating of AWB Harvest Finance and noted it was no longer on CreditWatch.⁵²¹

662 On 10 April 2007, AWB released to the ASX - Statement - Moody's Investor Services downgrade AWB Harvest Finance short term credit rating.⁵²²

663 On 24 August 2007, Standard & Poor's announced that it had lowered AWB's corporate credit rating to BBB-.⁵²³

Loss of the Single Desk wheat marketing arrangements

664 ASIC contends that the loss of the Single Desk occurred incrementally over the 18 months following the release of the Cole Report. ASIC says that throughout that time,

⁵¹⁷ CB 8/5131.

⁵¹⁸ CB 8/5595.

⁵¹⁹ CB 8/5637.

⁵²⁰ CB 8/5667.

⁵²¹ CB 8/5671.

⁵²² CB 8/5697.

⁵²³ CB 8/5845.

AWB was plagued by uncertainty as new wheat marketing arrangements were contemplated and (bit-by-bit) implemented.

665 By the time the Cole Report was issued, ASIC submits that the writing was clearly on the wall. Immediately following the release of the report, on 29 November 2006 AWB sought to isolate the Single Desk from the opprobrium that had attached to AWB Limited, with a proposal to demerge AWB into a wholly grower-owned Single Desk manager and a separate, purely commercial agri-business company.⁵²⁴ Within a week, that proposed de-merger was overtaken by events.

666 On 5 December 2006, the Australian Government transferred the bulk veto previously held by AWB to the Minister for Agriculture.⁵²⁵ The monopoly wheat export right that had until that time been exercised by AWB, on behalf of its wholly owned subsidiary AWBI, was henceforth to be exercised by the Government. While the Single Desk was still operated by AWB, its monopoly was now subject to ministerial discretion.

667 On 6 December 2006, AWB released to the ASX a preliminary response to the proposed changes in wheat marketing arrangements announced by the Australian Government, which included a broader 'public interest' test to apply to the use of the bulk wheat veto.⁵²⁶ AWB also acknowledged that its earnings are 'materially influenced' by the volume in the National Pool, and by the performance of AWB Harvest Finance performance, itself influenced by pool returns. ASIC submits that it is to be inferred that any subsequent move to introduce competition into the bulk wheat export market would inevitably reduce the amount of wheat in pools controlled by AWB and hence impact negatively on AWB's direct earnings (through pool management) and indirect earnings (through financial services provided to wheat

524 CB 8/5605.

525 CB 8/5640, 5641.

526 CB 8/5643.

farmers).

668 The Chairman's address to the 2007 Annual General Meeting dated 22 February 2007 noted that AWB's performance would be adversely affected by the impact of changes to wheat marketing arrangements,⁵²⁷ and its half-yearly results presentation for the period ending March 2007 noted that AWB's half-yearly profit had been impacted by matters including 'continued uncertainty about future wheat export arrangements.'⁵²⁸

669 On 22 February 2007, AWB announced that it would not commence foreign exchange hedging for the 2007 wheat harvest due to the uncertainty around wheat marketing arrangements.⁵²⁹

670 On 22 May 2007 the Australian government advised that the National Pool would be retained for 2007/2008 and new marketing arrangements would be introduced in 2008/2009.⁵³⁰ Consistent with this, on 7 November 2007, AWB informed the market in a letter to shareholders titled: 're Director Nominations'⁵³¹ that 'it is the directors' current expectation that AWB (International) will cease to be the holder of the Single Desk sometime during the first half of 2008.'

671 On 30 June 2008, the *Wheat Export Marketing Act 2008* (Cth) and associated pieces of legislation were passed which had the effect of abolishing the Single Desk and introducing a new accreditation scheme for all wheat exporters.⁵³²

672 As the *NEAT* litigation confirmed, while AWB held the Single Desk it had an effective monopoly over bulk wheat exports from Australia. That monopoly was lost following

527 CB 8/5685.

528 CB 8/5709.

529 CB 8/5691.

530 CB 8/5707.

531 CB 8/6013.

532 CB 9/6072-89.

the loss of the Single Desk. As the number of bulk wheat exporters increased:

- (a) As at 30 September 2010, there were 27 accredited bulk wheat exporters including two subsidiaries of AWB, AWB Harvest Finance Limited and AWB (Australia) Limited.⁵³³
- (b) As at 30 September 2012, there were 26 accredited bulk wheat exporters including two subsidiaries of AWB, AWB Harvest Finance Limited and AWB (Australia) Limited.⁵³⁴

AWB's share of the bulk wheat market fell:

- (c) In the first full financial year after the loss of the Single Desk (1 October 2008 to 30 September 2009), approximately 12.3 million tonnes of bulk wheat was exported from Australia⁵³⁵ of which AWB's share was just 27.9 per cent⁵³⁶ (23.7 per cent was AWB Harvest Finance Limited and 4.2 per cent was AWB (Australia) Limited).
- (d) In the financial year 1 October 2009 to 30 September 2010, approximately 12.1 million tonnes of bulk wheat was exported from Australia⁵³⁷ of which AWB's share was just 24.4 per cent (22.0 per cent was AWB Harvest Finance Limited and 2.4 per cent was AWB (Australia) Limited).⁵³⁸
- (e) In the financial year 1 October 2010 to 30 September 2011, approximately 16.3 million tonnes of bulk wheat was exported from Australia of which AWB's

⁵³³ CB 9/6517 – Wheat Exports Australia, 2009/10 Marketing Year Wheat Export Accreditation Scheme – Report for Growers at page 3 (CB 9/6521).

⁵³⁴ CB 9/6553 – Wheat Exports Australia, 2011/12 Marketing Year Wheat Export Accreditation Scheme – Report for Growers at page 3 (CB 9/6557).

⁵³⁵ CB 9/6531, 13.

⁵³⁶ CB 9/6531, 15 – the pie charts can be interpreted using the key at CB 9/6552.1.

⁵³⁷ CB 9/6531, 13.

⁵³⁸ CB 9/6531, 15 – the pie charts can be interpreted using the key at CB 9/6552.1.

share was 16.2 per cent⁵³⁹ (15.2 per cent was AWB Harvest Finance Limited and 1.0 per cent was AWB (Australia) Limited).

- (f) In the period 1 October 2011 to 30 September 2012, approximately 22 million tonnes of bulk wheat was exported from Australia of which AWB's share was 2.0 per cent (all of which was AWB Harvest).⁵⁴⁰ (It is to be noted that by this time Cargill Australia Limited had acquired AWB (Australia)'s commodity management business from Agrium.

673 Professor Stephen King (Professor King) provided evidence that in his expert opinion, the Single Desk was of value to AWB whilst it operated, and was worth at least \$10 million per year in direct benefits (that is, supra-competitive margins earned through management of the National Pool) but those direct benefits may also have been considerably higher.⁵⁴¹

674 In Professor King's view, the benefits of the Single Desk also included a variety of indirect benefits, and further, the loss of the Single Desk harmed AWB, not only through the loss of those direct and indirect benefits, but also through transition costs and sunk costs, which harm would not have been incurred or incurred as early, if the Single Desk had continued.⁵⁴²

675 ASIC submits that Professor King's estimate of the annual value of the single desk to AWB is undoubtedly conservative. AWB's own business records indicate that the loss of the single desk in 2003–4 would have reduced the annual profits of AWB by between \$23 million and \$69 million.⁵⁴³

⁵³⁹ CB 9/6570, 16 – the pie charts can be interpreted using the key, CB 9/6593.

⁵⁴⁰ CB 9/6570, 16 – the pie charts can be interpreted using the key, CB 9/6593.

⁵⁴¹ CB 10/8216, 8(a).

⁵⁴² CB 10/8213.

⁵⁴³ CB 6/3549.

Reputational damage

676 ASIC relied on the following evidence.

677 Relevant statements issued by the company in relation to the Cole Inquiry identified by Sisson and discussed above from paragraph 619, specifically the statement of the Board of AWB of 24 January 2006 released by the AWB to the ASX;⁵⁴⁴ and Chairman Brendan Stewart's (Stewart) (who was Chairman of AWB throughout the Cole Inquiry and thereafter) address prepared for the 2006 AWB Annual General Meeting and released to the ASX On 23 February 2006.⁵⁴⁵

678 On 27 November 2006, AWB released an ASX announcement in response to the release of the Cole Report, in which Stewart stated:⁵⁴⁶

The Board deeply regrets the way in which the company's wheat trade with Iraq under the United Nations Oil-for-Food programme was conducted.

679 At an AWB press conference held on 29 November 2006 in response to the Cole Report,⁵⁴⁷ Stewart stated:

Clearly, our reputation has been shattered by the events of the past year, as our role in the Oil-for-Food program has been examined forensically by Commissioner Cole...

It has been a long and painful process for all involved. The Board deeply regrets the damage done to the company. The Board accepts accountability for the actions of management and the culture at AWB during the Oil-for-Food program.

680 In the 2006 Annual Report, the Chairman's report states:⁵⁴⁸

The Board deeply regrets the manner in which the company's wheat trade with Iraq from 1999 until 2004 under the United Nations Oil-for-Food programme was conducted. The Board accepts ultimate responsibility for the actions of management and the culture at AWB during the Oil-for-Food programme. The

⁵⁴⁴ CB 8/5099.

⁵⁴⁵ CB 8/5118-9.

⁵⁴⁶ CB 8/5600.

⁵⁴⁷ CB 8/5611.

⁵⁴⁸ CB 8/5246.

Board is committed to building the right accountability and operating culture in the future and making significant changes to make sure it does not happen again.

681 Stewart gave evidence and described the effect of the Cole Inquiry on AWB in these terms:⁵⁴⁹

It was a devastating situation for the company to find itself in. It was demoralising to the board and staff and had a very severe impact on the company's reputation and its value on the market.

682 Stewart also confirmed in evidence that his view, and the view of the AWB board, was that:⁵⁵⁰

AWB's reputation [had] been significantly damaged as a result of the company's participation in the UN Oil-for-Food Program and subsequent media coverage.

Christopher Moffet, an AWB director at the time of the Cole Inquiry, described the effect of the Cole Inquiry as follows:

Well, it was almost disastrous. We had a CEO who had to leave the company. The polite way of putting it is he resigned. The chairman was under enormous stress during that period. At one of the international board meetings, he broke down, he broke down weeping, which I can understand It was an extremely stressful time for him and everybody else. ...

The effect on the company, certainly on the shareholders of the company, the growers, was disastrous because we as a company and myself as a director and other gentlemen had gone in battling hard that we had done no wrong because that's what we were told. All the investigations at great expense by Sir Anthony Mason and others could not find anything wrong and here we were starting to come out that a lot of wrong had allegedly happened.

683 On 26 February 2007, AWB released to the ASX commentary on the presentation given by the Managing director at the 2007 Annual General Meeting.⁵⁵¹ The commentary includes:

We have a Long way to go to strengthen and rebuild the company...

[M]y priorities were focused around dealing with the impacts of the Oil for Food Inquiry... initiating activities to start a program to rebuild the culture and inculcate a set of values through the whole organisation; working with the

⁵⁴⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1535, L31 - T1536, L9.

⁵⁵⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1493, L22 - T1494, L9; T1536, L27.

⁵⁵¹ CB 8/5693.

Board on the activities to improve the governance structure ... and clearly, re-engaging with a range of stakeholders who were disappointed with the outturn of events in a range of ways.

Staff morale, turnover and engagement

684 AWB's 2006 Annual Report states:⁵⁵²

The challenge for management during the Oil-for-Food Inquiry has been to maintain the focus of our people on the day to day operational requirements of the company. The Oil-for-Food Inquiry inevitably affected the traditionally high levels of employee engagement within the AWB group. Voluntary turnover has risen and a workforce re-engagement programme is in place.

685 AWB's report on its full year results for the financial year ended 30 September 2006 refers to a 'cultural change program engaging over 600 staff.'⁵⁵³

ASIC IS&M witnesses

686 ASIC called several witnesses who were employed in the IS&M division during the introduction of the inland transportation fees and the after sales service fees: Hogan, Whitwell, Officer, Edmonds-Wilson and Emons. For reasons I have discussed elsewhere, I do not accept the evidence of Emons unless it is corroborated by other reliable evidence. I do not propose to set out his evidence. Whitwell only took up his position in IS&M after Flugge had left AWB. I set out below a summary of the evidence of Hogan, Officer and Edmonds-Wilson as relevant to Flugge. On occasions the evidence is repeated when I address particular events that are relied on by ASIC in its case against Flugge or Geary.

Dominic Hogan

687 Hogan gave evidence for ASIC. Hogan commenced employment with the Australian Wheat Board in 1993. In early 1997, Hogan joined the Middle East Desk in the international marketing department of AWB as a marketing executive. He reported to Emons, the Regional Manager of the Middle East Desk. Officer was the general

⁵⁵² CB 8/5260.

⁵⁵³ CB 8/5459,5461.

manager of the Middle East Desk.

688 Hogan was stationed in Cairo from August 1998 to August 2000 as the account manager for Egypt, Sudan, Yemen, Israel and Jordan. In August 2000, Hogan was promoted to Regional Manager, Middle East and returned to Melbourne for that position, effectively taking over from Emons. Hogan remained in that position until August 2002 when he went on sick leave. Whitwell took over from him.

Introduction of the trucking fee – June 1999

689 Hogan gave evidence about correspondence within AWB which followed the IGB's wheat tender in 1999, which made provision (in Item 10 'Price') for delivery 'free on truck' with the 'Cost of discharge' set at US\$12.00 per tonne to be paid to the 'Land Transport Co.'

690 Hogan identified his handwriting on a copy of the tender on which he had written 'Iraqi accounts frozen.'

691 Hogan said that there was some discussion about Item 10 (Price) in the wheat tender among AWB personnel, including Lister, Borlase, Owen. It was in that context he was advised by Owen that Iraqi accounts were frozen. Owen had asked in an email of 17 June 1999 how the money would be paid when all Iraqi accounts were frozen.⁵⁵⁴

692 Hogan did not recall a response to that question.

June 1999 trip to Iraq and trip report

693 Hogan sent an email⁵⁵⁵ to Geary and others on 16 June 1999 referring to an impending trip to Iraq and noting that Zuhair wanted to discuss some contract terms and conditions 'personally'.

694 Hogan and Emons visited Iraq in June 1999. During that trip, he and Emons met with

⁵⁵⁴ CB 1/371 referred to at paragraph 148.

⁵⁵⁵ CB 1/367.

Zuhair, Director General of the IGB. Emons led the meeting on behalf of AWB.

695 Hogan sent an email report on 24 June 1999⁵⁵⁶ to Geary, Officer, Emons and others saying 'note from recent trip to Baghdad' and said that the main reason for the trip was to discuss new terms and conditions for the tender.

696 Hogan's report contains a section on 'Free in Truck' noting that 'The IGB have requested the offers are submitted free in truck Iraq.⁵⁵⁷ The cost is US\$12.00 a tonne which the supplier adds to their offer. Hence, this part is not an issue.'

697 Hogan said that the fact that this was 'not an issue' would have been discussed with Emons and referred to the fact that it was not an issue as far as AWB's commercial return was concerned.⁵⁵⁸

698 Hogan's report noted that the 'problem' which needed to be resolved was the payment mechanism, as all Iraqi accounts were frozen.

699 Hogan's report stated that the reason for the payment 'is due to excessive amount of Iraqi Dinars placed into the market by Ministry of Finance for every phase ... which has an impact on their currency rates.'

700 Hogan said that Zuhair told him this was the reason for the payment, he and Emons raised objections to the inland transport term. Hogan said he raised objections on this and subsequent trips.

701 Hogan said that Zuhair gave detailed reasons why the fee was to be included in the OFFP.⁵⁵⁹ Zuhair said that there was a decree from the president that this was a

⁵⁵⁶ CB 1/375.

⁵⁵⁷ CB 1/375.

⁵⁵⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T928.

⁵⁵⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T930.

standardised term for all suppliers into the Iraq market.⁵⁶⁰

702 Hogan said that ‘the Iraqis had told us that these terms and conditions had been submitted to the UN for approval.’⁵⁶¹

703 Hogan addressed ‘Snowy’ (Snowball) in the email, saying ‘Iraq have submitted the “distribution plan” to the UN which requests changes to conditions – can you chase to see where this paper is and what the feeling of the UN committee is????’.

704 Hogan said he recalled a response from Snowball that the Iraqis ‘had submitted something to the United Nations under this for some distribution plan.’⁵⁶² Hogan was taken to a response from Snowball which said ‘Distribution plan was submitted by the government of Iraq to the UN security council’ and provided the link to the distribution plan online.⁵⁶³

705 On 25 June 1999, Hogan emailed Snowball (copying others including Geary) and pasted Owen’s earlier comments on the IGB tender and noted his own comments.⁵⁶⁴ In relation to the new free in truck term, and Owen’s question as to how it could be paid when Iraqi accounts were frozen, Hogan noted that ‘The US\$12 will be added on to the CIF price, so no skin off our nose. However, we need to find a way to implement payments as all Iraqi accounts frozen. Discretion is required here.’

706 Hogan explained the need for discretion related to inquiries that were to be made (including with contacts in the UN) as to whether UN approval had been given. He said that there was a concern that, since Iraq had said the contract terms had been submitted to the UN for approval, Iraq would expect AWB to take that ‘on face value

⁵⁶⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T930.

⁵⁶¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T931.

⁵⁶² Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T927.

⁵⁶³ CB 1/379.

⁵⁶⁴ CB 1/381.

and trust.’ Hogan said Iraq could say ‘you don’t trust us’ and cut off trade, as they had done with other suppliers.⁵⁶⁵ I infer that Hogan feared this would be the response of Iraq if AWB queried whether the UN had approved the payments. Hogan said that that need for ‘discretion’ would not inhibit discussion with the UN. Rather, it was about discretely making inquiries to find out what is going on and what was happening with the submission from the Iraqis to the UN.⁵⁶⁶

707 Watson responded that he would have a chat with Emons about a ‘suitable method’ of payment.

708 Hogan noted that he considered that Watson and Emons would resolve the issue of method of payment as he was to return to Cairo.⁵⁶⁷

October 1999 meeting with Zuhair Daoud

709 Hogan took a trip to the Middle East (Jordan and Iraq) with Flugge and Rogers in October 1999. It is apparent that Emons was initially meant to go but did not. One of the agenda items suggested by Emons in an email to Hogan⁵⁶⁸ was the method of payment of the inland trucking fees.

710 Hogan met Flugge and Rogers in Amman. He did not recall discussing the matters raised in Emons’ email regarding the method of payment with Flugge or Rogers at the time he received the email (that is, before the trip).⁵⁶⁹

711 One of the reasons for the trip to Iraq was a grains conference that was being held there.⁵⁷⁰ Hogan said the reason for Flugge’s trip to Iraq was to open the seminar at

⁵⁶⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T931-2.

⁵⁶⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T932.

⁵⁶⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T932.

⁵⁶⁸ CB 2/653.

⁵⁶⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T936.

⁵⁷⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1043.

the grains conference.⁵⁷¹

712 During the trip there were meetings with The Minister for Trade, Minister Saleh and Zuhair. The meeting with Minister Saleh was at a 'higher level' and did not involve contract discussions.⁵⁷² The meeting with Zuhair involved Flugge, Rogers and Hogan.

713 Hogan said he could not recall the exact words used in the discussions with Zuhair in Iraq⁵⁷³ but said that his notes of the trip contained in emails recorded what happened.⁵⁷⁴

714 The discussions related to contracts under two OFFP phases under discussion, an old phase (25,000 tonnes) and the new phase (200,000 tonne contract), the latter of which included the inland transport fee.⁵⁷⁵

715 Hogan and Flugge sat directly opposite Zuhair at his desk; Rogers sat slightly behind them at the end of a small table. During the meeting, the AWB delegation discussed with Zuhair everything in Hogan's trip report, including AWB's objection to paying the US\$12.00 fee, Hogan's bartering proposal to not pay the fees but to give the IGB free wheat, and then some discussion of the pricing.⁵⁷⁶

716 Hogan gave evidence that the following idea which was written in an email to AWB colleagues after the meeting was discussed at the meeting with Zuhair: 'A brilliant idea how to settle the US\$12.00 free in truck payment to transport companies. We do a contract with them when enough equity was built up then they sell to IGB and IGB

⁵⁷¹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1045.

⁵⁷² Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1050.

⁵⁷³ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1049.

⁵⁷⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T938; CB 2/659, 2/665; discussed at paragraphs 249 and 256.

⁵⁷⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T938.L7 – T939, L3.

⁵⁷⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T938.

pay them in US dollars via the 986 system.⁵⁷⁷

717 During this discussion, Hogan said that Flugge was sitting a metre away from Hogan, focused on Zuhair, and was awake.⁵⁷⁸

718 During the Zuhair discussion, Zuhair said 'the president has issued to all ministers bringing product into Iraq, suppliers must pay the US\$12.00 before ship arrives so that unloading could proceed. If the US\$12.00 was not in place then the vessel would not be unloaded.'⁵⁷⁹

719 Hogan said that he voiced AWB's objections to paying the inland transport fees in terms set out in an email to Emons: 'I voiced our protest to this system as we already wait so long for payment. We would be unhappy to prepay this amount. Also with the weight discrepancies there would be a lot of juggling with payments, et cetera.'⁵⁸⁰

720 Hogan said that his comments in an email that Zuhair understood this point and was approaching the Minister for a special concession for AWB reflected the meeting.⁵⁸¹

721 Hogan said that he was the only one in the meeting with Zuhair, Flugge and Rogers who was involved in discussions about contracts and contract negotiations.⁵⁸²

722 After the Zuhair discussion, Hogan, Rogers and Flugge had a discussion while standing in a circle in the car park of the Al Rasheed hotel. Rogers asked Hogan to explain the barter system of giving the Iraqis a Panamax of wheat – effectively a \$10 million vessel of wheat – which was Hogan's brilliant idea. Hogan said that because

⁵⁷⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T940.

⁵⁷⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T940, L20-5.

⁵⁷⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T940, L26 - T941, L1; T941, L8-9.

⁵⁸⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T942; CB 2/665.

⁵⁸¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T943.

⁵⁸² Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1049.

of the issues of paying the inland transport fee, this was one way around it.⁵⁸³ Hogan cannot recall any further comment about his idea from Rogers or from Flugge.⁵⁸⁴ Hogan did not recall any other discussions with Rogers and Flugge during the trip about transport fees.⁵⁸⁵

723 Hogan said that no contracts were signed during the trip to Iraq in October 1999 and that the mechanism for payment of the transport fee had not been finalised.⁵⁸⁶ He says he did not inform Rogers and Flugge of the resolution of the inland transport issue.

724 Hogan said in cross-examination that Flugge was in Iraq to open the conference and that his status was that of a 'figurehead', similar to a minister in Iraq. It was a known practice to use Flugge's name when negotiating 'even without the Chairman's knowledge.' Hogan called it 'one of the last cards we would play.'⁵⁸⁷

725 Hogan gave evidence that the problem AWB faced in paying the inland transportation fees was due to US sanctions and not UN sanctions.

726 Hogan's email after the meeting discussed establishing an account in Jordan or paying directly into the Iraq nominated account 'as long as the link was not apparent that the funds were going into Iraq.'

727 Hogan explained that it was necessary that the link was not apparent because of US sanctions on Iraq. He said that if there was a reference to a payment involving Iraq 'actual transfer of funds was blocked through the US banking system.'⁵⁸⁸

728 When asked whether he was also concerned that UN resolutions prohibited transfer

⁵⁸³ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T942.

⁵⁸⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T941, L14 - T942, L21.

⁵⁸⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T946.

⁵⁸⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1042.

⁵⁸⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1050.

⁵⁸⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T944.

of currency to Iraq, Hogan said at this time it was his belief that the UN was approving the payment of currency to Iraq under the OFFP, and that he believed at the time that the programme had been changed to allow such payments to be made to Iraq. He said the problem was that the payment could not 'physically' be done because of US sanctions.⁵⁸⁹ I inferred that Hogan was conveying that it didn't surprise him that the UN could approve payment of the inland transportation fee by AWB to Iraq without considering how that could be carried out because of US sanctions preventing direct payment to Iraq.

729 Hogan's email then said 'Another option is to use the maritime agents, vessel owner's account or buy a very large suitcase.' Hogan explained that the suitcase reference referred to when Australia used to trade with Iraq during US sanctions between 1991 and 1996 and Zuhair would bring suitcases of cash to Amman for transfer to Australia, and transferred gold at one point.

730 Hogan said in cross-examination by Flugge's counsel that anyone at that meeting with the IGB in October 1999 would not have been made aware of any illegality or impropriety, or that the trucking fees proposal was against the law or in breach of sanctions.⁵⁹⁰

Hogan's belief in UN approval

731 Hogan said that at that time in 1999 until 'the iron filings part' he believed that the inland transport fee had been approved by the UN.⁵⁹¹ He said 'If someone had have asked me I would have said, "It's been approved by the UN, to my knowledge."' ⁵⁹²

732 Hogan said AWB was told by the IGB prior to the fee being introduced that the IGB

⁵⁸⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T944; this evidence is discussed at paragraph 165.

⁵⁹⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1037.

⁵⁹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1037.

⁵⁹² Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1058.

had submitted the term to the UN for approval,⁵⁹³ and was subsequently told by the IGB, that it had been approved by the UN (or at least that the addition of the after sales service fee had been approved).⁵⁹⁴

733 Hogan said that other global traders had free on truck terms with Iraq.⁵⁹⁵ He said that inland transport was spoken about openly and was reported in MarketWise.⁵⁹⁶

734 Hogan said that if it was something illegal or not quite right, it would not have been so openly discussed and known within AWB. Hogan was asked in cross-examination by Mr Hill QC whether he was acting honestly. Hogan said, 'Yes, I believe I was.' Mr Hill asked, 'So were the people around you as best you could gather?' Hogan said, 'Yes' and then said as follows:⁵⁹⁷

I think through all of these documents, and I've said this before, that at no stage - if there was something that was thought to be completely illegal or not quite right, the amount of people who were copied in on these widely distributed documents and the common knowledge within the company that we spoke openly and we read market reports about inland transport through Bellingham which was MarketWise, it wasn't a secret. It wasn't this secret dealing or anything, it was very, very open, it was very known. That's why I said no-one raised an eyebrow if we mentioned inland transport, it was a known and being a known and people actually - I always thought that people, we thought it was initially approved.

735 In re-examination, Hogan was asked the basis for his assumption that the inland transport had been approved.⁵⁹⁸ Hogan said that Iraq had advised that they had submitted the terms to the UN for approval. Hogan said:⁵⁹⁹

We had submitted contracts, it goes right back to the start, yes, there was something submitted to the UN as confirmed by Tim Snowball. We then had

⁵⁹³ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1102, L1-3.

⁵⁹⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T967, L23-8.

⁵⁹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1053.

⁵⁹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1058, L10-12.

⁵⁹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1058.

⁵⁹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1095.

⁵⁹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1097-8.

contracts that made reference to them, to free in truck all governorates of Iraq, that was approved by the UN. So the chain of events and we were executing against these contracts. I had deduced that - and no-one had actually - each time I had actually posed a question internally within the company as well, no-one came back and said, "No, we don't have any approval for this."⁶⁰⁰

....

I didn't think there was any impropriety in regards to what I had received from the information from our head office as well, that no-one was saying this was illegal. I didn't believe it was against the law, what we were doing.⁶⁰¹

[The Iraqis] had advised us at that time they had submitted this to the United Nations to get approval. That was confirmed then by Tim Snowball who returned back and said the Iraqis had actually submitted something to the United Nations. So what the Iraqis were telling us and what our New York office were telling us was consistent.

736 Hogan said that contracts were submitted to the UN which referenced the term requiring discharge 'free in truck all governates Iraq' and that those were approved. He said that AWB was executing against those contracts. He said the only issue was 'more about the US economic sanctions'.⁶⁰² However, at the time the port charge was introduced, Hogan understood that the UN sanctions prevented payments to Iraq without UN approval.' (see further section on 'Port charge' at paragraph 768 below)

737 In re-examination, Hogan again gave evidence of his state of mind that the inland transportation fees had been approved by the UN. Mr O'Bryan asked Hogan at what point did he concluded that his state of mind was wrong.

738 Hogan said:⁶⁰³

I always thought right through that there was an inland transport fee that was approved by the United Nations.

I came to the conclusion during certain periods of time, February 2001, that the Iraqis were milking it, the Tigris deal and that was a mechanism that allowed us to milk it, the AWB.

However, for the United Nations to introduce a distribution plan that actually made the payment of the actual product to go out through Iraq was - doesn't -

⁶⁰⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1096.

⁶⁰¹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1096-7.

⁶⁰² Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1098.

⁶⁰³ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1099.

it's not that far-fetched and you've got this period of time where they are talking about lifting sanctions, they are about to introduce smart sanctions. Those things were happening at the same time, that Iraq was looking like the sanctions were going to be lifted. So there's no reason to think it hadn't been approved. It wasn't secret knowledge, it was in the MarketWise. The whole market knew about it. You can see how our company corresponded. None of this is kept behind closed doors, it's pretty open correspondence with 50 people copied in. If something is corrupt and completely illegal, you wouldn't copy 50 people in.

739 I accept Hogan's evidence on this point. As discussed later this evidence is consistent with evidence given by other officers of AWB. This evidence undermines ASIC's case that it was widely known within AWB that AWB was acting wrongly in paying the inland transportation fees.

740 Hogan said that he held that belief that it was approved until mid-2002 or the time the iron filings issue was raised.⁶⁰⁴ Hogan did say a number of times that no approval was ever provided to AWB.

741 Hogan was asked about matters which might be said to run contrary to his belief in the UN approval of the trucking fees.

742 In June 2000 Hogan emailed⁶⁰⁵ Snowball, Borlase, Watson and others ahead of an internal meeting on Iraq. In that email, he inquired of Snowball about the NY mission position on the free in truck arrangement and said that he assumed that the 'UNSCR 986 has agreed to this condition as it is in the contracts?'

743 Hogan was asked why, if he assumed that the UN had approved the fees, he needed to ask this question.⁶⁰⁶

744 Hogan explained that he had no real involvement in the Iraq market between June and October.⁶⁰⁷ He later said in cross-examination 'at that time, in October, I hadn't

⁶⁰⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1058.

⁶⁰⁵ CB 1/1125.

⁶⁰⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T951.

⁶⁰⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1098.

fully learned whether they were approved or not approved or how the mechanisms themselves worked and I just wanted to see that that had all happened because the contracts were agreed, submitted to UN approved, I was just reconfirming that point.⁶⁰⁸

745 Hogan did not recall getting confirmation from Snowball or anyone about whether the UN had approved those arrangements.⁶⁰⁹

Ronly Holdings Limited

746 Hogan was asked about an email sent by Stott to, among others Hogan and Geary,⁶¹⁰ which referred to the arrangement with Ronly whereby AWB paid Ronly for making Iraq freight and land transport payments on behalf of AWB.⁶¹¹ Hogan said he was aware from around August 2000 that AWB was making transport payments to a Ronly nominated company.⁶¹²

747 Hogan said that he did not have a strong understanding about why Ronly was used as an intermediary for payment of inland transport and does not recall being given an explanation. He knew of a proposal for an AWB-Ronly joint venture. He understood why they wanted to get rid of Ronly; he said that there was a belief that it was corrupt 'from the previous management.'⁶¹³

748 Hogan said in cross-examination that he was aware that the Arthur Andersen report involved adverse findings against Emons.⁶¹⁴

⁶⁰⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1077.

⁶⁰⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T952.

⁶¹⁰ CB 1/1235.

⁶¹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T957.

⁶¹² Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T957.

⁶¹³ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T957.

⁶¹⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1081.

Trucking fee increase – October 2000

749 Hogan was asked about the increases in the trucking fees. Hogan and Stott went on a trip to Baghdad in October 2000 and met with the IGB and the Ministry of Trade. Hogan recalls being informed during the meeting with the IGB that the trucking fee would be increased. He recalls that it was the new director general, Abdul-Rahman, who told them of the increase and explained it on the basis that Iraq's costs were 17 Iraqi Dinar per kilometre.⁶¹⁵ Hogan noted the increase 'raised eyebrows' as the fee effectively doubled or tripled.⁶¹⁶ However, Hogan said that the increase did not lead him to question to credibility of the fee. He said, 'If it was approved by the UN it was just more money on the table we are going to have to prepay prior to getting payment back.'⁶¹⁷

750 Hogan said that AWB did not confirm that the increased fee was UN approved before agreeing to it because at this stage it was his understanding that the amount of the fee was predetermined between the Iraqis and the UN.⁶¹⁸ He said after his discussions with the IGB he was under the impression that the fee was agreed to, 'or it was being agreed or it was going up for the next phase.' Hogan could not recall the exact conversation.⁶¹⁹

751 Hogan did not recall discussing with anyone at AWB that the \$35 fee should be verified with the UN.

752 Hogan's evidence that he was not alerted to any impropriety by the increases in the fees as the original rate of US\$12.00 per tonne was 'very commercial' and that the increases were in line with the cost of transporting wheat from other ports, which were

⁶¹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T961.

⁶¹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T961.

⁶¹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T961.

⁶¹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T961.

⁶¹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T961.

known in the market.⁶²⁰

Alia for Transportation and General Trade

753 Hogan's draft trip report for the October 2000 meetings⁶²¹ referred to "AWB's agent reported discharge had been reduced due to a lack of transports to remove the wheat. IGB advised to their knowledge there was no transportation issue.'

754 Hogan confirmed that the 'agent' referred to was a Mr Vrjooran who worked for Alia and was based at the port of Um Qasr, representing AWB's interests.⁶²²

755 Hogan said he went twice to the Port of Um Qasr, once in the June or July 2000 and then subsequently with Rowland and Jones. Hogan said that he saw a lot of trucks at Um Qasr port.⁶²³

756 Hogan said the reference in his handwritten note⁶²⁴ to director general land transport company relates to a discussion he had with Alia agent Vrjooran at Um Qasr (it is not clear when). They discussed how the system worked with a view to reducing the cost of demurrage. Hogan described the process as follows: AWB paid Alia transport who took a commission; they confirm receipt to the state company for water transport; they write a letter advising the state overland company and then the transport is organised.⁶²⁵

757 Hogan said that the reference to 'no influence on trucks' likely means Alia has no influence on trucks as the Grain board owned the majority of the trucks. He

⁶²⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T954-5.

⁶²¹ CB 2/1455.

⁶²² Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T959.

⁶²³ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T960.

⁶²⁴ CB 3/1617.

⁶²⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T980.

understood that 75 per cent of trucks for grain were controlled by the IGB.⁶²⁶

758 Hogan met with Othman Al Absi of Alia in Jordan in August 2001. He was taken to an email summarizing those discussions.⁶²⁷ That email noted that Othman met with Saddam Hussein. Hogan was asked what he thought about that and whether he wondered what Alia did apart from being a transport company. He said he knew Alia had Iraqi owners who had some influence and that he had met two of the owners.

759 Hogan said that he did not take steps to investigate who controlled or owned Alia and was not aware of anyone else in AWB taking those steps.⁶²⁸

760 Hogan said he went some 12 or 13 times to Iraq and said that the 'whole country was extremely rundown.' He said transport was 'ordinary'. Hogan agreed that the standard of telecommunications and transport was 'extremely poor.'⁶²⁹

November 2000 – 10 per cent after sales service charge

761 Hogan sent an email on 2 November 2000 to various AWB personnel⁶³⁰ (not Flugge or Geary) confirming a sale with the IGB. The email records the way the final contract price was calculated:

**10% will be added to px [price] and included into trucking fee - i.e. IGB will confirm USD 214.50 .. trucking fee will be USD 44.50 ... this has been approved by UN (as per IGB - I will get this in writing).

762 Hogan recalls being told that by Abdul-Rahman on 1 November about the addition of the after sales service fee.⁶³¹ Hogan said he contacted his General Manager to discuss (Stott). He recalls that Abdul-Rahman advised the after sale service fee was for

⁶²⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T980.

⁶²⁷ CB 3/1975.

⁶²⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T980.

⁶²⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1072-3.

⁶³⁰ CB 2/1501.

⁶³¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T966.

improvements to the wharf and to increase grain logistics capacity. Hogan said Abdul-Rahman advised that the charge had been approved by the UN. Hogan said he requested that Abdul-Rahman send the approval from the UN. Hogan notes that the approval was never received and said that no one in AWB followed up on the issue.⁶³²

Introduction of the port fee – February 2001

763 Hogan said that he always thought the inland transport fees were approved but in February 2001 (around the time of the introduction of the port fee) he thought the Iraqis were ‘milking it’.⁶³³

764 Hogan was asked about the February 2001 trip report.⁶³⁴ Hogan and Borlase travelled to Iraq in January and February 2001. On 7 February 2001, Borlase sent an email which contained a summary of that trip and also attached a copy of the February 2001 Iraq trip report. The email was sent or copied to numerous AWB personnel and to email groups. Hogan confirmed that the email groups would have corresponded with the pool, international marketing, chartering, and that Jane Goode (Goode), copied to the email, was either Flugge or Lindberg’s assistant.

765 The trip report was prepared by Hogan and Borlase and said that the trucking fee was US\$25.00 plus a 10 per cent service fee. It states, ‘we believe the increase in trucking fee and the addition of the service charge is a mechanism of extracting more dollars from the escrow account.’

766 Hogan confirmed that that was the view he had formed at the time. Hogan discussed it with Stott.⁶³⁵ Hogan said that no one else who received the email raised this concern

⁶³² Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T967–8.

⁶³³ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1098; discussed above at paragraph 738.

⁶³⁴ CB 2/1557, see paragraph 483 and following for details of the report.

⁶³⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T972.

with him.⁶³⁶

767 Hogan said that he discussed this with Stott upon his return to Melbourne. He raised his concern that 'the funds weren't being used or had anything to do with grain ... hence we used the word "syphoning".' Upon raising these concerns with Stott he said Stott told him he was making assumptions and had no hard facts except for his interpretation of what Abdul-Rahman had said. Stott told Hogan not to make a big deal out of it and continue with how AWB was doing business.⁶³⁷

Introduction of the port fee – March 2001

768 Hogan was referred to an email chain⁶³⁸ from March 2001 about the levy demanded by the Iraqi port agents to be paid in cash at the port. That email chain recorded that 'Dom [Hogan] is of the opinion 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.' Hogan recalled expressing that opinion.⁶³⁹

769 Snowball replied that Moules from the Australia Mission will be following this up with the UN. Snowball later conveyed Moules' response that Iraq has the ability to charge a port fee but payments need to be made in Iraq currency as 'any payments in US dollars are breaching sanctions.' Moules advised that previous payments in USD were technically in breach but the 'sanctions committee has been aware of these payments but has been turning a blind eye if the amounts are not excessive.'⁶⁴⁰

770 Hogan said that, upon readings this, he did not have cause to reflect on the inland transport and service fees and whether the provision of US and European currency in

⁶³⁶ Transcript of hearing, *ASIC v Geary & Flugge* Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T973.

⁶³⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T973.

⁶³⁸ CB 2/1584-4, see paragraph 492 and following for details of the emails.

⁶³⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T978.

⁶⁴⁰ Referred to at T978.

those payments breached sanctions and no one else in AWB raised it.⁶⁴¹

771 The port charge was then built into the inland transport fee, Hogan saying he thought this would not breach sanctions, 'At this stage here, my state of mind, is the inland transport and however they loaded it up was still approved by the UN' and that 'I took it on face value from the Iraqis when they said it had been included and approved.'⁶⁴²

Tigris

772 Hogan said that he was instructed by Stott to raise the issue of Tigris with the Minister in February 2001. He said, 'Overall I paid very little attention to this matter.'⁶⁴³ Hogan confirmed in cross-examination that he was absent in August 2002 for a stress-related illness he described as a breakdown.⁶⁴⁴ Whitwell took over the market thereafter, although Hogan was still copied on emails.

773 In September 2002, Long emailed⁶⁴⁵ Norman Davidson Kelly (Davidson Kelly) copying others including Hogan, Stott and Geary on the Tigris issue noting, 'We may have an angle to assist you with the debt recovery.'

774 Hogan said that Long seemed to have taken up Tigris Debt recovery after Stott. He said there was discussion of recovering the debt and 'clipping the ticket', which meant charging Tigris a fee (he says this was Long's idea), to collect the debt.⁶⁴⁶

775 Hogan said he regarded the idea of trying to recover the debt as ridiculous but he does not recall raising that. He did not recall thinking it was improper he just did not

⁶⁴¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T979.

⁶⁴² Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T985.

⁶⁴³ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T976.

⁶⁴⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1054.

⁶⁴⁵ CB 4/2651.

⁶⁴⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1011.

understand why AWB was recovering this debt for donated cargo when IGB owed AWB for cargo. He met some weeks later with Davidson Kelly to discuss the Tigris Debt.⁶⁴⁷

776 Hogan signed a short-form contract for 500k of wheat to Iraq in December 2002. He confirmed that the two contracts entered into at that time included components for iron filings and the Tigris Debt.⁶⁴⁸

777 Hogan said that while he thought the transport fee was approved, he thought the Tigris deal was a mechanism for AWB to 'milk it' as the Iraqis had done.⁶⁴⁹

Iron filings

778 Hogan said that he held that belief that the inland transport fees were approved until mid-2002 or the time the iron filings issue was raised.⁶⁵⁰

779 On 22 August 2002, Hogan forwarded an email from the IGB to Whitwell and Edmonds-Wilson⁶⁵¹ and stated in relation to the iron filings issue, 'We need to think how we "legally" pay Iraq.'

780 Hogan was asked why 'legally' was in inverted commas. He said that it was his state of mind at the time that this was just a direct payment to Iraq and that it wasn't consistent with how AWB had been dealing with the inland transport payments which 'whether it was right or wrong, we assumed there was some UN approval over the inland transport part of it but this was not – this was completely different to inland transport.'⁶⁵² This gave rise to what Hogan considered a legal issue.

⁶⁴⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1030.

⁶⁴⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1032.

⁶⁴⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1098-9.

⁶⁵⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1058.

⁶⁵¹ CB 4/2619.

⁶⁵² Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1006.

Nigel Officer

781 Officer gave evidence for ASIC. Officer commenced employment with AWB on 26 March 1984. He held a number of positions at AWB over a period of 16 years. He was the General Manager Global Sales and Marketing from late 1995 until his employment ceased on 9 June 2000.

782 As General Manager of Global Sales and Marketing (IS&M), Officer reported to Rogers, AWB's Managing Director, and was responsible for some 50 staff, including three Regional Managers.

783 Emons was the Regional Manager for the Middle East, Africa and Europe Section (also known within the AWB Group as the 'Middle East Desk'). Officer recruited Emons for that position in early to mid-1996. Emons had three Account Managers based in Melbourne and an Account Manager, Hogan, based in Cairo, each of whom reported to Emons.

784 Officer was in a corner office, with the Middle East desk within his sight.

785 The Chairman of AWB during Officer's tenure as General Manager of IS&M was Flugge and, before him, Clinton Condon.

786 Officer gave evidence that he had various discussions with colleagues in AWB in or around the time the June 1999 IGB tender came in.

787 Officer did not recall discussions at the International Grains Conference (IGC) in London in 1999 (which he said was attended by Flugge and Emons and Joanne Martin (Martin) about the proposal that the Iraqi Grains Board would impose inland transportation or trucking fees on its contracts.

788 Officer recalled discussing the inland transportation fee clause with Emons, Watson, Flugge, Rogers, Ingleby, and probably Tighe.⁶⁵³ The general nature of the discussion was that AWB had been presented with a situation where the inland transport fee was to be paid, that the IGB had stated that they had negotiated or discussed that with the

⁶⁵³ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1168.

UN, the UN were on board and that was something that they were in agreement with and that AWB was required to make the payment to a company or bank advised by the IGB.⁶⁵⁴

789 The information that the UN were on board came from a conversation Emons had with Zuhair, wherein Zuhair advised that he had discussed the matter with the UN.⁶⁵⁵ This meeting was at or around 25 June 1999.⁶⁵⁶

790 Officer said that he 'suspected' that that discussion with those mentioned above included a discussion of using Ronly as an intermediary.⁶⁵⁷ He recalled discussing the need to 'divorce clearly from the FOB price any connection with a shipping/logistics charge should the contracts come under scrutiny', as recorded in an email from Emons.⁶⁵⁸

791 Officer also said he met with Ronly some time prior to March 2000.

792 Officer said that he discussed the Free in Truck provision with Flugge. He said he could not remember the time, the date, the place but he does 'in general' recollect discussing it with Flugge.⁶⁵⁹

793 Officer did not recall discussing any connection between the sanctions and trucking fee with Flugge. He said that the discussions focused on the fact that AWB had been requested to pay the fee as a 'non-negotiable.' He recalled that he told Flugge the fee was being paid for inland transport. He did not recall discussing with him how the

⁶⁵⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1168, L30 - T1169, L2; T1189, L27 - T1191, L3; T1193, L28-9.

⁶⁵⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1191, L5-11.

⁶⁵⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1192, L9.

⁶⁵⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1217.

⁶⁵⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1218 referring to CB 1/911.

⁶⁵⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1169.

fee would be paid.⁶⁶⁰

794 Officer said that he considered it necessary to discuss with Flugge as it was a deviation from standard terms of contract with Iraq that would require approval at the more senior levels. He said Flugge would be notified as the matter required board approval but he could not recall who told him that board approval was required. He said he also informed Rogers.

795 Officer did not have a recollection of anyone saying that the Board had given approval to the inland transport fees.⁶⁶¹

796 Officer said Emons also discussed inland trucking with Flugge.⁶⁶²

797 Officer said that he did not recall specifically what Flugge said but that he recalled an approval was given.⁶⁶³ Officer later said the nature of Flugge's response was that AWB was in the business of selling the wheat at the best possible price return and the business should continue.⁶⁶⁴

798 Officer said that he recalled Flugge giving his verbal approval to the fees in mid-1999. He said Flugge's approval would have been on the basis that it was a 'non-negotiable' scenario and that not agreeing to the inland transport component would mean no business. Officer said that that was a generally held view in the business.⁶⁶⁵

799 Officer recalls discussions that AWB had not assumed responsibility for trucking services or contracting transport companies, only the payment of it. He recalls discussions in those terms with the Chairman, managing director CEO and other

⁶⁶⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1170-1.

⁶⁶¹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1184.

⁶⁶² Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1197.

⁶⁶³ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1186.

⁶⁶⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1197.

⁶⁶⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1185.

executives but he did not recall when that discussion with Flugge took place.⁶⁶⁶

800 Officer did not recall any discussion that the trucking terms were misleading and said there was no intention to mislead anybody.

801 Officer said he was not surprised that the trucking fees were paid to a company. He was shown an email exchange with Emons in November 1999 in which he learned that IGB had still not advised the trucking company to whom payment should be made. He recalled that AWB had been approached by a company in Jordan in connection with trucking payments. He later signed a payment authorisation in favour of Alia.

802 Officer did not recall discussions that sanctions prohibited payment of hard currency into Iraq. He does not recall anyone discussing that payments had to comply with UN sanctions.⁶⁶⁷

803 Officer said that Flugge had reasonably regular interactions with the Middle East desk, mainly with Emons but also others on the desk including Hogan.⁶⁶⁸ Officer said that Flugge would have had more contact with that desk as the Middle East market was less predictable than other desks, more tender-based and a more competitive, volatile market.⁶⁶⁹ Officer said that because of the size and importance of the market, there would have been regular dialogue with Flugge about issues of concern relating to that market.⁶⁷⁰

804 Officer conceded that any conversation he did have with Flugge in or around mid-1999 concerning the inland transport fee and its payment was in the context that he

⁶⁶⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (2 November 2015) T1210.

⁶⁶⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (2 November 2015) T1210.

⁶⁶⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1118.

⁶⁶⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1118.

⁶⁷⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1116.

believed the fee had been approved by the UN.⁶⁷¹

805 Officer admitted he understood that there were restrictions on making payments directly to Iraq.⁶⁷²

806 Officer said that, at the time of his discussion with other AWB executives in his office, he learned that the IGB had said that the inland transport fee had been negotiated or discussed with the UN and that the UN was 'on board'.⁶⁷³

807 Officer took 'considerable comfort' that the contract term was stated to be subject to UN approval.⁶⁷⁴ Officer said that he was not aware that subsequently the provision about UN approval disappeared from the contracts.

808 Officer said that, in his view, whether there was UN approval was a 'grey area.'⁶⁷⁵ Officer said that people at the operational level within AWB were conscious of that grey area. Officer said that 'the overall issue of complying with Iraq's request' was approved at higher levels, but as to the manner in which it was carried out, that was done on an operational level.⁶⁷⁶

809 Officer said that AWB had not tested the 'veracity' of the advice that the UN had approved the payments, so discussions took place in mid-1999 about making payments through third parties.⁶⁷⁷

810 Officer said of the payments through an intermediary, 'I would not go as far as to use the term "disguise" but it was something that was considered, yes, to avoid the direct

⁶⁷¹ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1337, L10-18.

⁶⁷² Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1198.

⁶⁷³ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1190.

⁶⁷⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1193.

⁶⁷⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1199.

⁶⁷⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1201.

⁶⁷⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1218.

connection between AWB and the third party recipient of the trucking monies.⁶⁷⁸

811 Of the findings in the Arthur Andersen report that some in AWB had been trying to avoid attracting the attention of the UN, Officer denied that anyone was on a mission to avoid UN attention but that it was more a matter of making payments through third parties.

812 Officer gave evidence in relation to a fax sent by Emons to the IGB in which he conveyed a message allegedly from Flugge about the importance of AWB's longstanding relationship with Iraq.⁶⁷⁹

813 Officer had no knowledge of whether such a discussion did in fact take place between Emons and Flugge, but he considered it possible that the conversation did not actually occur as Flugge was seen as equivalent to a Minister in Iraq, and his name was therefore used to add gravitas to communications.⁶⁸⁰

814 Officer was referred to a diplomatic cable recording a discussion he had with Bob Bowker (Bowker) of DFAT in early 2000 and confirmed that he advised that AWB was aware of, and respected, Australian Government obligations and UN security council sensitivities and would act accordingly.

Christopher Whitwell

815 Whitwell gave evidence for ASIC. Whitwell was engaged as the marketing manager in IS&M from 15 July 2002. As noted above, by this stage Flugge had departed AWB. I will deal with his evidence later in relation to Geary.

Nigel Edmonds-Wilson

816 Edmonds-Wilson gave evidence for ASIC. Edmonds-Wilson commenced employment with AWB in 1999 and transferred to the International Sales & Marketing

⁶⁷⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1219.

⁶⁷⁹ CB 1/397; Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1192, L10.

⁶⁸⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1193, L5-9.

Division (IS&M) in the Middle East/ Africa desk. Edmonds-Wilson said that the IS&M division was located on the 6th floor in an open plan arrangement. Edmonds-Wilson reported to Hogan and Long. Stott was head of IS&M.

817 Edmonds-Wilson said that Lister headed contract administration and sat close behind Edmonds-Wilson at the Western end of the floor. Edmonds-Wilson described Lister as meticulous in his work and having worked for AWB for 42 years.

818 Under cross-examination, Edmonds-Wilson said that Geary was in a separate 'trading' division that involved mostly domestic trading until late 2001. Counsel for Geary said that Mitch Morison (Morison) acted in Geary's role from March 2002 until to 'at least July 2002' when Geary had been seconded to a team working on an acquisition (called 'Project Around'). This involved Geary taking up an office next door to the AWB building in Lonsdale Street.

819 In November 2001, Long replaced Stott as head of the IS&M division.

820 In 2003, Edmonds-Wilson changed role becoming an account manager still reporting to Long and Hogan. Later Edmonds-Wilson reported to Whitwell when Whitwell became regional manager for Africa/Middle East in August 2002.

821 Edmonds-Wilson was made redundant in 2006 when the whole of the IS&M division was retrenched.

822 Edmonds-Wilson said he believed at all times that the contracts and conditions entered into relating to the inland transportation fees had been authorised by the Australian Government and the UN.⁶⁸¹ Edmonds-Wilson adopted an insistent tone conveying a strong desire to indicate that at all times he believed that he and his colleagues were acting in accordance with the UN resolutions. As indicated below, Edmonds-Wilson visited Alia in Jordan and wrote a trip report that detailed the trucking facilities that Alia had to carry out the distribution by truck of wheat shipped

⁶⁸¹ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T656.

to Iraq by AWB and the other facilities Alia had.

823 Edmonds-Wilson agreed in cross-examination that his decisions were not commercial but of a 'clerical' nature.

824 Edmonds-Wilson was taken to a number of document categories which he prepared, using information received in 'sales notes', which summarised contracts and payments to Iraq, including inland transport fees.

825 Edmonds-Wilson also had carriage of file maintenance and stated a number of times that various communications he was being shown would have been sent to him for record keeping purposes.

826 Edmonds-Wilson was often responsible (along with Hogan sometimes) for signing payment requests for inland transport costs which were then authorised by two signatories at the General Manager level. Edmonds-Wilson described the process for the authorization of payment requests as being that he submitted the request with supporting documents to the General Manager; once he had procured two authorising General Manager signatures, he would submit the request to the treasury team for approval and payment to the party to whom payment was to be made.

827 Edmonds-Wilson described in cross-examination that this payment request was made after the approval process involving the Australian Government and international agencies had been undertaken. Hogan would communicate with DFAT as part of that process and would sometimes prepare the UN security committee application documents.

828 Edmonds-Wilson described that approval process as follows:

- wheat tenders were very important and were generally sent to the regional manager or maybe the 7th floor (where the chairman and managing director were located⁶⁸²);

⁶⁸² Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T608.

- contracts signed;
- contracts sent to DFAT;
- DFAT to Australian mission to UN; and
- UN to AWB via DFAT.⁶⁸³

829 Edmonds-Wilson stated that he thought AWB was complying with the UN process.⁶⁸⁴ These approvals from the Office of the Iraq Program (OIP) were important as they allowed AWB to commence shipping programme. The approvals were given to Lister.

830 Under cross-examination, Edmonds-Wilson discussed the Wheat Export Authority attending AWB offices to audit, suggesting there that there was another level of oversight.

831 Edmonds-Wilson was responsible for dealing with demands from Alia for alleged short-payment of inland transport fees on behalf of the state company for water transport. He was responsible from time to time for providing Alia with a breakdown of inland transport fees.

832 Edmonds-Wilson did not recall ever being told by anyone in AWB that payments to Alia were going to the state company.⁶⁸⁵

833 Edmonds-Wilson said that he understood 'FIT' to mean 'Free in truck to all Governates of Iraq.'

834 Edmonds-Wilson did not know who devised that language which was included in the contracts. Contracts would generally be generated in Lister's contracts administration

⁶⁸³ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T612-13.

⁶⁸⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T622.

⁶⁸⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T617.

team.⁶⁸⁶

835 Edmonds-Wilson recalled inland transport costs increased but he did not know the reason for those increases, other than it was a difficult market and that AWB 'delivered to all governorates of Iraq in a difficult, potentially a war zone environment.'⁶⁸⁷ Edmonds-Wilson believed it would have been Long or Hogan who explained that to him.

836 Edmonds-Wilson recalled that someone said Iraq was a difficult place to do business and it was the only place where inland transport was included in AWB's supply contracts. It was said that AWB assumed risk – the nature of risk was that the company was liable to deliver the wheat and failing to do so would breach the contract.⁶⁸⁸

837 Edmonds-Wilson said in cross-examination that in his experience, overland transport was more expensive than shipping wheat.⁶⁸⁹

838 Edmonds-Wilson said he did not know what the 'after sale service fee' was at the time (around June 2001).

839 Edmonds-Wilson travelled to Jordan to visit Alia two or three times. His first visit was with Hogan in early to mid-2001.⁶⁹⁰ He recalls meeting Othman Al Absi at that time.⁶⁹¹

840 Edmonds-Wilson travelled with Whitwell to Jordan and Iran in 2003 (post-invasion). He attended a meeting at Alia offices with Alia chairman and Othman Al Absi, the

⁶⁸⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T611.

⁶⁸⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T595.

⁶⁸⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T595-6.

⁶⁸⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T659.

⁶⁹⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T665.

⁶⁹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T657.

General Manager. Edmonds-Wilson could not recall the specifics of the discussion but said that the trip report would have accurately represented what was discussed.⁶⁹² Edmonds-Wilson said in that 2003 Iraq trip report⁶⁹³ that Alia had 300 to 500 trucks.

841 Under cross-examination, Edmonds-Wilson agreed that based on his understanding of Alia, there was never any suggestion of it being a front for the Iraqi government.⁶⁹⁴ Edmonds-Wilson agreed with a statement put to him during cross-examination that his understanding was that 'that Alia owned its own trucks and had access to a large pool of subcontractors from which it could engage other trucking services.'⁶⁹⁵

842 In my opinion, Edmonds-Wilson's evidence was significant as it established that as a member of the IS&M team he strongly believed that the inland transport fees were a legitimate fee for the transport of wheat, had the approval of the UN and the Australian government. His evidence also suggests that in the IS&M division's other members may have also held this view as there was no discussion with Edmonds-Wilson by any member of the division to suggest the contrary.

Tigris

843 Although not relevant to Flugge, I include here evidence given by Edmonds-Wilson on the Tigris and Iron Filings issues, which are relevant to the claims against Geary.

844 Edmonds-Wilson said that in October 2002, he was not aware of specific details concerning Tigris or 'how it came about.'⁶⁹⁶ Edmonds-Wilson did not recall discussions about 'loading' contracts to recover the Tigris Debt.⁶⁹⁷

⁶⁹² Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T638.

⁶⁹³ CB 6/3498.

⁶⁹⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T657.

⁶⁹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T657.

⁶⁹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T627.

⁶⁹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T630.

845 Edmonds-Wilson was asked about an email he sent on 13 December 2002⁶⁹⁸ which contained the following note:

All

NB: This has been sent to a reduced list due to the nature of the Tigris Petroleum issue. Please treat as private and confidential and not for further distribution.

846 Edmonds-Wilson said that he thought that note might have been included following an instruction from Whitwell.⁶⁹⁹

Iron filings

847 Edmonds-Wilson was taken to correspondence about the settlement of the Iron Filings Claim following the trip by AWB's delegation in August 2002),⁷⁰⁰ including an email from IGB noting an agreement to settle the contamination claim, and an email from Hogan which said AWB needed to think 'how we "legally" pay Iraq.' Edmonds-Wilson said he did not recall any discussion about why 'legally' was in inverted commas at the time nor any discussion about any problems AWB might have paying for iron filings.⁷⁰¹

Flugge's witness

848 Flugge did not give evidence. The only witness called on behalf of Flugge was Martin Douglas Eberlein Kriewaldt (Kriewaldt) as an expert director and chairman. Kriewaldt was asked to answer several questions, as follows.

Unless otherwise specified defined terms have the same meaning as defined in the Third Further Amended Statement of Claim dated 21 June (sic 23 September) 2015 (TFASC)

If all (or a combination of material matters identified by you) of the matters alleged in the TFASOC were proven to have occurred, what, in your opinion,

⁶⁹⁸ CB 5/2977.

⁶⁹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T633.

⁷⁰⁰ CB 4/2619.

⁷⁰¹ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T623.

based on your experience as a company director, would:

- (a) a reasonable careful and diligent non-executive chairman have done:
 - (i) in the period 19 December 2001 to 15 March 2002;
 - (ii) in the period June 1999 to March 2002; and
- (b) a reasonably careful and diligent person in Flugge's position have done:
 - (i) in the period 19 December to March 2002;
 - (ii) in the period June 1999 to March 2002?

in the context of a corporation of the nature of AWB Ltd and in light of its policies and procedures and business activities?

2. In your opinion, based on your experience as a company director, do you consider that the policies and procedures implemented by the board of AWB Ltd during the period 19 December 2003 to 15 March 2002 were reasonably appropriate by reference to generally accepted Australian corporate practice at the time?

'Matters' means factual matters alleged in the TFASOC other than the paragraphs pleading a contravention.

849 Kriewaldt had considerable experience as a director and a chairman of many public and other companies including as chairman of the Suncorp Building Society.

850 ASIC submitted that Kriewaldt's report was inadmissible and made detailed written and oral submissions in support of its submission. In Ruling No 11 of 8 December 2015, I disallowed the objection of ASIC to the admissibility of Kriewaldt's report. The report was tendered.⁷⁰²

851 Flugge does rely on Kriewaldt's report in its submissions on the response of Flugge to the complaint about AWB's conduct in paying the inland transportation fees conveyed to Flugge at the Washington meeting. I propose to deal with Kriewaldt's evidence on that subject when I consider the respective parties submissions on the Washington meeting and Flugge's conduct in response to that meeting.

852 Otherwise, I do not consider it necessary to summarise Mr Kriewaldt's report for reasons that become apparent when I consider the pleaded allegations concerning

⁷⁰² Exhibit F52.

Flugge's knowledge. The practice of a reasonable director or chairman has little relevance to whether or not Flugge knew the matters alleged, or of whether a reasonable person in the position would have knowledge of the matters alleged. The evidence of Kriewaldt may be relevant to Flugge's response and if so I will deal with it, if relevant, when I rule on whether or not Flugge did in fact have the knowledge alleged by ASIC.

Evidence on the privatisation and listing of AWB

853 Flugge tendered evidence on the role of the board of AWB during the conversion of AWB from a state owned corporation to a privately owned listed public corporation. Flugge submitted that directors of AWB gave evidence regarding the focus of the board being primarily upon these corporatisation and privatisation changes.

854 As it is, I do not consider this evidence of particular relevance to the issues I have to decide concerning the state of Flugge's knowledge and his duties as a director in response to such knowledge.

855 Further, Flugge took issue on the factual allegations made by ASIC on his knowledge that that AWB was engaged in wrongful conduct in paying IGB fees to Iraq. Also, Flugge took issue with what he was informed of at the Washington meeting. Flugge did not contend that on these particular issues that my findings should be influenced by the fact that AWB was undergoing a transformation from a statutory corporation to a publicly owned privatised corporation.

Evidentiary issues

856 ASIC must prove its case on the balance of probabilities: s 140 of the *Evidence Act 2008* (Vic) and s 1332 of the Act. The Court is to take into account the nature of the cause of action raised, and the gravity of the matters: s 140(2).

857 Section 140 of the *Evidence Act 2008* (Vic) provides:

PART 4.1 – STANDARD OF PROOF

140 Civil proceedings – standard of proof

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account –
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject-matter of the proceeding; and
 - (c) the gravity of the matters alleged.

858 Flugge contends that serious allegations are made in the case against him: breaches of civil penalty provisions that are likely to have a serious impact on Flugge’s reputation. Moreover, ASIC has referred to Flugge being:

- (a) involved in a sham;⁷⁰³
- (b) involved in a fraud;⁷⁰⁴ and
- (c) party to improper, and evil conduct.⁷⁰⁵

859 In *Batrouney v Forster*,⁷⁰⁶ I considered the issue of the onus of proof in a civil proceeding. I repeat my observations.

860 In *Briginshaw v Briginshaw*,⁷⁰⁷ Latham CJ said as follows:⁷⁰⁸

The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue – See *Wills’ Circumstantial Evidence* (1902), 5th ed., p. 267, note *n*: “Men will pronounce without hesitation that a person owes another a hundred pounds

⁷⁰³ Transcript of hearing, *ASIC v Geary & Flugge* T29, L15–20; T73, L23–9; T341, L21–3; T491, L19–21; T2072, L2–8; T2076, L2–5; T2076, L10–12; T2080, L15–18; T2081, L4–7; T2081, L10–12; T2438, L22–5; T2439, L12–18.

⁷⁰⁴ Transcript of hearing, *ASIC v Geary & Flugge* T81, L18–21; T771, L16–21; T2079, L22–5; T2081, L17; T2198, L24; T2199, L8.

⁷⁰⁵ Transcript of hearing, *ASIC v Geary & Flugge* T16, L1–3; T48, L12–14; T78, L3–5; T754, L4; T1449, L4–8; T2079, L8–11; T2195, L13–16; T2206, L3–4.

⁷⁰⁶ [2015] VSC 230.

⁷⁰⁷ (1938) 60 CLR 336 (*Briginshaw*).

⁷⁰⁸ *Briginshaw*, 343–4.

on evidence on which they certainly would not hang him, and yet all the rules of law applying to one case apply to the other and the processes are the same.”

861 Rich J said:⁷⁰⁹

In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion.

862 Dixon J said:⁷¹⁰

No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency. Thus, *Mellish* LJ says: ‘No doubt the court is bound to see that a case of fraud is clearly proved, but on the question at what time the persons who have been guilty of that fraud commenced it, the court is to draw reasonable inferences from their conduct’... In the same way, in dealing with the question in what county the publication of a criminal libel had taken place, *Best* J. said: ‘I admit, where presumption is attempted to be raised, as to the *corpus delicti*, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall...’ It is often said that such an issue as fraud must be proved ‘clearly’, ‘unequivocally’, ‘strictly’ or ‘with certainty’... This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It

⁷⁰⁹ *Briginshaw*, 350.

⁷¹⁰ *Briginshaw*, 361–3 (citations omitted).

means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues ... But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.

863 In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,⁷¹¹ the High Court of Australia explained the ambit of the principles established by cases such as *Briginshaw*. Mason CJ, Brennan, Deane and Gaudron JJ said:⁷¹²

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found.' Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

864 Their honours went on to quote from the passage of Dixon J in *Briginshaw* copied above,⁷¹³ and concluded that 'there are, however, circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading. In our view, it was so in the present case.'⁷¹⁴

865 In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACCC*,⁷¹⁵ the Full Court of the Federal Court of Australia

⁷¹¹ (1992) 110 ALR 449 ('*Neat Holdings*').

⁷¹² *Neat Holdings*, 449-450; *Rejtek v McElroy* (1965) 112 CLR 517, 521-2; *Chong v CC Containers Pty Ltd* [2015] VSCA 137, [41]-[48] (Redlich, Santamaria and Kyrou JJ) ('*Chong v Containers*').

⁷¹³ *Neat Holdings* (1992) 110 ALR 449, 450.

⁷¹⁴ *Neat Holdings*, [1].

⁷¹⁵ (2007) 162 FCR 466.

(Weinberg, Bennett and Rares JJ) addressed the standard of proof in civil proceedings for the recovery of a penalty. The Court said:⁷¹⁶

It follows that proceedings for recovery of pecuniary penalties under the Act are civil proceedings. Accordingly, s 140 of the *Evidence Act 1995* (Cth) requires the Court in such proceedings to apply the civil standard of proof on the balance of probabilities. In arriving at a conclusion of satisfaction that a case has been proved on the balance of probabilities, s 140(2) of the *Evidence Act* provides:

- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject-matter of the proceeding; and
 - (c) the gravity of the matters alleged.

The mandatory considerations which s 140(2) specifies reflect a legislative intention that a court must be mindful of the forensic context in forming an opinion as to its satisfaction about matters in evidence. Ordinarily, the more serious the consequences of what is contested in the litigation, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion.

Even though he spoke of the common law position, Dixon J's classic discussion in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-363 of how the civil standard of proof operates appositely expresses the considerations which s 140(2) of the *Evidence Act* now requires a court to take into account. Dixon J emphasised that when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. He pointed out that a mere mechanical comparison of probabilities independent of any belief in its reality, cannot justify the finding of a fact. But he recognised that: [their honours continue to quote the passage copied above at paragraph 862]

Dixon J also pointed out that the standard of persuasion, whether one is applying the relevant standard of proof on the balance of probabilities or beyond reasonable doubt, is always whether the affirmative of the allegation has been made out to the reasonable satisfaction of the tribunal. He said that the nature of the issue necessarily affected the process by which reasonable satisfaction was attained. And, so, he concluded that in a civil proceeding, when a question arose whether a crime had been committed, the standard of persuasion was the same as upon other civil issues. But he added, weight must be given to the presumption of innocence and exactness of proof must be expected

866 The standard of proof required in a civil proceeding remains the same no matter how

⁷¹⁶ *CEPU v ACCC*, 479 [29]-480 [32].

serious the allegation. However, the degree of satisfaction or strength of evidence may vary according to the gravity of the fact to be proved.⁷¹⁷ In *Rejfeke v McElroy*,⁷¹⁸ the High Court (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ) observed:⁷¹⁹

The 'clarity' of the proof required, where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved.⁷²⁰

But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.⁷²¹

867 Section 140 of the *Evidence Act 2008* (Vic) now prescribes the standard of proof in civil proceedings.⁷²² In *NOM v Director of Prosecutions*,⁷²³ the Court of Appeal held that the effect of s 140(2) of the *Evidence Act 2008* (Vic) equates with the principle developed in *Briginshaw*. The Court said in *NOM*:⁷²⁴

Accepting that the standard of proof expressed in *Briginshaw* requires actual persuasion on the part of a fact finder – and that is materially different from an assessment based only on a mere mathematical probability – s 140(2) of the Evidence Act reflects the conceptual principles underpinning that standard. Significantly, nothing was said to cast any doubt on the line of authority to which we have referred that has construed s 140(2) as embracing the principle in *Briginshaw*. We consider that line of authority plainly correct. In any event, such a view is now so settled that this Court should not now depart from an

⁷¹⁷ *Neat Holdings* (1992) 110 ALR 449, 450.

⁷¹⁸ (1965) 112 CLR 517. ('*Rejfeke v McElroy*').

⁷¹⁹ *Rejfeke v McElroy* 521–2.

⁷²⁰ See *Briginshaw v. Briginshaw* (Dixon J); *Helton v. Allen* (Starke J); *Smith Bros. v. Madden*, (Dixon J).

⁷²¹ See *Helton v. Allen* per (Dixon, Evatt and McTiernan JJ).

⁷²² *Chong v Containers* [2015] VSCA 137, [48].

⁷²³ (2012) 38 VR 618 ('*NOM*').

⁷²⁴ *NOM* 655–656 [123]–[124], (Redlich and Harper JJA and Curtain AJA) (citations omitted).

accepted construction of a uniform legislative provision of the Commonwealth and a number of States.

Accordingly, whether it be by virtue of the common law or s 140, the civil standard of proof subject to the principle in *Briginshaw* is the relevant conceptual standard to which a fact finder must satisfy him or herself in proceedings of this nature. Mere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact. The fact finder must feel an actual persuasion of the occurrence or existence of the fact in issue before it can be found. Where, as in the present case, the standard of proof is to be applied to circumstantial evidence, satisfaction as to a reasonable and definite inference is required.

868 In this case I am also asked to draw inferences, particularly with respect to Flugge's knowledge. Accordingly, I must be careful not to speculate rather than draw rational inferences. A distinction may be drawn between inferences and conjecture or a guess.

In *Gurnett v Macquarie Stevedoring Co Pty Ltd*, Street CJ said:⁷²⁵

A guess is a mere opinion or judgment formed at random and based on slight or uncertain grounds. In contradistinction to such a conjectural opinion, an inference is a reasonable conclusion drawn as a matter of strict logical deduction from known or assumed facts. It must be something which follows from given premises as certainly or probably true, and the mere possibility of truth is not sufficient to justify an inference of that effect.⁷²⁶

869 See also *Nominal Defendant v Owens* and the cases cited therein.⁷²⁷

Jones v Dunkel

870 ASIC, Flugge and Geary each seek to rely on the principles enounced in *Jones v Dunkel* to argue that certain inferences can be drawn from the evidence submitted and the failure of the other party to submit evidence to rebut the inference arguable drawn on the evidence.

871 In *ASIC v Hellicar*,⁷²⁸ French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ discussed the evidentiary consequences of a party failing to call a witness, as

⁷²⁵ (1955) 72 WN (NSW) 261, 264.

⁷²⁶ This case was overturned – but not on this point.

⁷²⁷ (1978) 22 ALR 128.

⁷²⁸ (2012) 247 CLR 345 ('*Hellicar*').

follows:⁷²⁹

Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. Principles governing the onus the standard of proof must faithfully be applied. And there are cases where demonstration that other evidence could have been, but was not, called may properly be taken into account in determining whether a party has proved its case to the requisite standard. But both the circumstances in which that may be done and the way in which *absence* of evidence may be taken to account are confined by known and accepted principles which do not permit the course taken by the Court of Appeal of discounting the cogency of the evidence tendered by ASIC.

Lord Mansfield's dictum in *Blatch v Archer* that '[i]t is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted' is not to be understood as countenancing any departure from any of these rules. Indeed, in *Blatch v Archer* itself, Lord Mansfield concluded that the maxim was not engaged for 'it would have been very improper to have called' the person whose account of events was not available to the court.

This Court's decision in *Jones v Dunkel* is a particular and vivid example of the principles that govern how the demonstration that other evidence could have been called, but was not, may be used. The essential facts of the case, though well known, should be restated. The personal representative of a driver who had died in a collision with another vehicle brought an action for damages on her behalf and on behalf of the deceased driver's dependents. The plaintiff's case depended on demonstration that the other driver's negligence was a cause of the accident. The plaintiff sought to demonstrate negligence by having the tribunal of fact (in that case a jury) infer from facts concerning the road and the two vehicles involved that the collision had occurred when the defendant's vehicle was on the wrong side of the road. One of the defendants, the surviving driver, did not give evidence at the trial. The Court divided about whether the inference which the plaintiff sought to have the jury draw about where the collision occurred was an inference that was open on the evidence. But the Court held 'that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn where a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.'

872 Heydon J said of the inferences that may be drawn from the failure of a witness to be called that:⁷³⁰

⁷²⁹ *Hellicar*, 412–413 (citations omitted). These statements of principle were recently applied in *Competition and Consumer Commission v Yazaki Corp (No 2)* (2015) 332 ALR 396, 407 [33] (Besanko J).

⁷³⁰ *Hellicar*, 432, citing *HML v The Queen* (2008) 235 CLR 334, 437–438 [302]–[303]; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 385 [64] [emphasis added].

One is that the trier of fact *may* infer that the evidence of the absent witness would not assist the case of that party. The other is that the trier of fact *may* draw an inference unfavourable to that party with greater confidence. But *Jones v Dunkel* does not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party.

873 Windeyer J in *Jones v Dunkel* explained the first proposition as follows:⁷³¹

Then, I think, his Honour should, when the juryman asked his question, have given an answer in accord with the general principles as stated in *Wigmore on Evidence* 3rd ed. (1940) vol. 2, s. 285, p. 162 as follows: 'The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.'

This is plain common sense. If authority be needed, two passages from *R. v. Burdett* may be cited. *Abbott* C.J. said: 'No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected.' And *Best* J. said: 'Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just.'

As *Wigmore* points out..., exactly the same principles apply when a party, who is capable of testifying, fails to give evidence as in a case where any other available witness is not called. Unless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not help his case.

874 ASIC relies on *Jones v Dunkel* particularly through the failure of Flugge to give evidence. The Court of Appeal in *Chong v Containers* made particularly pertinent observations on the failure of a party to give evidence, when the Court said:⁷³²

⁷³¹ *Jones v Dunkel*, 320-321 (citations omitted).

⁷³² [2015] VSCA 137, [206]-[212].

Alderson B recognised that a failure by a party in civil proceedings to deny a fact which it was in their power to deny 'gives a colour to the other evidence against him. In *Bridge v The Queen*, Windeyer J quoted what Frankfurter J said in *Adamson v California*:

Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict.

The inference, now usually described as the rule in *Jones v Dunkel*, is a particular application of Lord Mansfield CJ's maxim 'that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted'. The failure of a party to give evidence in his or her own defence may give rise to an inference that his or her evidence would not assist him or her in the case. As Windeyer J put it in *Jones v Dunkel*:

But silence may amount to much more than an acquiescence in the primary facts. It may be eloquent in support of an inference to be drawn from those facts.

The rule does not enable the absence of a witness to make up any deficiency of evidence. It will not support an adverse inference unless the evidence otherwise provides a basis on which that unfavourable inference can be drawn. But where evidence has been left uncontradicted, any inference favourable to a party for which there was ground in the evidence might be more confidently drawn when a person, presumably able to put the true complexion on the facts relied on as the ground for the inference, has not been called as a witness and the evidence provides no sufficient explanation of his or her absence. The reasoning involves the treatment of the failure to adduce evidence as a reason for increasing the weight of the proofs of the opposite party or reducing the weight of the proofs of the party in default.

In *RPS v The Queen*, Gaudron ACJ, Gummow, Kirby and Hayne JJ quoted the passage from the judgment of Menzies J in *Jones v Dunkel* in which he said:

[W]here an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.

Their Honours also said:

In a civil trial there will very often be a reasonable expectation that a party would give or call relevant evidence. It will, therefore, be open in such a case to conclude that the failure of a party (or someone in that party's camp) to give evidence leads rationally to an inference that the evidence of that party or witness would not help the party's case.

That passage was quoted with approval by the majority in *Azzopardi v The Queen*. In *Weissensteiner v The Queen*, Mason CJ, Deane and Dawson JJ said:

We have quoted rather more extensively from the cases than would

otherwise be necessary in order to show that it has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. *It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism.* It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.

In *Dilosa v Latec Finance Pty Ltd [No 2]*, Street J recognised that where the absent witness is a party then considerable importance may well attach to the inference that nothing which the party could say would assist his or her case. As Gleeson CJ said in *Azzopardi*, the judgments in *Weissensteiner* recognise that the inference that may be drawn from the silence of a party to civil litigation may be significant. Santow J drew such an inference in *ASIC v Adler* because the parties who were available and not called had a personal involvement in the transactions in question. Where a party elects not to give evidence ‘the court is entitled to be bold.’ As Heydon, Crennan and Bell JJ stated in *Kuhl v Zurich Financial Services Australia Ltd*, the rule has a particular application where it is the party which is the uncalled witness and may permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn.

875 In *ASIC v Adler*,⁷³³ which was a civil penalty proceeding brought by ASIC against three directors of a collapsed insurance company HIH Insurance Limited, Mr Williams, an executive director, did not give evidence. Santow J held that the adverse inferences which arose from Mr Williams’ words and conduct could more confidently drawn. As he was a party, the Court was entitled to be bold in doing so.⁷³⁴

876 The *Jones v Dunkel* rules are available in civil penalty proceedings.⁷³⁵ Flugge did not otherwise deny that this was the case.

⁷³³ (2002) 168 FLR 253 (*ASIC v Adler*’).

⁷³⁴ *ASIC v Adler*, 362 [449], citing *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* [1991] 1 Lloyd’s Rep 288, 293 (Gleeson CJ and Handley JA), citing *Insurance Commissioner v Joyce* (1948) 77 CLR 39, 49 (Rich J).

⁷³⁵ See *ACCC v Universal Music Australia Pty Ltd*,⁷³⁵ and *Hellicar*.

- 877 The *Jones v Dunkel* inferences may, not must, lead to the inferences described.⁷³⁶
- 878 The *Jones v Dunkel* inferences have no application if the failure to call a witness is explained by a reasonable explanation, such as illness or unavailability.⁷³⁷
- 879 The significance of the inference depends on the closeness of the relationship of the absent witness with the party who did not call him.⁷³⁸
- 880 From these cases the following relevant principles may be discerned:
- (a) the principles of *Jones v Dunkel* apply to a civil penalty procedures such as the claims against Flugge;
 - (b) in circumstances where ASIC has established a case against Flugge, his failure to give evidence may (not must) enable the trier of fact to more readily adopt the conclusion to which the evidence points;
 - (c) within those circumstances, the trier of fact may (not must) readily conclude that Flugge's evidence would not have assisted his case;
 - (d) the failure of Flugge to give evidence to rebut the inferences sought to be drawn by ASIC against them, particularly in relation to his knowledge, enables the Court to more comfortably draw an inference unfavourable to Flugge;
 - (e) this principle has particular application in the case of Flugge as he is the defendant.
- 881 Flugge submits that ASIC's failure to call a number of witnesses was notable as no explanation was provided as to the failure to call Watson, Stott, Borlase, Owen, McConville, Rogers, Laskie and Long.

⁷³⁶ *Café v Australian Portland Cement Pty Ltd* (1965) 83 WN (Pt 1) (NSW) 280, 287 (Full Court).

⁷³⁷ *Payne v Parker* [1976] 1 NSWLR 191, 202 (Glass JA).

⁷³⁸ JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 10th ed, 2014) [1215]; approved *Hospitality Group Pty Ltd Australian Rugby Union Ltd* (2001) 110 FCR 157, 176 [64].

882 All these gentlemen were former AWB employees engaged in the OFFP export of wheat to Iraq, none of whom could by any stretch of imagination be considered to be in ASIC's camp. All had been involved to some degree or another in the sale of wheat that involved payment of inland transport fees to Iraq. Those witnesses who were called from AWB to give evidence were on subpoena or otherwise quite hostile to ASIC.

883 ASIC sought leave to cross-examine some of the witnesses from AWB that it called. I refused leave but did notice that in some respect their evidence-in-chief was like drawing teeth.

884 As the discussion of *Jones v Dunkel* above discloses, adverse findings and inferences may be drawn in limited circumstances. There is no obligation on the Court to draw the adverse finding or inferences.

885 One particular matter the Court has regard to is the closeness of the relationship between the party failing to call the witness (in this case ASIC) and the witness. In my view, the relationship of those witnesses that were called from AWB tended to be hostile and unhelpful. In the circumstances, subject to some observations about McConville and Rogers, I would be reluctant to draw any inferences or be less comfortable in drawing any findings in favour of ASIC by reason of its failure to call any of the witnesses identified by Flugge.

886 Rogers was present with Hogan and Flugge at the meeting with Zuhair at the IGB in October 1999. Hogan gave evidence, supported by a contemporaneous email report of the meeting, of his discussions with Zuhair about the difficulties AWB had paying the inland trucking fee to maritime agents in Iraq because of the US sanctions. I placed considerable reliance on the contemporaneous notes made by Hogan. Flugge did not give any evidence to contradict the evidence of Hogan. In those circumstances, my comfort in drawing the conclusions that I have about that meeting have not been materially altered by the failure of ASIC to call Rogers.

887 As for McConville, he was present at the Washington meeting. Snowball gave

evidence of the meeting. He had little or no recollection of what was discussed. Snowball made a contemporaneous note that I found significant. Nicholas gave evidence. He made contemporaneous notes that I find more reliable than his recollection. Flugge did not give evidence. This was important as the meeting was a critical part of the case against him. My conclusion about what was discussed at the meeting was not materially altered by the failure of ASIC to call McConville. I would not have expected McConville to be in ASIC's camp in view of his strident rejection of any wrongdoing when he was questioned by Bowker about AWB's conduct in the OFFP in January 2000.

The effect of the antiquity of the case

888 Flugge refers to the fact that many of the conversations relied on by ASIC occurred many years ago. Flugge says that in those circumstances, ASIC bears the onus of proving spoken words with a degree of precision that enables the Court to be reasonably satisfied the conversation occurred. Flugge refers to *Watson v Foxman*,⁷³⁹ *ASIC v Rich*,⁷⁴⁰ and *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd*.⁷⁴¹

889 ASIC submits that in view of those considerations, the Court should place primary emphasis on 'the objective factual surrounding material and the inherent commercial probabilities, together with the documentation tendered in evidence.'⁷⁴²

890 Flugge submits that the Court should be most cautious about finding that a conversation took place over fifteen years ago 'in the absence of some reliable contemporaneous record or other satisfactory corroboration.'⁷⁴³

⁷³⁹ (1995) 49 NSWLR 315, 319, (McLelland CJ in Eq).

⁷⁴⁰ (2009) 236 FLR 1, 88-89 [421]-[422].

⁷⁴¹ [2013] VSCA 237, [159] (Warren CJ, Osborn JA and Macaulay AJA).

⁷⁴² *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599 (Gleeson CJ, Gaudron, Kirby and Hayne JJ), approving the trial judge's approach to oral evidence of meetings seven or eight years ago; see also *Fifteenth Eestin Nominees Pty Ltd v Rosenberg (as executor to the estate of Rosenberg, (dec'd)* (2009) 24 VR 155.

⁷⁴³ *Watson v Foxman* (1995) 49 NSWLR 315, 319 (McLelland CJ in Eq); see also *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 (Lord Pearce).

891 I accept these submissions. As will be noted, I have placed significant emphasis on contemporaneous documents and treated evidence of what was said some fifteen years ago with circumspection.

892 I accept Flugge's submissions that where there is evidence in the form of a reliable contemporaneous record of the content of the alleged conversations with Flugge that evidence assumes significance. Flugge suggests there is no such evidence in regard to the claims against Flugge. In the case of the Baghdad meeting in October 1999 and Washington meeting in March 2000, there are contemporaneous documents recording the events of those meetings.

893 ASIC submits that its case, and in particular in relation to knowledge of the defendants, is in large part circumstantial, as it must necessarily be where the defendants have chosen not to give evidence.⁷⁴⁴ ASIC refers to *Transport Industries Co Ltd v Longmuir*,⁷⁴⁵ where President Winneke set out the approach to be taken by the finder of fact when forming an assessment of circumstantial evidence:⁷⁴⁶

In cases of circumstantial evidence each proven fact may gain support from the others and, although each, considered in isolation, might not provide a sound basis for inferring the ultimate fact to be proved, a combination of all facts might provide a compelling basis from which to draw that inference...

The task of the learned judge was to consider the weight of the combination of facts proved to his satisfaction and then to determine whether the combined weight of those facts and circumstances supported the inference, as a matter of probability, that the respondent lit the fire. The onus of proof is only to be applied at the final stage of the reasoning process. It is, erroneous to divide the process into stages and, at each stage, apply some particular standard of proof. To do so destroys the integrity of circumstantial case...

894 ASIC submits that this approach has been subsequently applied in this Court. In *Oakley v Insurance Manufactures of Australia Pty Ltd*, Kaye J stated:⁷⁴⁷

The defendant's case, on both of its defences, is basically circumstantial. Thus,

⁷⁴⁴ PCS, [80].

⁷⁴⁵ [1997] 1 VR 125 ('*Longmuir*').

⁷⁴⁶ *Longmuir*, 128, 129.

⁷⁴⁷ [2008] VSC 68, [12].

the defendant relies on a process of inference, from the facts which it has established, in order to satisfy me, on the balance of probabilities, of its defences. In order to succeed on those defences, the defendant must, therefore establish that, on the factual circumstances proved by it, the more probable inference is that the plaintiffs deliberately lit the fire (in the case of the arson defence), and (in the case of the exaggerated claim defence) that the plaintiffs deliberately and fraudulently exaggerated the quantum of their claim. In determining the question whether an inference, relied upon by the defendant, has been established on the balance of probabilities, it is necessary to consider all the evidence, proven by the defendant, in combination. That is, in determining whether a particular inference relied upon by the defendant is the more probable inference, my task is to consider the evidence, proven by the defendant, as a whole. Inferences are not drawn by considering each individual fact in isolation from the other. On the contrary, it is the united and combined force of several facts, acting together, which may, in an appropriate case, give rise to an inference on the balance of probabilities.

Difficulties with evidence

- 895 The evidence led about the response to the IGB tender and the decision to enter into the sales, including the trucking fee, was contained in contemporary documents (mainly emails) and viva voce evidence given by former AWB employees, an officer of the UN and DFAT officers.
- 896 The viva voce evidence of former AWB officers presented several difficulties. For many, the AWB scandal including the Royal Commission, was a painful period in their lives. Most had lost their jobs by reason of the scandal. Clearly, several witnesses were reluctant to relive the events.
- 897 Memory was a problem. Witnesses were asked to recall events that took place in 1999 and subsequently. Thus witnesses were asked to recall what was said and done up to 16 years ago. Experience teaches us that memories of what was actually said would be very difficult to recall and that a witness doing his or her best would, to a greater and lesser degree, speculate or merely summarise their general understanding of what took place. Some, such as Snowball, purported to have virtually no recollection of any of the events.
- 898 Another problem was the desire of witnesses to distance themselves from any alleged wrongdoing that was involved in the events. Even if their conduct was not illegal or even improper, the desire to distance oneself from the disaster that subsequently befell

AWB was a natural reaction.

899 Finally, there is the issue of credit. I drew the distinct impression that Snowball was not being entirely honest in his protestations that he had no recollection when asked about events. I accept that he may have had no recollection of particular incidents, but his virtual total denial of all memory was difficult to accept.

900 More importantly, however, for the reasons discussed below at paragraph 1198, I did not believe the evidence of Emons. I find that I cannot rely on any oral evidence of Emons unless it is supported by other independent evidence.

901 Emons' first recollection of a discussion with the IGB about the fees was during a meeting with Director General of the IGB, Zuhair in Bangkok, which took place at Mr Zuhair's request.⁷⁴⁸ This meeting was prior to the 1999 Iraqi tender. I do not accept Emons' evidence on this point.

902 Emons also gave evidence that at the IGC in London in June 1999 there were discussions regarding the Iraqi trade,⁷⁴⁹ and the new IGB requirement to pay an amount for transport was widely discussed between traders on the sidelines of the conference.⁷⁵⁰

903 In addition, ASIC contends that AWB attendees at the IGC, including Emons and Flugge, discussed the transport fee with representatives of Ronly, who indicated that they could undertake payment of the transport fee on AWB's behalf.⁷⁵¹

904 The only evidence to support this proposition is that of Emons. Apart from his credit not being accepted by me, in cross-examination of Emons it was demonstrated to my satisfaction that Emons had confused the 1999 conference with the conference the

⁷⁴⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1682, L20; T1682, L25-7; T1894, L4 (xxn Dharmananda).

⁷⁴⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1687, L7-10.

⁷⁵⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1687, L12-15 (Emons); T1963, L22-8 (xxn Emons).

⁷⁵¹ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1687, L28 - T1689, L18.

following year.

905 The contemporary records of AWB tendered by ASIC did not record or suggest that AWB was aware of the concept of trucking fees until the tender invitation from IGB was received in the 1999 Iraqi tender.

906 Accordingly, I do not accept ASIC's contention that the topic of inland transport fees had been raised with AWB or any of its officers before the invitation to tender was received in the 1999 Iraqi tender.

907 Following receipt of the 1999 Iraqi tender, Emons said that there were discussions about the inland transport fees between himself and Officer⁷⁵² and with other AWB employees, including Aucher and Owen.⁷⁵³ There is no contemporary record to support this evidence of Emons.

908 Hogan discussed the free on truck item and the US\$12.00 per metric tonne referred to in the 1999 Iraqi tender with Borlase, Owen and potentially Lister. It was in that context and discussion that Hogan made a handwritten note, 'Iraqi accounts frozen, increase our C&F price by US\$12.'⁷⁵⁴ Hogan was aware from a meeting with Emons and Zuhair in Baghdad that all Iraq accounts had been frozen for any transactions.⁷⁵⁵

909 Officer gave evidence that the proposed payment of US\$12.00 per tonne in inland transportation fees was an important issue, and that the 'free in truck' contract term⁷⁵⁶ was discussed with Emons, Watson, Flugge, Rogers and Ingleby and probably Tighe.⁷⁵⁷ Officer's evidence on who he discussed the 'free in truck' issue with struck

⁷⁵² Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1682, L6-18.

⁷⁵³ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1694, L21-3.

⁷⁵⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T925, L5-17.

⁷⁵⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T929, L7-18.

⁷⁵⁶ CB 1/376.

⁷⁵⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1167, L30 - T1168, L26; T1187, L8.

me as being based on speculation and probabilities rather than from his actual recollection. As discussed below at paragraph 1332 and following, I approached Officer's evidence with a degree of caution.

Transportation fees: knowledge and views of AWB employees and directors

910 At all times, Edmonds-Wilson believed that the OFFP contracts had been authorised by the Australian Government and the UN.⁷⁵⁸ He understood that Alia was a Jordanian trucking company with access to a large pool of sub-contractors. Edmonds-Wilson said that he and Whitwell compiled a document referring to a meeting with Al-Absi and Al-Khawam (the Chairman of Alia) reporting on the trucks they had available and the time taken for trucks to travel from Umm Qasr Baghdad to Umm Qasr and the cost of the trips. Edmonds-Wilson said that comparative to other transport costs, the contract transportation costs were reasonable.

911 Emons gave evidence on DFAT and UN approval. Emons said that in discussions with Zuhair in July 1999 that he told Zuhair that 'any approval or action for the trucking fee to take place had to have UN approval at which he agreed to.'⁷⁵⁹

912 Hogan knew that the initial \$12.00 fee had been expressly included in contracts submitted to the UN and repeatedly stated his belief that the inland transport fee would be, or had been, approved by the UN prior to the fee being introduced.⁷⁶⁰ Hogan held that belief from prior to the first fee being paid until after Flugge ceased holding office as AWB Chairman.

913 Hogan was taken to his email of 2 November 2000, where Hogan confirmed the sale of wheat to Iraq and advised that 10 per cent had been added to the price into the trucking fee. Hogan said that 'this has been approved by the UN (as per IGB – I will get this in writing).' Hogan was asked who informed him that this had all been

⁷⁵⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T656, L5-7.

⁷⁵⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1704, L17-19.

⁷⁶⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T1101, L28 – T1102, L3.

approved by the UN and replied that Abdul-Rahman of the IGB had advised him 'this had all been approved by the United Nations.'⁷⁶¹

914 Hogan was aware that other global traders were trading with Iraq on the same terms, and he knew the 'free on truck' delivery terms with Iraq were a matter of industry and public knowledge, and were reported publicly in MarketWise.⁷⁶²

915 Hogan said his concern was not about UN sanctions but that it was more about US economic sanctions that AWB needed to address.⁷⁶³

916 I have quoted Hogan at some length above from paragraph 731 following, under the heading 'Hogan's belief in UN approval,' as I formed the view that his beliefs were representative of those at AWB.

917 Officer was the Group General Manager of IS&M from late 1995 until June 2000. Officer did concede that he thought the UN approval may have been a 'grey matter' because there was a question as to whether the UN were 'on board'. Officer said that the issue of greyness was resolved as the clause in the contract referred to the trucking fee as 'subject to UN approval of the Iraqi Distribution Plan.' Further he said that the UN were ultimately responsible for establishing the letter of credit from the escrow account and the UN in the process were checking the contract.

918 Scales commenced work at AWB in 1992 as a domestic trader and remained in that role until 1995. In 1995–1996, Scales was a pricing analyst and between 1996 and 1999 she was a trader in derivatives in the New York office. Between March 1999 to 2000, Scales was a pricing manager of AWBI. Between April 2001 and December 2006, Scales was a general manager of AWBI.

919 Scales gave evidence that she was aware that there was a trucking fee attached to the contracts for the sale of wheat into Iraq and that they had been approved by the UN

⁷⁶¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T967, L26–8.

⁷⁶² Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1053, L5–13.

⁷⁶³ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1098.

and by DFAT. However, she said she did not see any approval from the UN. Rather, she believed that AWB's sales to Iraq went through a process of approval involving the UN and DFAT.⁷⁶⁴

The directors' knowledge

920 Mr Warrick McClelland (McClelland) was at all relevant a director of AWB and a member of the Audit Committee.⁷⁶⁵ McClelland said that he knew about the trucking fee and it did not raise a 'red flag' with him.

921 The Audit Committee assisted the Board to monitor the overall efficiency and effectiveness of AWB operations and to discharge its responsibilities in relation to external audit, internal audit, business ethics, policies and processes, corporate governance and compliance with the law.⁷⁶⁶

922 McClelland remembered 'quite clearly' that in mid-2000, a few months after Lindberg became CEO, that Lindberg informed the Board of the trucking fee, reporting that it was \$12.00 a tonne.⁷⁶⁷ McClelland deposed:⁷⁶⁸

At a board meeting in approximately the middle of 2000, I learned that wheat contracts between AWB and the Iraqi Grain Board (IGB) involved payment of inland trucking costs. The board was told that AWB was to pay for trucking within Iraq, in order to ensure that wheat was transported throughout Iraq, because in previous phases of the Oil for Food Programme the Hussein regime had not distributed goods to all Iraqi citizens. The board was not told to whom payments were being made or what arrangements existed to facilitate transportation of the wheat within Iraq. The board was told that the payments were approved by the United Nations and the Australian Government.

923 McClelland deposes that he later learned (sometime after the fall of the Hussein regime, he believes around May 2004) in a joint information session of the boards of AWB and AWBI that the contracts involved the use of a company called Alia. After

⁷⁶⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T2004, 2034.

⁷⁶⁵ Exhibit P-19: McClelland affidavit sworn 6 April 2015, paragraphs 1 and 2.

⁷⁶⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T799, L10-25 (McClelland - XXN Hill).

⁷⁶⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T801, L20-9 (McClelland - XXN Hill).

⁷⁶⁸ Affidavit of Warrick McClelland sworn 6 April 2015.

that information session, Lindberg told the board at a meeting that Alia was part owned by the Iraqi government and that it was alleged that the funds AWB paid for trucking went back to the Hussein regime, however some of the funds were applied to trucking. McClelland is not sure of the date of the meeting but believes it may have been 28 September 2005, having regard to his previous statutory declarations.

924 McClelland recalls Lindberg said words to the effect that 'how were AWB meant to know who owned Alia' and stated that this was an issue for the UN. Lindberg then later advised at a joint information session of the boards of AWB and AWBI of a 10 per cent surcharge or service fee on contracts with Iraq.

925 McClelland in oral evidence said that he recalled it was Lindberg who told the board about the trucking fee and that Flugge was at that board meeting.⁷⁶⁹

926 McClelland said:⁷⁷⁰

He (Lindberg) said because of the way the Iraqis handled the previous sanctions that the UN had imposed on them in regard to providing medicines to the people of Iraq, which they had really comprehensively failed to do very well, that it was sensible so that they would not mess up the transport...that we would take on part of the trucking fees to deliver and make sure that happened and I must say that sounded like a very convincing idea to me. Particularly, it was sanctioned by both the United Nations and the Australian government and it raised no questions from the board because it just seemed a very sensible line to take.

927 McClelland's recollection of Lindberg's presentation to the Board is supported by:

- (i) an Information Paper Cover Sheet to the 29th Board Meeting of AWB, dated 26 July 2000, signed by Goodacre (Group General Manager Trading) and Lindberg: Titled 'Iraq Update, Purpose: to advise the Board of the issues concerning the AWB at discharge port in Iraq.' Under the heading 'New Business' is a reference to a 1 million tonne sale for shipment in September 2000

⁷⁶⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T786.

⁷⁷⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T801, L20 - T802, L11 (McClelland - XXN Hill).

to January 2001 with 'Price: 175.00 CIF, free out on truck, delivered any governorates/provinces in Iraq;'⁷⁷¹

- (ii) the Minutes of the 29th Board meeting of AWB on 26 July 2000, which show McClelland attended that meeting.⁷⁷²

928 McClelland testified that the Board understood that the Australian Government, through DFAT, had been very supportive and had provided valuable assistance to AWB with obtaining UN approval for OFFP contracts.⁷⁷³

929 McClelland also gave evidence of a letter he had written to Flugge after Flugge failed to win re-election to the board thanking Flugge for his excellent leadership and management of the board and complimenting Flugge on the vision, wisdom, skill and determination he had demonstrated over the years as chairman.

930 In early 2001, Arthur Andersen (Andersen) had been asked by the Audit Committee to look at possible risks occurring in AWB's international marketing process including Iraq. There were no red lights flashed in the direction of Iraq.⁷⁷⁴

931 Christopher Duncan Moffet (Moffet) was:⁷⁷⁵

- (i) non-executive director of AWB and AWBI between 1998 and 2008;
- (ii) a member of the corporate risk committee from 1998 to 2008;
- (iii) a member of the Audit Committee from 1999 to 2001.

⁷⁷¹ Exhibit 18 (Lucas affidavit): Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T8917.

⁷⁷² Exhibit 18 (Lucas affidavit): Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T8915; T802-4 (McClelland - XXN Hill).

⁷⁷³ Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T807, L10-31 (McClelland - XXN Hill).

⁷⁷⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T801, L3-15 (McClelland - XXN Hill).

⁷⁷⁵ Exhibit P29, [13].

932 Moffet deposed:⁷⁷⁶

I first became aware of the contracts between AWB and the IGB in 1999. At a board meeting in (1999) (probably an AWBI board meeting), the board was told that the contracts were not the usual CIF...CNF...or FOB contracts; rather the contract terms with the IGB included the costs of inland transportations in Iraq. Flugge told the Board that this was the usual contractual arrangement with the IGB, and this arrangement had been entered into some time previously, at a time before I had been appointed to the boards of AWB and AWBI.

933 Moffet also gave evidence that in 1999, when AWBI was just set up, at one of the first Board meetings of AWBI it was revealed that there was a US\$12.00 trucking fee.⁷⁷⁷

934 Stewart was:⁷⁷⁸

- (i) director of AWB between March 2000 and 2006;
- (ii) non-executive chairman of AWBI and AWB from March 2002 to 2006.

935 Stewart's affidavit relevantly states:⁷⁷⁹

17. My understanding in about 2000 to 2002 was that AWB was obliged to pay for trucking to ensure delivery of wheat within Iraq under the United Nations Oil-for-Food Programme.
18. There was discussion at Board Level that "FIT" terms of contracts with Iraq involved delivery. However I was not aware of the increases in price until 2004.
19. To the best of my knowledge and recollection...:
 - (a) I was first informed of the name "Alia" during a briefing by Jim Cooper on 2 May 2004. I was informed that Alia was the name of the Jordanian trucking company and that the cost of inland trucking;
 - (e) prior to...September 2005, I had not seen, and as far as I was aware the Board had not been presented with, any information which mentioned or suggested that AWB had been in breach of

⁷⁷⁶ Affidavit of Christopher Duncan Moffet sworn 15 April 2015, [17], exhibit P28.

⁷⁷⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1453, L3-11.

⁷⁷⁸ Exhibit P28, para. 3.

⁷⁷⁹ Exhibit P28, para.1719.

or acting inconsistently with UN sanctions;

- (f) up until 26 September 2005, I had been given no information that led me to believe that:
 - i. Alia was not a bona fide transport company; or
 - ii. there was any money that was paid back to the benefit of Iraq by way of kickback payments.

936 Stewart deposed⁷⁸⁰ that prior to 2004 he was aware:

- (i) there was a trucking fee, and
- (ii) the trucking fee increased over time.

937 Bowker gave evidence for ASIC. Bowker had been the officer in charge of approving the export of wheat to Iraq in DFAT. Bowker agreed that it would be reasonable for an officer of AWB to conclude that upon receiving a permission to export form, that the trucking clause and the contract had been approved by both the UN OFFP, OIP and DFAT.⁷⁸¹ Moreover, in re-examination, Bowker said that the provision in contracts for distribution costs implied that payment to Iraq for trucking fees was acceptable to the UN Office of the Iraq Program and to DFAT.⁷⁸²

938 As discussed earlier, ASIC seeks to establish that the IGB fees wrongdoing was widely known within AWB and thus from the fact of Flugge's active involvement in the affairs of AWB infer that Flugge knew of the IGB fees wrongdoing.⁷⁸³

939 Based on the evidence given by the AWB witnesses referred to above and from the evidence overall, I am not satisfied that ASIC has established that the IGB fees wrongdoing was widely known in AWB. On the contrary, the evidence satisfies me that the widely held view within AWB was that the payment of the inland

⁷⁸⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1538, L14-17 (Stewart - XN).

⁷⁸¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T899, L3-8.

⁷⁸² Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T911, L1-5.

⁷⁸³ PCS, [756].

transportation fees had been approved by the UN and DFAT.

940 It is not appropriate to draw any conclusion about Flugge's knowledge at this stage as in doing so I must take into account all the evidence. Nevertheless, when I come to do so, in the absence of further proof, I will not be taking into account the allegation by ASIC that the IGB fees wrongdoing was widely known in AWB and that I should infer from this fact that Flugge knew the facts alleged.

941 To the contrary, the conduct and view of those around AWB as shown in the evidence supports the view that Flugge honestly believed that the UN and the Australian government had approved of the payments as the board was informed in mid-2000.

942 For the reasons explored in these reasons, I am not satisfied that Flugge knew that AWB was engaging in what ASIC has described as the IGB fees wrongdoing and AWB was engaged in conduct that the UN Resolutions had called on member states to prevent. I am not satisfied that Flugge did not believe (as he asserted he did believe) that the payments had been approved by the UN. He informed the lawyer, Mr O'Connell in 2004 that had been his belief, he informed the ABL solicitors in 2005 that had been his belief and he so informed Wells and Dawson.

943 ASIC also contends that Flugge knew that the public revelation of the IGB fees wrongdoing would be likely to cause substantial and enduring harm to AWB.

944 I accept that if Flugge had believed that the fees had not been approved by the UN he would have aware of the damage that could have been sustained by the AWB. Nevertheless, I am not satisfied that ASIC has established that Flugge knew that the payment of the IGB fees was contrary to the UN Resolutions, nor that a reasonable person in the position of Flugge so knew.

Relevant provisions of the Corporations Act

The provisions

945 Before turning to the pleaded case it is necessary to set out the relevant provisions of the Act. Each of the contraventions alleged in the Flugge proceeding and the Geary

proceeding involves breaches of ss 180 and 181 of the Act. These are set out in Ch. 2D of the Act.

946 Part 2D.1 headed 'Duties and powers' begins with s 179 'Background to duties of directors, other officers and employees', which provides:

- (1) [*Coverage of Part*] This Part sets out some of the most significant duties of directors, secretaries, other officers and employees of corporations. Other duties are imposed by other provisions of this Act and other laws (including the general law).
- (2) [*Director and officer defined*] Section 9 defines both *director* and *officer*. *Officer* includes, as well as directors and secretaries, some other people who manage the corporation or its property (such as receivers and liquidators).

947 Division 1 of Pt 2D.1, headed 'General duties' begins with s 180 dealing with care and diligence. It is followed by s 181 dealing with good faith.

948 Section 180 relevantly provides:

Care and diligence – civil obligation only

Care and diligence – directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (a) were a director or officer of a corporation in the corporation's circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E)

Business judgment rule

- (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
 - (a) make the judgment in good faith for a proper purpose; and
 - (b) do not have a material personal interest in the subject matter of the judgment; and
 - (c) inform themselves about the subject matter of the judgment to

the extent they reasonably believe to be appropriate; and

- (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

...

- (3) In this section:

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

949 Section 181 relevantly provides:

Good faith – civil obligations

Good faith – directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
 - (a) in good faith in the best interests of the corporation; and
 - (b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E). ...

950 Section 206C relevantly provides:

Court power of disqualification – contravention of civil penalty provision

- (1) **[Court may disqualify person]** On application by ASIC, the Court may disqualify a person from managing a corporation for a period that the Court considers appropriate if:
 - (a) a declaration is made under:
 - (i) Section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or ...and
 - (b) the Court is satisfied that the disqualification is justified.
- (2) **[Matters to which Court may have regard]** In determining whether the disqualification is justified, the Court may have regard to:
 - (a) the person's conduct in relation to the management, business or property of any corporation; and

- (b) any other matters that the Court considers appropriate.

951 Part 9.4 sets out the civil consequences for contravening civil penalty provisions. Sections 180 and 181 are identified as civil penalty provisions in the table under s 1317E.

952 Section 1317E relevantly provides:

Declarations of contravention

- (1) **[Circumstances arising in contravention]** If a Court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention. The provisions specified in column 1 of the following table are *civil penalty provisions* ...
- (2) **[Specifics required in declaration]** A declaration of contravention must specify the following:
 - (a) the Court that made the declaration;
 - (b) the civil penalty provision that was contravened;
 - (c) the person who contravened the provision;
 - (d) the conduct that constituted the contravention;
 - (e) if the contravention is of a corporation/scheme civil penalty provision – the corporation or registered scheme to which the conduct related.

953 Section 1317G relevantly provides:

Pecuniary penalty orders

Corporation/scheme civil penalty provisions

- (1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to \$200,000 if:
 - (a) a declaration of contravention by the person has been made under section 1317E; and
 - ...
 - (b) the contravention:
 - (i) materially prejudices the interests of the corporation or scheme, or its members; or
 - (ii) materially prejudices the corporation's ability to pay its creditors; or

(iii) is serious ...

954 The penalty is a civil debt payable to ASIC on the Commonwealth's behalf. ASIC or the Commonwealth may enforce the order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

955 Section 1318 relevantly provides:

Power to grant relief

(1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.

....

(4) This section applies to a person who is:

(a) an officer or employee of a corporation;

....

Case against Flugge

956 ASIC presented a great deal of evidence covering the activities of AWB from when the inland transportation fees were first requested until well after the fall of the Saddam Hussein regime. This proceeding, however, is not a general inquiry into the conduct of AWB during this period but the hearing and determination of the case alleged against Flugge and Geary. Accordingly, I turn to the pleaded case against Flugge as pleaded in the Third Further Amended Statement of Claim (TFASOC).

TFASOC – paragraphs 1, 2 and 3.

957 ASIC pleads that it is a body corporate:

(a) established by s 7 of the *Australian Securities and Investments Commission Act*

1989 (Cth);

- (b) continued by s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (*'ASIC Act'*); and

able to sue in its corporate name by reason of s 8 of the *ASIC Act*.

958 AWB is and was at all material times:

- (a) a corporation duly incorporated; and
- (b) from 22 August 2001 until 10 December 2010 listed on the Australian Securities Exchange.

959 AWBI was at all material times a corporation duly incorporated, and a wholly-owned subsidiary of AWB.

960 Flugge admits these allegations.

TFASOC – paragraph 4

961 ASIC pleads that Flugge was:

- (a) from 1984 to 1999, a director of the Australian Wheat Board, an Australian government statutory authority, the predecessor of AWB before its public listing;
- (b) from 1991 to April 1995, the deputy chairman of the Australian Wheat Board;
- (c) from April 1995 to 1999, the chairman of the Australian Wheat Board;
- (d) from 1 May 1998 to 15 March 2002, a director of AWB;
- (e) from 1 May 1998 to 15 March 2002, the chairman of AWB.

962 Flugge admits paragraph 4 and says further that, during the relevant period, he was also:

- (a) a director of Wesfarmers Limited from May 1998 to July 2006;

- (b) a director Australian Wool Services Pty Ltd incorporating the Woolmark Company from January 2001 to January 2006;
- (c) chair of the Centre for Legumes in Mediterranean Agriculture from 2001 to at least March 2002;
- (d) chair of the Centre for High Analysis of Genetics in Agriculture, Murdoch University, from 1995 to at least March 2002;
- (e) member of the Rabobank Advisory Board from 1995 to at least March 2002; and
- (f) chair of various Commonwealth Scientific and Industrial Research Organisation agribusiness committees.

TFASOC – paragraph 5

963 ASIC pleads that by 15 March 2002 Flugge had the following significant experience and expertise relating to the sale of wheat in international markets, including Iraq:

- (a) Flugge had worked in the grain industry for approximately 40 years;
- (b) Flugge had held senior positions in industry bodies including the positions of president of the Australian Wheat Growers Federation, chairman of the State Wheat Industry Research Committee, a director of the Grains Research and Development Corporation and chairman of the CSIRO Food Futures Flagship research and development programme advisory group;
- (c) Flugge had received public recognition and awards for his contributions to grain research and international grain marketing including the Farrer Memorial Medal (1997), the Order of Australia (1999) and the Centenary Medal (2001);
- (d) Flugge had visited Iraq as part of AWB's delegations on several occasions including in 1996, April 1998, October 1999 and June 2001;
- (e) at various time between 1999 and 2002 Flugge was closely involved in AWB's

trading operations in the Iraq market.

964 ASIC gave particulars of the visits to Iraq as follows.

The visits to Iraq relied upon took place on or about 9-10 July 1996, 15-16 April 1998, 8-10 October 1999 and 20-22 June 2001.

The members of the delegation for the 1996 visit were Flugge, Emons and Greg Harvey (Harvey).

The members of the delegation for the 1998 visit were Flugge, Emons and Hogan.

The members of the delegation for the 1999 visit were Flugge, Rogers and Hogan.

The members of the delegation for the 2001 visit were Flugge and Stott.

965 Flugge admits sub-paragraphs 5(a), (b) and (d); and says that he was awarded the Farrer Memorial Medal in 1997, the Order of Australia in 1999 and the Centenary Medal in 2001; and he otherwise denies paragraph 5.

Findings on paragraph 5

966 For reasons that will become apparent when I review the evidence below, I am not satisfied that, at various times between 1999 and 2002, Flugge was closely involved in AWB's trading operations in the Iraq market, if that is meant to imply that Flugge was undertaking some executive functions outside his responsibilities as a director and chairman.

TFASOC – paragraph 6

Flugge's responsibilities as director and chairman AWB

967 ASIC pleads that by reason of his position as director and chairman of AWB and the matters alleged in paragraphs 4 and 5 of the TFASOC, during the period from 1 May 1998 to 15 March 2002, Flugge's responsibilities relevantly included the following:

- (a) to oversee the overall strategic direction of AWB;
- (b) to select matters and documents to be brought to the attention of, and to be addressed by, AWB's Board;

- (c) to take reasonable steps to ensure that he and the other members of AWB's Board were properly informed in respect of all matters which could materially adversely impact upon AWB's financial performance, commercial position, standing or reputation;
- (d) to take reasonable steps to ensure that AWB was represented with integrity to national governments, the media, institutions, analysts and other stakeholders;
- (e) to oversee, counsel, review, assist, mentor and advise the Chief executive officer of AWB; and
- (f) to lead the AWB Board in the oversight and monitoring of AWB's senior management and officers, including the consideration and implementation of appropriate policies and procedures to enable the Board to detect and assess any material adverse development affecting or potentially affecting AWB.

968 Flügge responds saying that as Chairman of the board, he had responsibilities to:

- (a) manage effective discussion at meetings of the board including by consulting with the CEO and other members of the board about matters they wished to raise;
- (b) ensure discussions of the board led to clear decisions which are appropriately recorded and communicated;
- (c) take reasonable steps to engender cohesion, harmony and unity of the board;
- (d) take reasonable steps to ensure that relevant financial and non-financial performance indicating information made available to the board.

969 As a director of AWB he had responsibilities to:

- (a) become familiar with the fundamentals of the business in which AWB was engaged;
- (b) be kept informed about the activities of AWB; and

(c) maintain familiarity with the financial position of AWB.

970 Flugge says that he was a member of the board which collectively had responsibilities to:

(a) oversee the overall strategic direction of AWB;

(b) guide and monitor the management of AWB; and

(c) oversee the implementation of corporate governance policies and procedures.

971 Flugge otherwise denies paragraph 6.

972 In my view, it is not necessary to resolve any areas of dispute about the responsibilities of Flugge unless it becomes relevant in dealing with any alleged breach of duty. Accordingly, I will defer any findings on paragraph 6 of the TFASOC at this stage.

TFASOC – paragraphs 7 and 8

Statutory duties

973 ASIC pleads that during the period from 1 May 1998 to 15 March 2002, as a director of AWB Flugge owed a duty to AWB to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were an officer of a corporation in AWB's circumstances; and

(b) occupied the office held by Flugge and had the same responsibilities as Flugge.

974 The duty arises by reason of s 180 of the Act.

975 ASIC plead that during the period from 1 May 1998 to 15 March 2002, as a director of AWB Flugge owed a duty to AWB to exercise his powers and discharge his duties:

(a) in good faith in the best interests of AWB; and

(b) for a proper purpose.

976 The duty arises by reason of s 181 of the Act.

977 Flugge admits these allegations.

TFASOC – paragraph 9

United Nations Resolutions on trade with Iraq

978 ASIC pleads that by Resolution 661 of the UN Security Council, adopted on 6 August 1990 (Resolution 661), the Security Council, *inter alia*:

- (a) decided that member states should prevent the sale or supply by their nationals or from their territories of any commodities or products to any person or body in Iraq or to any person or body for the purposes of any business carried on in or operated from Iraq but not including supplies intended for strictly medical purposes and, in humanitarian circumstances, foodstuffs;
- (b) decided that all member states should not make available to the Government of Iraq or its instrumentalities any funds or any other financial or economic resources and should prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to the Government of Iraq or its instrumentalities any such funds or resources; and
- (c) established the 661 Committee.

979 Flugge admits UN Resolution 661 and its terms and says further that the 661 Committee was mandated to, *inter alia*, monitor and control the implementation of sanctions imposed on Iraq and the purchase of humanitarian items and their distribution inside the country; and otherwise denies paragraph 9 of the TFASOC.

980 I accept Flugge's plea on the mandate of the 661 Committee. In my view there is no need otherwise to resolve any dispute (if any) in view of the admissions made.

TFASOC – paragraph 10

981 ASIC pleads that by resolution 687 of the United Nations Security Council adopted on 3 April 1991 (Resolution 687), the Security Council determined, *inter alia*, that the

prohibitions on the sale of commodities or products and prohibitions on financial transactions related thereto contained in Resolution 661 should not apply to foodstuffs notified to the 661 Committee.

982 Flugge admits UN Resolution 687 and its terms by otherwise does not admit paragraph 10.

983 In view of the admission made by Flugge, I do not consider it necessary to resolve any further issues at this stage.

TFASOC – paragraph 11

984 ASIC pleads that by Resolution 986, the Security Council, inter alia:

- (a) authorised member states to permit the importation of petroleum and petroleum products originating in Iraq, notwithstanding Resolution 661, of a value not exceeding one billion US dollars every 90 days;
- (b) required the funds paid for the purchase of Iraqi petroleum and petroleum products to be paid into the UN escrow account; and
- (c) decided that the funds in the UN escrow account should be used to meet the humanitarian needs of the Iraqi population, including to finance the export to Iraq of foodstuffs in accordance with the procedures established by the 661 Committee.

985 ASIC provides particulars referring to the full terms of Resolution 986.

986 Flugge admits the terms of the resolution and otherwise does not admit paragraph 11.

987 I am satisfied that ASIC has established that paragraph 11 is made out.

TFASOC – paragraph 12

988 ASIC pleads that Resolution 986 authorised the operation of the OFFP for an initial period of 180 days. Subsequent resolutions of the United Nations Security Council extended the operation of the OFFP for further periods of up to 180 days. ASIC

provides the following particulars of the phases:

The initial period of 180 days was referred to as Phase I of the Oil-for-Food Programme. Subsequent resolutions adopted by the United Nations Security Council extending the operation of the programme were as follows:

PHASE	RESOLUTION	DATE ADOPTED
Phase II	Resolution 1111	4 June 1997
Phase III	Resolution 1143	4 December 1997
Phase IV	Resolution 1153	20 February 1998
Phase V	Resolution 1210	24 November 1998
Phase VI	Resolutions 1242, 1275, 1280	21 May 1999, 19 November 1999, 3 December 1999
Phase VII	Resolution 1281	10 December 1999
Phase VIII	Resolution 1302	8 June 2000
Phase IX	Resolutions 1330, 1352	5 December 2000, 1 June 2001
Phase X	Resolution 1360,	3 July 2001
Phase XI	Resolution 1382	29 November 2001
Phase XII	Resolutions 1409, 1443	14 May 2002, 25 November 2002
Phase XIII	Resolution 1447	4 December 2002

989 Flugge admits the UN Resolutions and their terms but otherwise does not admit paragraph 12.

990 I am satisfied that ASIC has established that paragraph 12 is made out.

TFASOC – paragraph 13

991 ASIC pleads that by Resolution 1472, the Security Council, inter alia approved adjustments to the OFFP and authorised:

- (a) the review of the approved funded and non-funded contracts concluded by the Government of Iraq to determine the relative priorities of the contracts; and
- (b) the negotiation and agreement on necessary adjustments in the terms or

conditions of these contracts and their respective letters of credit.

992 Flugge admits the U N Resolutions but otherwise does not admit paragraph 13.

993 I am satisfied that ASIC has established that paragraph 13 is made out.

TFASOC – paragraph 14

994 ASIC pleads that at all material times on and after 15 October 1997:

- (a) in order to obtain payment from the UN escrow account, exporters of foodstuffs to Iraq were required to submit to the OIP the concluded contract for each transaction in respect of which payment was sought;
- (b) each concluded contract was required to be submitted through the exporter's UN embassy;
- (c) the contracts were examined by the OIP for, inter alia, price and value; and
- (d) if the OIP approved the relevant contract, the exporter became eligible for payment from the UN escrow account.

995 Flugge admits the UN Resolutions referred to in paragraph 14 but otherwise does not admit paragraph 14.

996 I am satisfied that ASIC has established that paragraph 14 is made out.

TFASOC – paragraph 15

997 ASIC pleads that as a signatory of the United Nations Charter, each of the resolutions alleged (UN Resolutions) bound Australia and all other nations which were signatories, including, relevantly, Canada and the United States of America.

998 ASIC gives particulars alleging that Australia was bound at all material times by Art 25 of the UN Charter to take steps to implement resolutions of the UN Security Council.

999 Flugge does not plead to the allegations in paragraph 14 as they allege matters of law.

Flugge otherwise made no submissions on the binding nature of UN resolutions. In my view, it is only necessary for me to find that the resolutions did bind the countries referred to without exploring what is entailed in being 'bound'.

TFASOC – paragraph 16

1000 ASIC pleads further and alternatively, by reason of each of the UN Resolutions, the UN called upon its member states – including Australia – to ensure that their nationals (including corporations registered in each member state) acted in accordance with the UN Resolutions, including by:

- (a) preventing the payment by their nationals of currency other than Iraqi Dinars (hereafter, internationally traded currency) to the Government of Iraq or its instrumentalities; and
- (b) ensuring that their nationals obtained payment from the UN escrow account only on account of goods supplied to the people or Government of Iraq under the OFFP, to meet the humanitarian needs of the people of Iraq (OFFP humanitarian goods).

1001 Flugge does not plead to the allegations in paragraph 16 as they allege matters of law, otherwise Flugge makes no submissions on this allegation.

1002 Up to this plea, ASIC has alleged the terms of relevant UN resolutions.

1003 Under Resolution 661 there was a carve out for 'supplies intended for strictly medical purposes, and, in humanitarian circumstances, foodstuffs.' Resolution 687 resolved that 'the prohibitions on the sale of commodities or products and prohibitions on financial transactions related thereto, contained in Resolution 661 should not apply to foodstuffs notified to the 661 Committee.'

1004 Resolution 986 established the OFFP which provided, inter alia, that the funds in the UN escrow account 'should be used to meet the humanitarian needs of the Iraqi population and for the following other purposes:

- (a) To finance the export to Iraq, in accordance with the procedures of the Committee established by resolution 661 (1990), of medicine, health supplies, foodstuffs, and material and supplies for essential civilian needs as referred to in paragraph 20 of Resolution 687 (1991) provided that:
 - (i) Each export of goods is at the request of the Government of Iraq;
 - (ii) Iraq effectively guarantees their equitable distribution, on the basis of a plan submitted to and approved by the Secretary-General, including a description of the goods to be purchased;
 - (iii) The Secretary-General receives authenticated confirmation that the exported goods concerned have arrived in Iraq.'

1005 As noted, Resolution 986 required Iraq to provide a plan for the equitable distribution of goods purchased under the OFFP. Several of the AWB witnesses referred to this requirement when giving evidence of their belief that the UN had approved the payment by AWB of inland transportation fees to Iraq and by inference that this requirement supported their belief.

1006 The plea in paragraph 16, seeks to allege the construction or meaning to be given to 'each of the UN Resolutions.' As indicated above, under Resolution 986 the UN escrow account was not limited to 'the humanitarian needs of the Iraqi population' but extended to 'the following purposes' there set out.

1007 What fell within the 'humanitarian needs' and the 'following other purposes' was subject to policy discretion of the 661 Committee, as discussed below' and not capable of precise definition. In any event, humanitarian needs involved more than 'goods supplied to the people of Iraq' as alleged in paragraph 16.

1008 I accept Flugge's contention that the allegations in paragraph 16 are an allegation as to the construction and meaning of the resolutions previously pleaded and are thus an allegation of law.

1009 As discussed below, the actual arrangement entered into with the IGB by the AWB fell outside any reasonable construction of the Resolutions and does not turn on matters of construction of the resolutions.

TFASOC – paragraph 17

1010 ASIC pleads that in compliance with Australia's obligations as alleged, or alternatively in response to the UNs' call upon its member states referred to above, the Commonwealth Parliament inter alia passed into law regulation 13CA of the Customs Regulations.

1011 Flugge says that in light of his plea as to the non-justiciable allegations of the TFASOC (see paragraph 1018 and following below), he admits so much of paragraph 17 as does not involve non-justiciable allegations. Flugge says that, at the relevant time, the words of regulation 13CA(2) were as copied above at paragraph 86.

1012 Flugge says that:

- (a) in passing into law regulation 13CA, the government of Australia entrusted solely to the Minister of State and Foreign Affairs and Trade the task of ensuring that Australia complied with its international obligations under the terms of the UN Resolutions;
- (b) the Minister of State for Foreign Affairs and Trade's power to grant permissions pursuant to regulation 13CA was, by the authority of the Minister, exercised by officers of DFAT;
- (c) DFAT established a process to satisfy regulation 13CA and to ensure that Australia's obligations under the terms of the UN Resolutions were complied with, which process included:
 - (i) providing information to Australian companies in respect of the process of seeking approval from the UN to export goods to Iraq;
 - (ii) receiving, reviewing and scrutinising completed UN forms from Australian companies, which was required to be submitted in relation to the OFFP along with the relevant contract;
 - (iii) once reviewed, forwarding the completed UN form along with the relevant contract to the UN through the Australian Mission in New

York; and

- (iv) receiving and reviewing the form and the contract approved by the UN in order to exercise the power provided for in regulation 13CA(2) of the Customs Regulations to satisfy the duty holder, prior to executing an export permit, that permitting the exportation would not infringe the international obligations of Australia.

1013 I find that the Australian Government did pass into law the regulation alleged. ASIC tendered a consolidated version of the resolution that indicates the resolution was enacted prior to 17 June 1999.

1014 The evidence of Bowker and the regulation itself established (c), (d) and (e) of Flugge's plea. Flugge submits that volume 13 of the Court Book contained the relevant OFFP contracts along with the permissions to export signed by the Minister's authorised officer. Flugge says that those permissions provided that the authorised officer, being an officer of DFAT granted permission pursuant to regulation 13CA stating:

This permission is granted because the exportation from Australia of the goods destined for Iraq specified in Part 1 of this schedule do not infringe Security Council Sanctions against Iraq.

1015 Flugge submits and I accept that the task entrusted exclusively to the Minister was in fact exercised by delegation.

Non-justiciable issues

1016 Flugge pleads in paragraph A of his Further Amended Defence of 7 December 2015 (FAD) that:

- (a) any allegations in the statement of claim that require the Court to adjudicate upon:
 - (i) agreements, understandings or obligations between Australia and foreign States that create rights and obligations under public international law (in this case the UN Security Council Resolutions) that

have not been enacted by the Commonwealth Parliament into Australian domestic law; or

- (ii) the acts of a foreign State within its own territory including the validity, legality, acceptability or motives of state actors

are not justiciable and this Court may not be required to, or does not have, or may not exercise jurisdiction in respect of such allegations.

(b) The following paragraphs of the TFASOC contain non-justiciable allegations:

- (i) paragraph 17 requires the Court to enforce or adjudicate upon rights and obligations arising from UN Security Council Resolutions set out in paragraphs 15 and 16 of the TFASOC that have not been enacted by the Commonwealth Parliament into Australian domestic law;
- (ii) paragraph 22 requires the Court to determine or adjudicate upon the intention, motive or expectation of a State actor being the 1GB on behalf of the government of Iraq;
- (iii) paragraph 23 requires the Court to determine or adjudicate upon the intention motive or expectation of a State actor being the IGB on behalf of the government of Iraq;
- (iv) paragraph 25 requires the Court to determine or adjudicate upon the intention motive or expectation of a State actor being the IGB on behalf of the government of Iraq;
- (v) paragraph 29 requires the Court to determine or adjudicate upon the purpose, legality, validity or effect of acts of a State actor being the IGB on behalf of the government of Iraq;
- (vi) paragraph 48(c) requires the Court to enforce or adjudicate upon rights and obligations arising from UN Security Council Resolutions set out in paragraphs 15 and 16 of the TFASOC that have not been enacted by the Commonwealth Parliament into Australian domestic law;
- (vii) paragraph 48(i) requires the Court to determine or adjudicate upon the purpose, legality, validity or effect of acts of a State actor being the IGB on behalf of the government of Iraq;
- (viii) paragraph 49(a) requires the Court to enforce or adjudicate upon rights and obligations arising from UN Security Council Resolutions set out in paragraphs 15 and 16 of the TFASOC that have not been enacted by the Commonwealth Parliament into

Australian domestic law;

- (ix) paragraph 49(d), by incorporation of paragraph 48(i), requires the Court to determine or adjudicate upon the purpose, legality, validity or effect of acts of a State actor being the IGB on behalf of the government of Iraq.

1017 ASIC contends that the issue is misconceived.

1018 Flugge contends that paragraph 17 (see paragraph 1010 above) of the statement of claim requires the Court to enforce or adjudicate upon rights and obligations arising from UN Security Council Resolutions set out in paragraphs 15 and 16 of the statement of claim (see paragraphs 997 and 1000 above) that have not been enacted by the Commonwealth Parliament into domestic law.

1019 In *Victoria v Commonwealth*,⁷⁸⁴ the plurality of the High Court of Australia said:

as matters stand in Australia, and as they stood in 1900, the conduct of external affairs by the Executive may produce agreements which the Executive wishes to translate into the domestic or municipal legal order. To do so, it must procure the passage of legislation implementing those agreements if it wishes to create individual rights and obligations or change existing rights and obligations under that legal order.

1020 ASIC accepts that unless implemented by Australian legislation, UN resolutions have no direct effect under Australian domestic law. Unless so implemented, such resolutions are incapable of creating a new Commonwealth criminal offence.

1021 ASIC also accepts that Resolutions 661 and 986 were not, by legislation, incorporated in Australian domestic law. ASIC concedes that although under Article 25 of the Charter of the UN, Australia was obliged to adhere to and implement Resolutions 661 and 986, those resolutions imposed no obligations on companies or persons within Australia. ASIC acknowledges that breach of, or acts inconsistent with, such UN resolutions by companies or persons within Australia does not breach Australian domestic law or have any criminal law consequences under Commonwealth, State or Territory law.

⁷⁸⁴ (1996) 187 CLR 416, 481 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

- 1022 ASIC submits, however, that it is relevant to the case against Flugge to find that AWB's payments to Iraq via Alia represented the very type of conduct the United Nations resolutions were designed to prevent. ASIC says that such findings are a necessary background fact and surrounding circumstance to the question whether Flugge and Geary breached their statutory duties as officers of AWB.
- 1023 ASIC submits that the issue is whether Flugge breached his duties as a director of AWB. In substance, ASIC alleges that he breached his duties by failing to prevent AWB engaging in conduct that the Australian government had been called on to prevent or not inquiring whether AWB was engaging in conduct that the UN had called on Australia to prevent.
- 1024 As it was there is no issue that Australia did not pass any law in accordance with the UN Resolutions save to require exporters seek approval to export to Iraq.
- 1025 ASIC submits that contrary to the submission of Flugge, the Court has not been called on to enforce or adjudicate upon rights and obligations arising from the UN Security Council Resolutions set out in paragraphs 15 and 16 of the statement of claim. Rather, the Court has been asked to rule on whether AWB's reputation would suffer if it did engage in conduct the UN had called on Australia to prevent.
- 1026 ASIC submits that the statement of claim does not allege that AWB 'breached' the UN Security Council Resolutions. Rather, the statement of claim alleges that AWB engaged in the very conduct that the UN had called on Australia to prevent. ASIC says that there is a clear distinction between the two.
- 1027 I accept ASIC's submissions that Flugge has erred in his contention that each of paragraphs 17,⁷⁸⁵ 48(c)⁷⁸⁶ and 49(a)⁷⁸⁷ of the statement of claim requires the Court to enforce or adjudicate upon rights and obligations arising from United Nations

⁷⁸⁵ Flugge Defence [A(b)(i)].

⁷⁸⁶ Flugge Defence [A(b)(vi)].

⁷⁸⁷ Flugge Defence [A(b)(viii)].

Security Council Resolutions, that have not been enacted by the Commonwealth Parliament into Australian domestic law.

1028 I accept ASIC's analysis of paragraphs 17, 48(c) and 49(a) as follows:

Paragraph 17 of the statement of claim pleads '[i]n compliance with Australia's obligations as alleged in paragraph 15 above, or alternatively in response to the United Nations' call upon its member states alleged in paragraph 16 above, the Commonwealth Parliament inter alia passed into law regulation 13CA of the Customs (Prohibited Exports) Regulations 1958 (Cth) (Customs Regulation).' That pleading does not require the Court to enforce or adjudicate upon obligations that have not been enacted. The allegation is simply that the Australian Parliament enacted a law in compliance with Australia's obligations under the UN charter, or in response to or in the context of the UN resolutions. It matters not for the purposes of these proceedings whether, as a matter of international law, Australia was actually obliged to do so. The fact is that it did, and did so in the context that the UN had called on Australia to prevent payments being made to Iraq.

Paragraph 48(c) of the statement of claim pleads that Flugge knew that the United Nations had called on Australia to act in accordance with the UN Resolutions. That allegation does not require the Court to enforce or adjudicate upon obligations that have not been enacted. Rather, the Court is asked to determine that Flugge had knowledge of a particular fact.

Paragraph 49 (a) of the statement of claim pleads that Flugge failed to take reasonable steps to ensure that when AWB was selling and exporting wheat to Iraq and obtaining payments from the UN escrow account, AWB was not engaging in conduct that the UN Resolutions had called on member states to prevent. In other words, Flugge had a duty to ensure AWB was not engaging in highly unethical and improper conduct that, if revealed, would cause substantial damage to AWB. The Court is being asked to determine that Flugge had a duty to take reasonable steps to ensure AWB was not engaging in conduct that the UN Resolutions had called on member states to prevent. The Court is not asked to determine that AWB was 'engaging in breaches' of the UN resolutions. It is quite wrong to suggest that ASIC's pleaded case requires the Court to make that determination.

1029 Flugge also raises the act of state doctrine to challenge paragraphs 22, 23 and 25. Although, I have not come to those paragraphs it is convenient to deal with this plea while also dealing with the earlier plea that the UN resolutions were not part of Australia's domestic law.

1030 Flugge says the pleas require the Court to determine or adjudicate upon the intention, motive or expectation of a State actor being the IGB on behalf of the government of Iraq.

1031 In paragraph 22, ASIC alleges that the IGB imposed what was described as an inland transportation fee in relation to the supply of wheat by AWB to Iraq that was not a genuine fee for transport services provided to or by AWB.

1032 In paragraph 23, ASIC make a similar allegation that the after sales service fee was not a genuine fee for any service provided to or by AWB.

1033 In paragraph 25, ASIC alleges that the inland transportation fee was a sham in that contrary to the written terms of the OFFP contracts, neither AWB nor the IGB ever intended or expected that AWB would deliver or transport or arrange to deliver or transport any AWB within Iraq.

1034 The act of state doctrine was explained by Black CJ (in agreeing with the reasons of Jagot J) in *Habib v Commonwealth* as follows:⁷⁸⁸

Judicial consideration of the doctrine in Australia has been limited and conceptions of it in this country draw upon cases decided by the House of Lords and courts of the United States. The doctrine is commonly defined by reference to the observations of Fuller J in *Underhill v Hernandez* 168 US 250 at 252 (1897) that:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

1035 The passage from *Underhill v Hernandez* was quoted with approval by the High Court in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd [No 2]*, where the Court said that the act of state doctrine reflected a:⁷⁸⁹

principle of international law, which has long been recognized, namely that, in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign's own territory.

1036 In *Moti v The Queen*,⁷⁹⁰ the applicant had sought a stay of criminal proceedings based on an alleged abuse of process arising from the circumstances of the applicant's

⁷⁸⁸ (2010) 183 FCR 62, 66 [6].

⁷⁸⁹ (1988) 165 CLR 30, 40.

⁷⁹⁰ (2011) 245 CLR 456 ('*Moti*').

removal from the Solomon Islands to Australia and the alleged connivance of Australian Government officials in those events. The applicant was charged under the *Crimes Act 1914* (Cth) for an offence under a provision that provided it was an offence for an Australian citizen to engage in sexual intercourse with a person under the age of 16 years while outside of Australia. The offence was alleged to have occurred in the Solomon Islands.

1037 The applicant's deportation from the Solomon islands was not authorised by Solomon Islands law.

1038 The High Court held (Heydon J dissenting) that the further prosecution of the charges laid should be stayed as an abuse of process because Australian officials had facilitated the deportation of the accused knowing that it was, at the time, unlawful under Solomon Islands law.

1039 The High Court held that the fact that the decision of a foreign official was called into question did not of itself prevent the courts from considering the issue.⁷⁹¹

1040 The High Court held that in the circumstances the act of state doctrine did not prevent the Court from making a decision upon the exercise of a sovereign power by a foreign government if that decision was only a preliminary question to the decision of a question which itself was within the competency of the Court. The Court said:⁷⁹²

In these circumstances consideration of questions of act of State and the decision of Fuller CJ in *Underhill* is better conducted by reference to more recent examination of those questions. And, as will be explained, neither what was said in the *Spycatcher Case* nor the decision of Fuller CJ in *Underhill* should be understood as establishing as a general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law.

It should be emphasised that it follows that there will be occasions when to decide the issues that must be determined in a matter an Australian court must state its conclusions about the legality of the conduct of a foreign government or persons through whom such a government has acted. The present case is

⁷⁹¹ *Moti*, 475-476 [52].

⁷⁹² *Moti*, 475-476 [50]-[52] (citations omitted).

an example of an occasion of that kind.

The dictum of Fuller CJ was stated in absolute and universal terms. It is a dictum often associated with the expression 'act of State.' But both the dictum, and the phrase 'act of State', must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula. Thus, as has now been pointed out in successive editions of *Dicey and Morris*, the result to which the dictum of Fuller CJ would point is often a result dictated by the application of ordinary rules governing the choice of law. So, for example, there could be no recovery by an action brought in this country in tort for the governmental seizure of property in a foreign country if the law of the place where the alleged tort was committed permitted that seizure. Whether the acts of which complaint was made in such a case were tortious would be determined by reference to the law of the place where the alleged tort was committed. And other circumstances in which the dictum might be thought to be engaged will more appropriately require the application of well-established rules about foreign states immunity. As F A Mann has cogently argued, issues like those considered in *Buttes Gas* and in *Sabbatino* are better approached at a more particular level of inquiry than the level of generality reflected in the dictum of Fuller CJ and in references to international comity and the conduct by the executive branch of foreign relations. Rather, as Mann has correctly said, 'the Courts are free to consider and pronounce an opinion upon the exercises of sovereign power by a foreign Government, if the consideration of those acts of a foreign Government only constitutes a preliminary to the decision of a question ... which in itself is subject to the competency of the Court of law.' The fact that the decision of a foreign official is called into question does not of itself prevent the courts from considering the issue. Here, the question of the lawfulness of the appellant's removal from Solomon Islands, although effected by the Solomon Islands Government, was 'a preliminary' to the decision whether a stay should be granted. The primary judge was not right to conclude that '[i]t is not for this court to express an opinion on these decisions made by the Solomon Islands government.'

- 1041 ASIC submits that Flugge's reliance on the act of state doctrine is misplaced. ASIC contends that this Court is not required to adjudicate upon the validity of acts and transactions of Iraq within Iraq's own territory.
- 1042 ASIC says that questions of legality about contracts entered into by AWB and Iraq and Iraq's conduct are not questions to be decided in these proceedings. The Court is not being asked to make any finding that the contracts are illegal or even unenforceable.
- 1043 ASIC contends that the key allegation by ASIC in this case is that the payments by AWB of the IGB fees to Iraq was the very thing that the UN Security Council resolution had called on member states to prevent. ASIC contends that there is no pleaded issue, and therefore no need for the Court to determine, that anything Iraq did was illegal or

invalid. ASIC says that the Court is not sitting in judgment on Iraq's conduct. It is sitting in judgment on the conduct of Flugge and Geary.

1044 ASIC submits that if contrary to its primary submissions that the pleadings do require the Court to pronounce an opinion upon the exercise of sovereign power by Iraq, the act of state doctrine would not be infringed. ASIC says that the passage from *Moti* I have quoted above, makes clear that the Court is free to do so if the consideration of those acts of a foreign Government is 'preliminary to the decision of a question ... which in itself is subject to the competency of the Court of law.'

1045 Flugge submits that the decision in *Moti*, is best seen as one resting on its own peculiar facts, where no contested foreign act of State was in issue and the central focus was on the legality of conduct of Australian government officials.

1046 I do not accept this proposition. The High Court's decision was expressed in general terms. There is nothing to suggest the Court's decision was limited to the circumstance in which there was no dispute that the action of the Solomon Island Government was contrary to law. Further, the Court approved without qualification F A Mann's general statement of principle that 'the Courts are free to consider and pronounce an opinion upon the exercises of sovereign power by foreign Government, if the consideration of those acts of a foreign Government only constitutes a preliminary to the decision of a question ... which in itself is subject to the competency of the Court of law.'⁷⁹³

1047 Flugge submits that here the conduct of the foreign State actor, the IGB, is central to the allegations against Flugge, with the legality, motive, purpose and effect of such acts requiring review and determination by the Australian court. Flugge says that in such circumstances, ASIC's case raises non-justiciable matters that ought not to be the subject of adjudication or review in this Court.

1048 I reject this submission. In my view the critical issue for the determination of the case

⁷⁹³ *Moti*, 476 [52].

is whether Flugge has breached his duties as a director. The High Court has made it clear in *Moti* that it is appropriate for the Court to make a finding about the conduct of a foreign state so long as that finding is preliminary to making a decision which the Court is competent to make.

1049 In this case, it would seem an irrational result that Flugge could escape sanctions for breaches of his duties as a director if the conduct he was alleged to have engaged in involved a failure to prevent AWB being party to conduct of a foreign state or its instrumentality.

1050 In accordance with *Moti*, I find that the Court is not prevented from deciding the matters pleaded in paragraphs 17, 22, 23, 25, 48(i) and 59(d).

1051 I find that the plea in paragraph 17 has been made out.

TFASOC – paragraph 18

1052 ASIC pleads that pursuant to the Customs Regulation, at all material times prior to 9 May 2003, AWB was prohibited from exporting wheat to Iraq unless it received permission for the export of wheat from the Minister of Foreign Affairs and Trade or his authorised representative.

1053 Flugge admits paragraph 18 and says further that AWB sought and received the necessary permissions from an authorised representative of the Minister of State for Foreign Affairs and Trade, namely officers of the DFAT, for each relevant shipment of wheat.

1054 I find that ASIC has made out paragraph 18 and I accept Flugge's further contention.

The inland transportation fee and the after sales service fees

TFASOC – paragraph 19

1055 ASIC pleads that at all material times, AWB's wheat sales to Iraq constituted a substantial part of AWB's overall annual wheat sales and were highly profitable for AWB, and therefore Iraq was a very important market for AWB.

1056 Flugge admits that in the period 1 October 1999 to 30 September 2002, Iraq was one of the largest markets for wheat exported by AWB;

1057 Flugge further says further that:

- (a) AWBI was responsible for the operation of the national pool on behalf of growers who delivered grain to it through the single desk;
- (b) AWBI and AWB had differently constituted boards, held separate board meetings, and employed separate executive staff;
- (c) in operating the national pool, AWBI utilised services provided by AWB for which AWB was compensated by AWBI in accordance with services agreements; and in accordance with the services agreements, AWB acted as agent for AWBI in entering into contracts for the sale of the wheat.

1058 Flugge otherwise does not admit paragraph 19.

1059 The evidence established Iraq was at all relevant times a major buyer of Australian wheat. Prior to the Gulf War in 1990 and 1991, Iraq was a major buyer with annual purchases in excess of 1 million tonnes. As mentioned earlier, in 1990, Iraq was Australia's largest wheat market and Iraq's preference was for Australian Hard wheat, with prices achieved at a premium to other markets and sold on a freight delivered (C&F) basis.⁷⁹⁴

1060 A number of internal information papers and Iraq briefs prepared during the OFFP revealed the importance of the Iraq trade to AWB.⁷⁹⁵

1061 Iraq continued to be a primary overseas market for AWB during the OFFP and AWB became Iraq's largest supplier of wheat increasing its percentage of the market to

⁷⁹⁴ CB 1/121.

⁷⁹⁵ CB 1/247.

85 per cent market.⁷⁹⁶ The Annual reports of AWB noted Iraq as a key market.⁷⁹⁷

1062 For the period 1 October 1999 to 30 September 2000, AWB exported 2,516,776 tonnes of wheat to Iraq (Wheat Exports Australia: Statistics 1999-2000⁷⁹⁸). Over the period 1 October 2000 to 30 September 2001, Australia exported 2,500,893 tonnes of wheat to Iraq.⁷⁹⁹

1063 In the 2003 Investor Fact Book, it was estimated in 2001 that the Middle East (including Egypt) contributed to 25 per cent of the AWB National Pool, and the Fact Book set out the role of the Single Desk, and the details of the wheat supply process to Iraq.⁸⁰⁰

1064 An AWB document setting out 'success stories' for inclusion in the 2002 - 2003 Pool Performance Report (cover the period 1 October 2002 - 30 September 2003) stated that Iraq was 'one of AWB's strategically important markets'.⁸⁰¹

1065 ASIC submitted that the importance of the Iraq trade was also demonstrated by Flugge's interest and interaction with the Middle East desk. Further, between 1996 and 2002, Flugge travelled regularly to Iraq and corresponded with Iraq and the Australian government in connection with the Iraq trade.⁸⁰²

1066 I accept that Iraq was a very important and highly profitable market for AWB.

1067 I accept that ASIC has made out the allegations in paragraph 19. I also accept the

⁷⁹⁶ CB 3/1560.

⁷⁹⁷ 2001 report at CB 3/2003.

⁷⁹⁸ CB 2/1335.

⁷⁹⁹ CB 3/2083.

⁸⁰⁰ CB 6/3811.

⁸⁰¹ CB 6/3893.

⁸⁰² CB 1/121, 251, 271, 2/811, 3/2183, 2185, 2187. Prior to the final version being sent, Hogan and Flugge discussed a draft of the letter. Hogan amended the letter following his discussions with Flugge (CB 2189, 2191). CB 4/2219 is a DFAT email which describes the purpose of the meeting is for Flugge to talk to the UN Treasury about processes and payments for OFFP wheat shipments. CB 4/2221 is a DFAT report of the meeting.

contentions of Flugge about the separate operation of the AWB and AWBI as set out above.

TFASOC – paragraph 20

1068 ASIC pleads that between 1 May 1998 and 15 March 2002, AWB entered into several contracts with the IGB for the sale of wheat under the OFFP.

1069 Flugge admits paragraph 20 and says further that the full wording of the relevant clause of the contracts relating to the inland transportation fee is set out in the particulars alleged – Complete Chart of Wheat Contracts July 1999 – December 2002 to the TFASOC.

1070 I find that ASIC has made out the allegations in paragraph 20. I also accept the defence of Flugge as to the full wording of the relevant contracts.

TFASOC – paragraph 21

1071 ASIC pleads that in the period between 1996 and June 1999, AWB and the IGB entered into 20 contracts for the sale of wheat and each of those contracts provided that the contractual basis on which AWB sold wheat to the IGB was either:

(a) ‘C and F Umm Qasr’ or ‘C&F Free Out Umm Qasr’, which meant that the price per tonne for which the wheat was sold included:

(i) the price of the wheat; and

(ii) the cost of the carriage of the wheat from Australia to the port of Umm Qasr, Iraq;

or

(b) ‘CIF Umm Qasr’ or ‘CIF Free Out Umm Qasr’, which meant that the price per tonne for which the wheat was sold included:

(i) the price of the wheat;

- (ii) the cost of the carriage of the wheat from Australia to the port of Umm Qasr, Iraq; and
- (iii) the cost of insuring the shipment against the risk of loss of or damage to the wheat during its carriage to Iraq.

1072 ASIC provides particulars of the contracts alleging that each of the contracts was in writing, comprising an AWB-created 'short-form' contract and, in most instances, and IGB-created 'long form' contracts. The dates and material terms of each of the twenty contracts are particularised in the TFASOC.

1073 Flugge does not admit this allegation.

1074 For each of the first five phases of the OFFP, the usual basis on which AWB (and the Australian Wheat Board before it) sold wheat to the IGB was 'CIF free out Umm Qasr' or 'C and F free out Umm Qasr'.

1075 Between 1995 and June 1999, AWB and IGB executed:

- (a) 'Standard Terms and Conditions' which stated that payment was to be on CIF terms;⁸⁰³
- (b) a number of contracts for the sale of bulk wheat on C and F terms⁸⁰⁴ and on CIF terms.⁸⁰⁵

1076 Under the CIF element of those terms, the price per tonne for which the wheat was sold included:

- (i) the cost of the wheat;
- (ii) the freight, or the cost of the carriage of the wheat from Australia to

⁸⁰³ CB 137, 141.

⁸⁰⁴ CB 145, 147, 151, 153.

⁸⁰⁵ CB 217, 219, 221, 223, 229, 237, 243, 253, 255, 259, 261, 265, 269, 275, 279, 281, 285, 287, 291, 297-313.

Umm Qasr (the ocean carriage); and

- (iii) the cost of insuring the shipment against the risk of loss of or damage to the wheat during its carriage to Iraq (marine cargo insurance).⁸⁰⁶

1077 As the seller of the wheat on such terms, AWB was required to arrange, and in the first instance pay for, both the cost of the ocean carriage and the cost of the marine cargo insurance for each shipment. It would in turn recover those costs from the proceeds of the sale of the wheat.

1078 In determining the price at which it was prepared to sell its wheat, AWB took into account the anticipated costs of the ocean carriage and marine insurance that would need to be recouped from the proceeds, as well as the FOB price it wished to obtain.

1079 Wheat AWB sold free out Umm Qasr during this period did not include in the sale price any allowance for the cost of the discharge of the wheat from the vessel on its arrival at Umm Qasr. That was because the IGB had full responsibility for operation of the port facilities at Umm Qasr, as well as for the wheat's accumulation, storage and distribution to flour mills.

1080 Under the terms of the IGB's contracts with AWB, the obligation to effect or arrange for the discharge of the wheat from the vessel at Umm Qasr rested with the purchaser, the IGB. The costs of discharge, along with the usual port dues, were also to be borne by the buyer (the IGB).⁸⁰⁷ AWB therefore had no obligation to discharge the wheat shipped to Iraq or to arrange for its discharge. Nor did it have any obligation to pay for the cost of the wheat's discharge or the costs of distributing the wheat within Iraq. Under the terms of its contracts with the IGB, AWB had no obligation to make any payments in or to Iraq.

1081 I am satisfied that prior to July 1999, the contracts for the sale of wheat included the

⁸⁰⁶ CB 137-8.

⁸⁰⁷ CB 139.

elements alleged.

TFASOC – paragraph 22

1082 ASIC pleads that in and after June 1999 the IGB imposed a fee on AWB:

- (a) that was described as an ‘inland transportation’ or ‘trucking’ fee in relation to the supply of wheat by AWB to Iraq;
 - (b) in amounts that were:
 - (i) denominated in US dollars, Euros or another internationally traded currency;
 - (ii) fixed by the IGB from time to time in steadily increasing amounts, ranging from US\$12.00 to US\$51.15 per metric tonne of wheat; and
 - (iii) not negotiated with, or otherwise explained or justified to, AWB by reference to any costs actually incurred in transporting wheat within Iraq;
 - (c) that was payable in cash in an internationally traded currency to an entity nominated by Iraq, and not to the IGB; and
 - (d) that was not a genuine fee for transport services provided to or by AWB;
- (the inland transportation fee).

1083 Flugge denies paragraph 22.

1084 In June 1999, IGB invited AWB to tender for the supply of wheat under the OFFP on the basis that AWB was to pay what was described as an inland transportation or trucking fee of \$USD12.00 per tonne to the Land Transport Co in Iraq. Such fee was to be included in the price at which AWB sold the wheat to the IGB and was to be recovered from the UN escrow account. This request constituted a fundamental change in the way that AWB did business with the IGB.

1085 At the time that AWB received the invitation to tender, the relevant officers of AWB that negotiated the new contracts were Officer, Hogan, Emons, Snowball and Watson. On 16 June 2009, AWB received from the IGB an invitation to tender for the supply to the IGB of 200,000 tonnes of wheat under Phase VI of the OFFP. The tender included a term that AWB pay \$12 per metric tonne to the Land Transport Co in Iraq. Clause 10 provided that the sale was 'CIF free on truck to silo at all Governorate. Cost of discharge at Umm Qasr and land transport will be USD 12 per metric ton. To be paid to the Land Transport Co. For more details contact Iraqi Maritin in Basrah [sic].'⁸⁰⁸

1086 As discussed above, the wheat tender contained terms to the effect of which were that each contract required UN approval.⁸⁰⁹ As noted, this was the first time that the IGB had requested a payment be made for inland transportation fees.

1087 On the same day as the invitation to tender was received, Hogan who was based in Cairo, commenced preparations to go to Baghdad to speak to Zuhair the Director General of the IGB. Zuhair had said that he wanted to discuss contract terms in person.

1088 On 21 June 1999, Hogan and Emons went to Iraq to discuss the invitation to tender. In particular they discussed with Zuhair the requirement to pay the trucking fee and the provision 'CIF free on truck to silo at all governorates.'⁸¹⁰ This trip is mentioned above at paragraph 151, where it is discussed that AWB objected to the payment of the inland transport fee and Zuhair's response being that it was to be a standard contract term.⁸¹¹

1089 On 24 June 1999, following his return from Baghdad to Cairo, Hogan sent an email to Emons, copied to Geary and others, reporting on the outcome of the meeting with the

⁸⁰⁸ CB 1/359-360.

⁸⁰⁹ Geary, sch A [6].

⁸¹⁰ CB 1/360.

IGB.⁸¹² Hogan included in this email a report on the new terms for the price at which wheat was to be supplied; the relevant text of the email is copied at paragraph 153.

1090 As indicated in the email, AWB understood that the inland transportation fee was to be added to the price of the wheat to be sold to the IGB, so there was no cost to AWB.

1091 Although, some officers of AWB initially thought that AWB were responsible for the wheat after it was discharged, others understood that AWB was not responsible for the inland transportation of the wheat sold despite the terms of the contract referring otherwise.

1092 The facts relating to the tender, counter proposals, subsequent agreement, terms of the short- and long- form contracts and notes of contemporary discussions are set out above at paragraph 188 to 208.

1093 AWB understood that it was not responsible for trucking. On 4 November 1999, Emons emailed Officer saying:

To date IGB have not advised the trucking co. to whom payment should be made. We have been approached by a company in Jordan but our response has been to ask for confirmation from IGB before discussing further.

We are not responsible for trucking in Iraq only the payment. Payment to us occurs as per existing contract after UN inspectors cert is issued at discharge.

When I see Zuhair at the end of Nov I hope to clear a number of the details up.⁸¹³

1094 Under the terms of the proposed sale, AWB was not required to discharge the wheat and effect delivery to all or any Governorates in Iraq, despite the specification of the price in terms to that effect in the wheat tender (and subsequent written contracts).⁸¹⁴ The obligation to transport the wheat sold by AWB to all governorates within Iraq was

⁸¹² CB 1/375.

⁸¹³ CB 2/741.

⁸¹⁴ CB 2/741.

to rest upon the Iraqis, as it always had.

- 1095 On 14 July 1999, Emons sent an email to Flugge and others noting that AWB had concluded a sale of 700,000 tonnes at US\$155.00 CIF Umm Qasr with the IGB.⁸¹⁵
- 1096 That sale was divided into three contracts numbered A4653, A4654 and A4655, which were submitted to the UN for approval. The UN reviewed the contracts on or about 10 August 1999.⁸¹⁶
- 1097 The evidence disclosed that later contracts were also denominated in Euros or other internationally traded currencies.
- 1098 The evidence also established that the amounts were fixed by the IGB from time to time in steadily increasing amounts, ranging from US\$12.00 to US\$51.15 per metric tonne of wheat.
- 1099 The evidence also established that the amounts for the inland transportation fee were not negotiated with or otherwise explained or justified to AWB by reference to any costs actually incurred in transporting wheat within Iraq.
- 1100 AWB officers visited the IGB in Iraq in June 1999 and October 1999. Although trip reports were prepared on those visits there is no mention of any discussion with the IGB seeking to relate the inland transportation costs to any costs actually incurred in transporting wheat within Iraq. Further, none of the many emails and faxes between AWB and Iraq make any reference to any negotiations or explanations or justifications for the inland trucking fee and actual costs of transporting wheat within Iraq.
- 1101 Accordingly I find that in June and after June 1999, IGB imposed a fee on AWB that was described as an 'inland transportation' or 'trucking' fee in relation to the supply of wheat by AWB to Iraq in amounts that were denominated in internationally traded currencies as alleged, and were fixed by the IGB as alleged.

⁸¹⁵ CB 2/541; TFASOC the particulars alleged , [6].

⁸¹⁶ Johnston statement (exhibit P31) [15].

- 1102 I find that these fees were not negotiated with, or otherwise explained or justified to AWB by reference to any costs actually incurred in transporting wheat within Iraq.
- 1103 I find that the fee was payable in cash in an internationally traded currency to an entity nominated by Iraq and to the IGB.
- 1104 I find that the fee was not a genuine fee for the transport services provided to or by AWB.
- 1105 AWB was informed and accepted that it was under no obligation to provide transport services in Iraq.
- 1106 For that matter, nor was the IGB obliged under the contracts to provide any transport services within Iraq.
- 1107 I find that the inland transportation fee was not a genuine fee for transport services provided to or by AWB. AWB did not provided any transport services. No transport services were provided to AWB.
- 1108 Accordingly, I find that the allegations in paragraph 22 have been made out.

TFASOC – paragraph 23

- 1109 ASIC pleads that in and after November 2000 the IGB also imposed a fee on AWB:
- (a) that was described as a payment for ‘after sales service’ in relation to the supply of wheat by AWB to Iraq;
 - (b) in an amount that was:
 - (i) fixed by the IGB at the rate of 10 per cent of the total price per tonne of all wheat shipped to Iraq by AWB (including the inland transportation fee);
 - (ii) expressed as an increase in the inland transportation fee; and
 - (iii) not negotiated with, or otherwise explained or justified to, AWB by

reference to any costs actually incurred in the provision of 'after sales service' in relation to wheat supplied by AWB to Iraq; and

(c) that was payable in cash in an internationally traded currency to an entity nominated by Iraq, and not to the IGB; and

(d) that was not a genuine fee for any service provided to or by AWB;

(the after sales service fee). ASIC refers to the inland transportation fee and the after sales service together as the 'IGB fees').

1110 Flugge denies paragraph 23.

1111 In October 2000, the IGB imposed a fee that was described as an after sales service fee. The fee was imposed without any negotiation. The fee was added to the price of the wheat including the existing inland transportation fee.

1112 IGB did not identify any after sales service to be provided to Iraq by AWB and none was provided save that Hogan recalled Abdul-Rahman the then general director of the IGB informed him that the after sale service fee was for improvements to the wharf and to increase grain logistics capacity. Hogan said Abdul-Rahman advised that the charge had been approved by the UN. Hogan said he requested that Abdul-Rahman send the approval from the UN. Hogan notes that the approval was never received and said that no one in AWB followed up on the issue.⁸¹⁷

1113 Despite what Abdul-Rahman told Hogan, I am satisfied that the after sales service fee was merely a further means by Iraq to obtain internationally traded currency. I have no reason to find that the after sales service fee was used to assist sales of wheat or that it was other than the inland transportation fee.

1114 I find that the fee was not a genuine fee as alleged.

1115 I am satisfied that the allegations in paragraph 23 are made out.

⁸¹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T967-8.

TFASOC – paragraph 24

- 1116 ASIC pleads that the written terms of each contract for the sale of wheat entered into between AWB and the IGB after June 1999 under the OFFP (the OFFP Contracts) used expressions which suggested that AWB had an obligation to deliver or transport wheat to all silos within all Governates of Iraq (the 'inland transport obligation').
- 1117 ASIC says that the inland transport obligation was implied by the use of various terms in the OFFP Contracts such as 'FIT', 'FOT', 'Free into Truck', 'Free Onto Truck', 'Free into Truck to all silos within all governorates of Iraq' and the imposition of the inland transportation fee by the means previously alleged.
- 1118 Other than to say that the relevant terms are set out in each contract, Flugge denies paragraph 24. I find that the written terms of each contract for the sale of wheat between AWB and the IGB after June 1999 under the OFFP used expressions which suggested that AWB had the obligations as ASIC alleges.
- 1119 I am satisfied that the allegations in paragraph 24 have been made out.

TFASOC – paragraph 25

- 1120 ASIC alleges that the inland transport obligation was a sham, in that, contrary to the written terms of the OFFP Contracts, neither AWB nor the IGB ever intended or expected that AWB would deliver or transport, or arrange to deliver or transport, any AWB wheat within Iraq.
- 1121 ASIC alleges that the absence of an intention on the part of AWB and the IGB that AWB would deliver or transport wheat within Iraq is to be inferred from the fact that prior to July 2003 AWB did not deliver, or transport, or arrange to deliver or transport, any wheat to any silo within any Governorate of Iraq.
- 1122 Flugge denies paragraph 25.
- 1123 The evidence concerning Alia's introduction to AWB is as follows.
- 1124 On 19 October 1999, AWB received a facsimile from Alia. The facsimile was addressed

to 'Australian Wheat Board', to the attention of 'Mr Murray Rogers Manager Director' [sic].⁸¹⁸ The facsimile is set out above at paragraph 284.

1125 The copy of the facsimile from Alia bears a manuscript note 'Mark Emons', suggesting that it had been passed on to Emons.

1126 There is no evidence that either AWB or the Australian Wheat Board had previously dealt with Alia. This is consistent with the sentence in the facsimile from Alia⁸¹⁹ saying, 'We would like to introduce to you our company...'. As discussed above at paragraph 286, Emons recalls seeing this fax, but noted that it 'had no substance.'⁸²⁰

1127 On 27 October 1999, Alia sent a further facsimile, in similar terms to the 19 October 1999 facsimile, to 'Australian Wheat Board', addressed to Emons.⁸²¹ The facsimile is discussed above at paragraph 288.

1128 Unknown to AWB, on 13 November 1999, Alia entered into the collection agreement with the ISCWT to collect inland transportation fees on behalf of the ISCWT.⁸²² The terms of the agreement are set out above at paragraph 289.

1129 Accordingly, this agreement discloses that Alia had no transport obligations in respect of arriving goods. The only obligation Alia had under its agreement with the ISCWT was the provision of information about future shipments and the receipt and payment on to the ISCWT of the inland transportation fees payable in respect of those shipments.

1130 Consistent with the collection agreement, Iraqi Ministerial records show that the amounts paid by AWB to Alia were received by Iraq, Alia acting as mere conduit for

⁸¹⁸ CB 2/695.

⁸¹⁹ CB 2/695.

⁸²⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1716, L26-8.

⁸²¹ CB 3/711.

⁸²² CB 2/743-8.

the payments. Those same records suggest that the majority of the hard currency thus obtained ended up with Iraq's Ministry of Finance.⁸²³

1131 The evidence concerning payment by AWB of the inland transportation fees discloses that the inland transportation fees were paid by several different methods. The first payment made in November 1999 was paid to a Jordanian bank account of Alia, a Jordanian company on the instructions of Zuhair of IGB. Subsequently, payments were by AWB to shipping companies to pass onto Alia and to Ronly (or in some case its subsidiaries) to pass onto Alia. Eventually, from July 2000, all payments were made direct to the account of Alia by AWB.

1132 Flugge submitted that there was no convincing proof of a sham. The submissions, however, are directed at the understanding and belief that was drawn by some officers of AWB and that could be drawn from the terms of the contract and the payments that were made to Alia. Flugge refers to the evidence of Whitwell, who was employed by AWB as marketing manager in IS&M from July 2002 until January 2007. Whitwell gave evidence that when he came to AWB he learned that Alia was the Jordanian company organising trucking in Iraq.⁸²⁴

1133 Whitwell and Edmonds-Wilson visited Alia in Jordan in 2003, and prepared a report which documented their observations. The Jordan/Iran trip report dated May 2003 contained details of Alia's trucking capabilities which Whitwell and Edmonds-Wilson became aware of after meeting with Alia.

1134 The report recorded, inter alia:

Alia currently own four vessels, all smaller than handy size, really coasters, however, were in the market to buy one 40,000 vessel to add to their fleet.

300 to 500 Alia trucks ready for deployment in Iraq or neighbouring countries. An additional 600 could be available through Alia if and when required. 40

⁸²³ CB 4/2394 (Arabic) CB 4/2397 (ASIC translation); CB 4/2415 (Arabic) CB 4/2417 (ASIC translation); CB 4/2419 (Arabic) CB 4/2421 (ASIC translation); CB 4/2468, 7/4891 (Arabic) CB 4/2471 (ASIC translation); CB 5/2824 (Arabic) CB 5/2827 (ASIC translation); CB 5/3037 (Arabic) CB 5/3041 (ASIC translation).

⁸²⁴ CB 5/3377.

metric tonne truck.

1135 Edmonds-Wilson's understanding, as a result of discussions that he was party to or overheard with Othman Al Absi of Alia, was that:

- (a) there was never any suggestion of Alia being a front for the Iraqi government; and
- (b) Alia owned its own trucks and had access to a large pool of subcontractors, from which it could engage other trucking services.

1136 I accept that there were officers of AWB who genuinely believed that the inland transportation fees being paid to Alia were in consideration of Alia providing the trucking services to deliver AWB wheat within Iraq. As discussed above, there were many officers of AWB, including board members, who genuinely believed that the UN had approved the payment by AWB of the inland transportation fees.

1137 The plea, however, is directed to the actual state of affairs and not what was represented to AWB or understood by certain AWB officers.

1138 I have already discussed at length the contracts entered into between the IGB and AWB and the inconsistencies between what was purportedly agreed and the true nature of what was agreed between at paragraphs 1084 to 1094 above.

1139 ASIC alleges that AWB never intended or expected that AWB would deliver or transport, or arrange to deliver or transport, any AWB wheat within Iraq. ASIC contends that the absence of an intention on the part of AWB and the IGB that AWB would deliver or transport wheat within Iraq is to be inferred from the fact that prior to July 2003 AWB did not deliver, or transport, or arrange to deliver or transport, any wheat to any silo within any Governorate of Iraq.

1140 I find that this was the case. AWB did not deliver or transport any AWB wheat within Iraq. Further, AWB did not arrange with Alia or any other entity to deliver or transport AWB wheat within Iraq. Although payments were made by AWB to Alia, a trucking company, there was never any agreement or arrangement made by AWB

with Alia about transporting wheat. Rather, the only dealings were the payment of moneys by AWB to the bank account of Alia in Jordan.

1141 At most, officers of AWB genuinely believed that the inland transportation fees were being used to pay for Alia to distribute wheat delivered by AWB within Iraq.

1142 I am satisfied that the allegations in paragraph 25 have been made out.

TFASOC – paragraph 26

1143 ASIC alleges that the price payable to AWB pursuant to each of the OFFP Contracts entered into after June 1999 included the amount of the IGB fees.

1144 Flugge does not admit the allegation.

1145 ASIC tendered the relevant contracts and summarised the relevant terms in annexure D to the TFASOC. There was no challenge by Flugge to this evidence.

1146 Flugge's defence annexed a schedule entitled a complete chart of wheat contracts July 1999 to December 2002 setting out the IGB fees included and paid.

1147 I find the allegation in paragraph 26 has been made out by the evidence.

TFASOC – paragraph 27

1148 ASIC pleads that in respect of the OFFP Contracts entered into after June 1999:

- (a) AWB was paid out of the UN escrow account amounts that reflected the full contract price agreed between the IGB and AWB in respect of each such contract, inclusive of the IGB fees;
- (b) AWB did not deliver or transport, or arrange to deliver or transport, any wheat to any silo within any Governorate of Iraq; and
- (c) neither AWB nor any other person provided any 'after sales service' to anybody (including AWB or IGB) in consideration for AWB's receipt from the UN escrow account of the after sales service fees.

- 1149 Flugge admits that AWB was paid out of the UN escrow account amounts that reflected the full contract price agreed between IGB and AWB in respect of each such contract, inclusive of IGB fees and otherwise denies paragraph 27.
- 1150 As to the allegation that AWB did not deliver or transport, or arrange to deliver or transport, any wheat to any silo within any Governate of Iraq, I have already found that to be the case under paragraph 25.
- 1151 As to the allegation that neither AWB nor any other person provided any 'after sales service' to anybody (including AWB or IGB) in accordance for AWB's receipt from the UN escrow account of the after sales service fees, I am satisfied that was the case.
- 1152 In November 2000, the IGB imposed on AWB a further fee described by the IGB as an after sales service fee. The fee was 10 per cent of the contracted price of the wheat including any existing transportation fees. Hogan was informed of the imposition by Abdul-Rahman the director general of IGB. The fee was to be included into the trucking fee and added to the price payable by AWB under future contracts for the sale of wheat by AWB to the IGB.
- 1153 There was no discussion between the IGB and AWB of any services to be provided by anybody. The arrangement was just a means to increase the payments to Iraq. The price of wheat (including the after sales service fee).
- 1154 On 7 February 2001, Borlase (of the IS&M division) sent an email to officers of AWB that included an 'Iraq trip report' prepared by Hogan and Borlase relating a trip they had made to Iraq and the IGB. The trip report referred to the increase in the trucking fee and the introduction of the 10 per cent after sales service fee by the Iraqis.⁸²⁵ The relevant reference is copied above at paragraph 483.
- 1155 As can be seen, Borlase and Hogan were of the view that the service fee was merely a mechanism for extracting more dollars from the escrow account. There was no

evidence led that established otherwise.

1156 I find that ASIC has made out the plea in 27(c).

1157 Accordingly, I find that the allegations in paragraph 27 have been made out.

TFASOC – paragraph 28

1158 ASIC pleads that in and after June 1999 AWB agreed to pay the IGB fees to or at the direction of the IGB. ASIC provided full particulars of the agreements and tendered the relevant contracts.

1159 Flugge denies the allegation.

1160 Flugge says that the agreements to pay the IGB fees after he ceased to be a director in March 2002 are irrelevant. I accept this submission. According to the particulars this relates to the contracts under Phases XII and XIII of the OFFP.

1161 I find that ASIC has made out the allegations in paragraph 28. I find that the allegations relating to the contracts entered into after Flugge ceased to be a director are irrelevant to the case against him.

TFASOC – paragraph 29

1162 ASIC pleads that by reason of the matters alleged in paragraphs 22 and 28 (as set out above), the purpose and effect of the payment of the IGB fees and the inclusion of the inland transport obligation in AWB's contracts with the IGB, were:

- (a) to enable the Government of Iraq to obtain payments of internationally traded currency from AWB, disguised as amounts payable by AWB in respect of the IGB fees, which payments the UN had called on its member states to prevent, as alleged in sub-paragraph 16(a) as set out above at paragraph 1000; and
- (b) to enable AWB to inflate the contract prices in the OFFP Contracts by amounts equal to the IGB fees paid to or at the direction of the IGB, and thereby to enable AWB to recover from the UN escrow account the amount of the IGB fees paid,

such recovery constituting payments that the UN had called on its member states to prevent, as alleged at sub-paragraph 16(b) above.

1163 Flugge denies paragraph 29.

1164 As discussed below when dealing with Flugge's knowledge, several officers of AWB, the managing director, Flugge and members of the AWB board of directors were of the view that the payments of the inland transportation fees had been approved by the UN and were being applied towards the inland transportation of wheat sold by the AWB to the IGB.

1165 I am satisfied that the effects of the payment of the IGB fees and the inclusion of the inland transport obligations in AWB's contracts with the IGB were as pleaded. I am also satisfied that this was the purpose of the IGB in imposing the IGB fees.

1166 In view of the belief of Flugge and the other officers of AWB that the payments of the inland transportation fees had been approved by the UN and were being applied towards the inland transportation of wheat sold by the AWB to the IGB discussed above at paragraph 910 and following, I not satisfied that ASIC has established that it was AWB's purpose as alleged.

1167 I find that the effect of the transactions was as alleged. Further, I am satisfied that the purpose of the IGB was as alleged.

1168 Flugge submits that paragraph 29 requires the Court to determine the purpose of IGB. Flugge submits that issue is not justiciable under the Act of State doctrine. I dealt with that defence at paragraph 1016 and following. For the reasons there given, I reject the contention, that the Court is not entitled to make the finding alleged concerning the purpose of the IGB as alleged.

1169 Accordingly, I find that the allegations in paragraph 29 are made out to the extent indicated.

TFASOC – paragraph 30

- 1170 ASIC pleads that at all material times, Alia was a company partly owned by the Iraq Ministry of Transport. ASIC alleges that Alia was incorporated in Jordan in 1994 as a joint venture between Sheik Al-Khawam and the Iraqi Ministry of Transport. In the period between July 1999 and November 2003, the Iraq Ministry of Transport held a forty-nine percent shareholding in Alia. ASIC refers to and relies on a letter dated October 2004 from Alia to Whitwell of AWB.
- 1171 Flugge does not admit paragraph 30.
- 1172 ASIC rely on a letter a letter from Othman Al Absi to Whitwell. Othman Al Absi did not give evidence and an affidavit sworn by him tendered by ASIC was ruled as incapable of being adduced.
- 1173 During the trial there was no submissions made on the admissibility of this letter. ASIC sought to rely on the letter in its final submissions.
- 1174 In the letter, headed 'Sub: Insurance/AWB', the writer asserts 'we would like to clarify that Iraqi Trade Ministry has about 49% of Alia capital while the other 51% are personal shares.'
- 1175 Flugge submits that no basis for the submissions made by ASIC. Flugge says that the letter is dated October 2004. Flugge says that no company search is attached. Flugge says that no time period as to the asserted ownership is provided. Flugge asks when did the asserted, unsourced, claim of ownership commence.
- 1176 Flugge says that no evidence was adduced by ASIC to answer this question. Moreover, the letter speaks of the Iraqi Trade Ministry, not the Ministry of Transport, as pleaded in paragraph 30 of the TFASOC.
- 1177 Flugge submits that ASIC ought not be able to prove the ownership of Alia other than by tendering in evidence a proper record from the relevant foreign business authority of Jordan in accordance with the *Foreign Evidence Act 1994* (Cth).
- 1178 ASIC does not allege that AWB or Flugge was aware of this fact, if it be the case. The

evidence suggested that this fact, if it be the case, did not become known to AWB or Flugge until after Flugge finished his term as a director of AWB. The letter was received some eighteen months after Flugge left AWB.

1179 I am not satisfied that ASIC has made out the allegations in paragraph 30.

TFASOC – paragraph 31

1180 ASIC pleads that at all material times, there was no agreement (whether in writing or otherwise) between AWB and Alia in relation to the supply of transport or other services by Alia to AWB, or AWB's payment for such services, other than the agency appointment alleged in paragraph 33 (which I deal with below).

1181 Flugge does not admit paragraph 31.

1182 As discussed above at paragraph 1140 and following, I have found that there was no agreement between Alia and AWB for the supply of transport services. I also find that there was no agreement for other services until the agency appointment alleged in paragraph 33 of the TFASOC.

1183 I find that AWB has made out the allegations in paragraph 31.

TFASOC – paragraph 32

1184 ASIC pleads that at all material times, other than as specified in the agency appointment alleged in paragraph 33 (which I deal with below):

- (a) Alia played no role in the purchase, importation or transportation of the wheat delivered in respect of the OFFP Contracts – including Contracts A1111 and A1112 – and Alia was not entitled to any amount on account of such purchase, importation or transportation; and
- (b) Alia's only role was to collect the IGB fees on behalf of the ISCWT and remit such fees to the ISCWT, an instrumentality of the government of Iraq.

1185 ASIC alleges that on or about 13 November 1999, Alia entered into a the collection

agreement with the ISCWT. Pursuant to the collection agreement, between late 1999 and mid-2003, Alia:

- (a) notified the ISCWT upon receipt of IGB fees (including any inland transportation fees or after sales service fees) which were deposited into Alia's bank account; and
- (b) remitted the amount of such fees, less Alia's commission, to the ISCWT's bank account at the Al-Rafidain Bank in Jordan.

1186 Flugge does not admit this allegation.

1187 I have already dealt with the role of Alia in addressing paragraph 25 of the TFASOC.

1188 I am satisfied that Alia played no role in the purchase, importation or transportation of wheat as alleged. I am satisfied that Alia's only roles was to collect the IGB fees as alleged.

1189 I find the allegations in paragraph 32 have been made out.

TFASOC – paragraph 33

1190 ASIC pleads that on or around 17 April 2000, AWB appointed Alia as its protective agent in respect of vessels carrying AWB wheat upon their arrival at Umm Qasr ('agency appointment').

1191 Flugge admits this allegation.

TFASOC – paragraph 34

1192 ASIC pleads that in the period between July 1999 and March 2003, AWB paid \$223 million in IGB fees to Alia. Flugge does not admit the allegation.

1193 ASIC say that the payments of the IGB fees on a contract-by-contract basis are set out in schedule D to the TFASOC. ASIC says that all payment of the IGB fees made by AWB over the life of the AFFP are set out in spreadsheets prepared by Ferrier Hodgson (Hodgson) on behalf of AWB.

1194 A table of all 'inland transport' payments made by AWB is exhibit P6, and a revised version with additional information is attached as Appendix E to the final submissions of ASIC. Exhibit P6 is a table setting out each of the payment requests for IGB fee payments approved for payment between November 1999 (when IGB fees were paid for the first time) and March 2003 (when IGB fees ceased to be paid). That table demonstrates that a total of approximately US\$223 million in IGB fees were paid by AWB to Alia, either directly or through intermediaries.

1195 ASIC tendered exhibit P6 under s 50 of the *Evidence Act 2008* (Vic).

1196 I am satisfied that ASIC has made out the allegations in paragraph 34.

Flugge's involvement in events and transactions concerning the IGB fees

1197 In paragraphs 35 to 43 of the TFASOC, ASIC pleads Flugge's alleged involvement in events and transactions concerning the IGB fees.

TFASOC – paragraphs 35–36

Discussions with Emons

1198 ASIC alleges that in or about June-July 1999, Flugge had a number of discussions regarding the Iraq market with Emons of AWB, the material effect of which was that:

- (a) the IGB intended to impose an inland transport fee of US\$12.00 per tonne on future contracts for the sale of wheat by AWB to the IGB;
- (b) it was probable that payment of the inland transport fee would go either directly or indirectly to the Iraq Government, and payment of any US currency to Iraq would be a breach of US law; and
- (c) there were various ways to facilitate the payment of the inland transport fee through indirect means, including by paying the inland transport fee via shipping companies engaged by AWB.⁸²⁶

- 1199 The discussions were alleged to have taken place at AWB's Melbourne office.
- 1200 Flugge admits he had a discussion with Emons and otherwise denies paragraph 35. Flugge denies paragraph 36.
- 1201 ASIC contends that the evidence establishes the following.
- 1202 Emons gave evidence that he spoke with Flugge on a number of occasions over a period of time about the trucking fee.⁸²⁷
- 1203 Emons said he would have discussed the matter of the trucking fee of US\$12.00 with Flugge prior to the fax of 13 July 1999 being sent to Zuhair.⁸²⁸ Emons regards it as very likely that he had discussions with Flugge prior to the fax concerning the authority to offer to a certain price CIF delivered onto truck at a cost of US\$12.00.⁸²⁹
- 1204 Emons said that he reported the sale of 700,000 tonnes at US\$155.00 to Flugge, Rogers, Laskie and Officer. Emons said that any contract that was concluded for a sizeable tonnage that would impact on returns or the pool returns was reported to the CEO, the chairman and other parties like Laskie and Officer. Emons said that emails like the one sent by him on 14 July 1999 to Flugge and others (see paragraph 216) were quite common.⁸³⁰
- 1205 ASIC tendered transcript of evidence given by Emons at the Cole Inquiry and extracts from an affidavit that Emons swore that was tendered at the Cole Inquiry.
- 1206 At the Cole Inquiry, Emons' evidence was as follows:
- (a) The negotiations were very unusual. The discussions were very difficult because of the phone lines. AWB had grave concerns about how it was going to execute this contract to the point where it was looking at various ideas but

⁸²⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1742, L9-10.

⁸²⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1705, L13-14.

⁸²⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1705, L26 - T1706, L1.

⁸³⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1707, L12-22.

at the end of the day, it was determined to do the contracts. It was very important to the organisation at that time. Emons had discussions with Officer, Rogers and Flugge and as a result of these discussions Emons was of the opinion that AWB wanted to do this business and it had to find a way around it.⁸³¹

- (b) Emons spoke to each of Officer, Rogers and Flugge around June/July 1999. Flugge's response was basically that AWB had to find a method to pay this money as long as it wasn't costing AWB any money, AWB had to be satisfied that it could find a methodology. Emons had a discussion with him in Flugge's office at the wheat board and they also had a number of discussions while travelling at this time;⁸³²
- (c) Emons cannot recall where or when he spoke with Flugge about trucking fees but he recalls discussing these and related matters with him on a number of occasions. The matters discussed on those occasions included (probably more than once) the issue of a trucking fee being quoted at the price US\$12.00 per tonne. Emons recalls saying words to the effect, 'The contract is subject to UN approval; if that comes through its all well and good' and 'We are looking at various methods to facilitate this.' In these discussions, Emons said that Flugge said to him words to the effect, 'We have to find a way to pay this money. As long as it is not costing AWB any money, you have to find a method of paying it.'⁸³³
- (d) Emons told Flugge that the trucking fee was something the IGB had imposed and that the IGB had nominated Alia as the recipient of the trucking fee.⁸³⁴

⁸³¹ Cole Transcript 34.16-30; CB 9/6618.1.

⁸³² Cole Transcript 34.32-35.9; CB 9/6618.1-6618.2.

⁸³³ Statutory declaration [42]-[43]; CB 9/6684.3-4; Cole Transcript 1856.9-23; CB 9/6618.3.

⁸³⁴ Cole Transcript 1941.17-19; 1941.44-1942.2; CB 9/6618.4-5.

Emons spoke with each of Officer, Rogers and Flugge about the contract. Those discussions were on occasions one on one but other occasions involved more than one other person.⁸³⁵

1207 ASIC also claims Flugge overheard a dinner-table discussion with representatives of Ronly IGC in London in June 1999, during which the imposition of the inland transport fee was allegedly discussed.⁸³⁶

1208 Emons' first recollection of a discussion with the IGB about the fees was during a meeting with Zuhair in Bangkok, which took place at Zuhair's request.⁸³⁷ This meeting was prior to the 1999 Iraqi tender.

1209 Emons gave evidence that he attended an IGC in London in June 1999. Emons said that Flugge, Martin and Officer from AWB also attended. Emons said that one evening he, Officer and Flugge were having drinks with representatives of Ronly, Bali and Ero Yahya (Yahya). Emons said that they were discussing 'basic difficulties in trading with the IGB and some of the proposals coming out of the IGB and the difficulty of discharge, et cetera, that was taking place.' Emons was asked by counsel for ASIC did Emons recall any discussion at this event at the Hilton Hotel with the Ronly people present about the inland transport fees.

1210 Emons said, 'As I mentioned before, we discussed the problems that were associated with the IGB and dealing with that obviously inclusive in that was the payment and the execution of the trucking fee.' Emons said that to the best of his recollection 'it was suggested by the members of Ronly that they could undertake the payment of the trucking fee in their name to facilitate the contracts.' Emons said that they agreed to discuss it further. Emons says that Flugge was sitting next to him. When asked

⁸³⁵ Statutory declaration [40]; CB 9/6684.3; Cole Transcript 1856.9-23; CB 9/6618.3.

⁸³⁶ TFASOC, [5].

⁸³⁷ Transcript of hearing, *ASIC v Geary & Flugge* (11 November 2015) T1682, L20; T1682, L25-7; T1894, L4 (xxn Dharmananda).

whether to his observation Flugge was paying attention during this part of the conversation, Emons said, 'I believe he was but I'm sure that he could speak for himself on that matter.'

1211 Emons also gave evidence that at the IGC in London in June 1999 there were discussions regarding the Iraq trade,⁸³⁸ and the new IGB requirement to pay an amount for transport was widely discussed between traders on the sidelines of the conference.⁸³⁹

1212 The only evidence to support of this proposition is that of Emons. In cross-examination of Emons, it was demonstrated to my satisfaction that Emons had confused the 1999 conference with the conference the following year. Flugge tendered diary entries which satisfied me that Martin did not attend the grain conference in 1999.⁸⁴⁰

1213 The contemporary records of AWB tendered by ASIC did not record or suggest that AWB were aware of the concept of trucking fees until the tender invitation from IGB was received in the 1999 Iraqi tender on 17 June 1999. According to Flugge's diary, Flugge had dinner with representatives of Ronly in London with Emons and Officer on 10 June 1999.

1214 Accordingly, I do not accept ASIC's contention that the topic of inland transport fees had been raised with AWB or any of its officers before the invitation to tender was received in the 1999 Iraqi tender. Further, I reject ASIC's submission that at the meeting with Ronly in London in June 1999, 'it was suggested by the members of Ronly that they could undertake the payment of the trucking fee in their name to

⁸³⁸ Transcript of hearing, *ASIC v Geary & Flugge* (11 November 2015) T1687, L7-10.

⁸³⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1687, L12-15 (Emons); T1963, L22-8 (xxn - Emons).

⁸⁴⁰ Exhibits F24 and F26.

facilitate the contracts.’⁸⁴¹

1215 ASIC contends that Emons spoke with Flugge on a number of occasions over a period of time about the trucking fee.⁸⁴² ASIC contends that Emons would have discussed the matter of the trucking fee of US\$15.00 with Flugge prior to the fax of 13 July 1999 being sent to Zuhair.⁸⁴³ In the fax, Emons said that discussions had taken place at the highest level and that Flugge had asked him to convey the importance of the long relationship between both parties. Emons regards it as very likely that he had discussions with Flugge prior to the fax concerning the authority to offer to a certain price CIF delivered onto truck at a cost of US\$12.00.⁸⁴⁴

1216 ASIC submits that Emons reported the sale of 700,000 tonnes at US\$155.00 to Flugge, Rogers, Laskie and Officer. Emons said that any contract that was concluded for a sizeable tonnage that would impact on returns or the pool returns was reported to the CEO, the chairman and other parties like Laskie and Officer. Emons said that emails like the one at CB 1/541 were quite common.⁸⁴⁵

1217 ASIC tendered evidence given by Emons at the Cole Inquiry. At the Cole Inquiry, Emons gave evidence that he told Flugge that the trucking fee was something the IGB had imposed. Emons said that Flugge told him that as long as it was not costing AWB any money ‘we had to be satisfied that we could find a methodology.’ Emons said that it was the IGB that had nominated Alia as the recipient of the trucking fee.

1218 Emons swore a statutory declaration that was tendered at the Cole Inquiry. Portions of it were tendered in evidence before me.

1219 Emons deposed:

⁸⁴¹ The particulars alleged, [5] TFASOC.

⁸⁴² Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1742, L9-10.

⁸⁴³ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1705, L13-14.

⁸⁴⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1705, L26 - T1706, L1.

⁸⁴⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1707, L12-22.

I now cannot recall where or when I spoke to Flugge about trucking fees. I do recall discussing those and related matters with him on a number of occasions. The matters discussed on those occasions included (probably more than once) the issue of a trucking fee being quoted at the price of US\$12 per tonne. I recall saying in relation to this words to the effect – ‘The contract is subject to UN approval; if that comes through it’s all well and good.’ I also recall saying to him words to this effect – ‘we are looking at various methods to facilitate this.’

It was during those discussions that I refer to that Flugge said to me words to the following effect –

‘We have to find a way to pay this money. As long as it is not costing AWB any money, you have to find a method of paying it.’

1220 Flugge tendered an extract of transcript of a record of interview with Emons taken by a Royal Commission officer, Mr Condon that Flugge submitted was inconsistent with what Emons had deposed in the statutory declaration. The extract was as follows:

Mr Condon: ‘That the contract was subject to UN approval.’

Mr Emons: ‘And he [Flugge] said “Well if that comes through, it’s all well and good.”’

1221 Flugge submits that I should not accept what Emons deposed to in his statutory declaration. Further, Flugge submits that I should not accept any evidence from Emons given in this proceeding for the following reasons.

1222 The only clear evidence Emons gave was that he had no recollection of any particular discussions.⁸⁴⁶ Throughout his evidence, Emons was often unable to recall matters put to him and displayed a propensity to speculate.⁸⁴⁷ On three occasions the Court gave clear instructions to Emons to refrain from giving evidence of assumption or

⁸⁴⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1906, L3.

⁸⁴⁷ No recollection or speculative response: Transcript of hearing, *ASIC v Geary & Flugge* T1683, L6-7, 10, 14-15; T1684, L14-15; T1685, L30; T1686, L5; T1692, L10; T1693, L7-8, 13-14; T1704, L7; T1705, L5, 13, 31; T1708, L3, 8-9; T1711, L11, 20-2; T1713, L31; T1715, L21-2; T1719, L31; T1720, L3; T1721, L1-2, 22; T1722, L25; T1724, L28; T1725, L2; T1726, L15-16; T1727, L5-6; T1728, L9, 12; T1729, L1, 4, 21, 23; T1730, L23-5; T1732, L29-30; T1733, L3-4, 24-25; T1734, L1, 3, 5, 7, 9-10, 13; T1737, L17, 23, 26-27, 31; T1739, L24-6; T1740, L3, 16, 27-8; T1741, L12-13; T1742, L2-4, 7, 8-10, 28-29; T1743, L28-9, 31; T1744, L14, 23; T1751, L1-2, 4; T1751, L31 – T1752, L1; T1889, L25-6; T1891, L7-9, 11, 22; T1893, L11, 31; T1895, L9; T1896, L7; T1897, L4; T1898, L1, 10, 31; T1899, L12; T1900, L31; T1901, L2-3, 15; T1904, L4, 8; T1906, L3, 16, 19, 31; T1907, L16, 18, 21; T1910, L24-5; T1911, L4; T1912, L4; T1913, L6, 12; T1914, L11, 30; T1917, L16-18, 31 – T1918, L1; T1918, L7, 11, 14; T1919, L19; T1920, L4-5, 29, 31; T1921, L31 – T1922, L3; T1923, L6; T1926, L16, 28; T1927, L10, 17, 20, 22-3; T1928, L5; T1929, L17-18; T1930, L7-8, 14; T1931, L29-30; T1935, L27-8; T1936, L11, 19-20; T1938, L4, 11, 30; T1939, L9-10, 27, 29; T1944, L13; T1945, L14, 20, 31.

belief.⁸⁴⁸ Emons persisted in giving speculative evidence.⁸⁴⁹

1223 Emons had no clear recollection of the year the inland transport fee was introduced,⁸⁵⁰ and could not even recall uncontentious matters such as the companies he had worked for since leaving AWB.⁸⁵¹

1224 Emons admitted suffering from illnesses that affected his ability to recall specific facts.⁸⁵² He acknowledged the unreliability of his own evidence by admitting his recollection: 'may well have changed from the time that [he] gave evidence in 2005.'⁸⁵³

1225 The issues that Emons could not recall are too numerous to set out.⁸⁵⁴ He had no clear recollection of any material matter and no clear or reliable recollection of any conversation with, or involving, Flugge concerning the inland transport fee. His evidence concerning these alleged discussions is speculative, inconsistent, self-

⁸⁴⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1685, L31; T1689, L7-14; T1741, L14.

⁸⁴⁹ Emons' use of the word 'believe' in relation to his evidence: Transcript of hearing, *ASIC v Geary & Flugge* T1689, L7-8, 12-13; T1711, L22; T1725, L2; T1726, L15, 16; T1727, L5-6; T1729, L1, 4; T1732, L29-30; T1737, L23, 26-7; T1739, L25-6; T1740, L3, 16; T1742, L9-10; T1744, L14; T1893, L11, 31; T1896, L7; T1897, L4; T1898, L1, 31; T1900, L31; T1901, L2-3, 15; T1904, L8; T1911, L4; T1914, L30; T1919, L19; T1920, L29; T1930, L14; T1936, L11; T1938, L11, 30; T1945, L14.

Emons' use of the words 'would have', 'would be' or 'would assume': Transcript of hearing, *ASIC v Geary & Flugge* T1683, L6-7, 10, 14-15; T1684, L15; T1685, L30; T1705, L13; T1719, L31; T1720, L3; T1729, L21; T1733, L24-5; T1734, L1; T1739, L24; T1751, L1-2, 4; T1895, L9; T1904, L4; T1914, L11; T1917, L16-18; T1918, L11; T1930, L14; T1938, L4; T1945, L20, 31.

Emons' use of the words 'likely' or 'unlikely': Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1684, L15; T1693, L8; T1705, L31; T1705, L5, 31; T1708, L3; T1944, L13.

⁸⁵⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1893, L30 - T1894, L2.

⁸⁵¹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1891, L7-9.

⁸⁵² Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1942, L14-31. See also Exhibit F33 - Copy of an affidavit of Emons sworn 12 March 2010 [24].

⁸⁵³ Transcript of hearing, *ASIC v Geary & Flugge* (17 November 2015) T1946, L18-20.

⁸⁵⁴ No recollection/"I don't/can't recall": Transcript of hearing, *ASIC v Geary & Flugge* T1683, L20-1; T1684, L14; T1686, L5; T1692, L10; T1693, L7, 13-14; T1704, L7; T1708, L8-9; T1711, L11; T1711, L11, 20-1; T1713, L31; T1715, L21-2; T1721, L1-2; T1724, L28; T1728, L9, 12; T1729, L23; T1730, L23-5; T1733, L3-4; T1737, L17, 31; T1742, L3-4, 7-8; T1743, L28-9, 31; T1744, L23; T1751, L31 - T1752, L1; T1898, L10; T1889, L25-6; T1891, L7-9, 11, 22; T1906, L3, 16, 19, 31; T1907, L16, 18, 21; T1910, L24-5; T1912, L4; T1913, L6, 12; T1917, L31 - T1918, L1; T1918, L7; T1920, L4-5, 31; T1921, L31 - T1922, L3; T1926, L16, 28; T1927, L17, 20, 22-3; T1928, L5; T1929, L17-18; T1930, L7-8; T1935, L27-8; T1936, L19-20; T1939, L9-10, 27, 29.

serving, and, in many respects, likely to be false.

1226 In addition to these submissions on the reliability of Emons' evidence, Flugge attacked Emons' credit and submitted that Emons' evidence should not be accepted. Flugge submitted in substance that Emons had taken advantage of the inland transportation fees to make improper moneys for himself and Watson. Flugge submitted as follows.

1227 Emons admitted having a 'very close relationship' with Ronly,⁸⁵⁵ that he was the contact point for Ronly at AWB,⁸⁵⁶ and that he played a pivotal role in the negotiations concerning the proposed joint venture between AWB and Ronly.⁸⁵⁷

1228 Emons admitted disclosing internal AWB discussions to Ronly during the period that AWB was engaged in negotiations about a possible joint venture with Ronly.⁸⁵⁸ Flugge submits that this was disloyal to AWB but consistent with Emons' other conduct.

1229 In an email to Bali of Ronly on 7 March 2000,⁸⁵⁹ Emons sought Ronly's assistance to pay the inland transport fee as a means of disguising it.⁸⁶⁰ Emons claimed the fee needed to be disguised in order to minimise AWB's profile amongst its competitors.⁸⁶¹

1230 That email also insisted that Bali exercise discretion with whom he spoke to at AWB. Emons claimed that was because he did not want him speaking to other third parties

⁸⁵⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1917, L17.

⁸⁵⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1915, L24-6.

⁸⁵⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1915, L24-6.

⁸⁵⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1921, L23 - T1922, L19; Exhibit F30 - Copy of the Arthur Andersen Integrity Risk Review, Appendix 2, Email from Emons to members of Ronly: Nori Bali and Erol Yahya dated 7 April 2000, barcode references AWB.011.002.0163/AWB.0182.0154.

⁸⁵⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1729, L24; CB 2/911; the text of the email is copied above at paragraph 311.

⁸⁶⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1730, L26-30.

⁸⁶¹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1730, L31 - T1731, L6.

who may have competing interest with AWB.⁸⁶² Flugge says that evidence does not make sense and does not answer why Emons did not want Ronly speak to his colleagues at AWB.

1231 Emons admitted he did not discuss the detail of his plans to use Ronly as a payment conduit with Officer.⁸⁶³

1232 Certain matters from the Andersen Integrity Risk Review⁸⁶⁴ were put to Emons in cross-examination, including that Emons took trips to London to meet with Ronly that were not authorised by AWB.⁸⁶⁵ Emons claimed he could not recall those trips, and he could offer no explanation for why he did not seek approval.⁸⁶⁶

1233 Emons also claimed he could not recall email correspondence identified in the Andersen Integrity Risk Review between himself, Watson and Ronly on 9 May 2000⁸⁶⁷ in which:

- (a) Watson took issue with invoices AWB had received from Tse Yu Hong concerning trucking fees, stating they were 'not what were required', and that it was essential that certain invoices were not sent to AWB;⁸⁶⁸ and
- (b) Emons said to Ronly, 'I don't need to remind you of the sensitivity of sending the freight invoices to AWB (by mistake no doubt) but with all the book

⁸⁶² Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1731, L12-15.

⁸⁶³ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1731, L27-9.

⁸⁶⁴ Exhibit F30.

⁸⁶⁵ Exhibit F30 - Copy of the Arthur Andersen Integrity Risk Review, 13 (barcode references AWB.011.002.0119 / AWB.0182.0120).

⁸⁶⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1917, L22 - T1918, L12.

⁸⁶⁷ Exhibit F30 - Copy of the Arthur Andersen Integrity Risk Review, Appendix 2, email from Watson to Ronly (Simone Jordan cc Erol Yahya, bcc Emons) 9 May 2000 (barcode references AWB.011.002.0172 / AWB.0182.0163).

⁸⁶⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1926, L5-30; Exhibit F30 - Copy of the Arthur Andersen Integrity Risk Review, Appendix 2, email from Watson to Ronly (Simone Jordan cc Erol Yahya, bcc Emons) 9 May 2000 (barcode references AWB.011.002.0172 / AWB.0182.0163).

balancing we are doing plus the discretionary payments to our Friends in the Middle East we do need to run a very tight admin. If you have any doubts as to the security of what we are doing I suggest you fax the invoices to Michaels home fax...or mine.⁸⁶⁹

1234 Emons claimed he could not recall what he meant by 'book balancing',⁸⁷⁰ 'discretionary payments to our Friends in the Middle East',⁸⁷¹ or why he suggested using Watson's or his home fax number.⁸⁷² This is not credible.

1235 Emons claimed any payment requests authorised by Watson, including the payment request to Tse Yu Hong for US\$1,456,308.00 in March 2000,⁸⁷³ would not have come to his attention.⁸⁷⁴

1236 Flugge pointed to evidence of skimming by Emons and made the following further submission on Emons' credit.

1237 There is evidence that Emons was, together with Watson, skimming from the payments being made in respect of the inland transportation fee.

1238 Emons admitted Watson was the person he first spoke to about the structure of the payment of the inland transport fee.⁸⁷⁵

1239 Emons admitted sending an email to Watson in October 1999 from his private email address which referred to discussions he had with Zuhair, in which he was told Zuhair

⁸⁶⁹ Exhibit F30 - Copy of the Arthur Andersen Integrity Risk Review, Appendix 2, email from Emons to Ronly (Erol Yahya) 9 May 2000 (barcode references AWB.011.002.0172 / AWB.0182.0163).

⁸⁷⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1927, L18-20.

⁸⁷¹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1927, L21-3.

⁸⁷² Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1928, L5.

⁸⁷³ Such as at CB 2/943.

⁸⁷⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1928, L30.

⁸⁷⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1916, L12-15.

would 'instruct [him] accordingly' in relation to the inland transport fee.⁸⁷⁶ Emons claimed he could not recall what those instructions were.⁸⁷⁷

1240 Emons claimed to have no recollection of why Watson did not wish to conduct certain discussions with him using the AWB email account in December 1999.⁸⁷⁸

1241 On 30 April 2000 Emons received an email from Watson concerning 'after sales service' and stating, 'our friends have obtained chartering telex number which AWB does not see...' Emons claimed to have no idea why there was a need for a telex number AWB did not see.⁸⁷⁹

1242 A second email from Watson the same day, which forwarded details of a telex from the IGB concerning payment of the inland transport fee, said there was danger in using Watson's telex number because 'all within Chartering [would] see.' Emons purported to speculate about the danger referred to, and claimed this was due to 'manoeuvring taking place under the new CEO and a lot of suspicious behaviour for self-promotion.'⁸⁸⁰ Flugge says that this is not a credible explanation.

1243 Emons admitted to colluding with Watson to orchestrate their travel arrangements to London to avoid the scrutiny of his colleagues.⁸⁸¹ He suggested this was because of comments being made about their frequency of travel together.⁸⁸² Again, Flugge says

⁸⁷⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1911, L1-11. Exhibit F28 - copy of email from Emons to Watson 19 October 1999.

⁸⁷⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1911, L12; T1912, L4.

⁸⁷⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1920, L24; Ex F30 - Copy of the Arthur Andersen Integrity Risk Review, Appendix 2, email from Watson to Emons 21 December 1999 (barcode references AWB.011.002.0158 /AWB.0182.0149).

⁸⁷⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1923, L26 - T1924, L1; Ex F30 - Copy of the Arthur Andersen Integrity Risk Review, Appendix 2, email from Watson to Emons 30 April 2001 (barcode references AWB.011.002.0166 /AWB.0182.0157).

⁸⁸⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1924, L3-13 - T1924, L1; Exhibit F30 - Copy of the Arthur Andersen Integrity Risk Review, Appendix 2, email from Watson to Emons 30 April 2001 (barcode references AWB.011.002.0167 /AWB.0182.0158).

⁸⁸¹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1925.

⁸⁸² Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1925, L12-15.

that this is not credible.

1244 Emons was unable to explain why Watson had agreed to arrange for AWB to issue Ronly with a 'dummy invoice' in early 2000, despite the email recording that agreement being forwarded to him by Watson.⁸⁸³

1245 Emons claimed he did not know and could not recall why, in April 2000, he instructed Ronly to pay only \$10.00 [per tonne] to Alia in respect of the inland transport fee despite confirming AWB had remitted the amount of \$12.00 per tonne in respect of the fee.⁸⁸⁴ Emons could not say where the balance of \$2.00 per tonne went,⁸⁸⁵ although he denied it went to benefit him and Watson.⁸⁸⁶ Flugge submits that this denial ought not be accepted in the context of the evidence of the millions of dollars received by Emons with no documentary evidence, and in respect of which he had a dispute with the Australian Taxation Office (ATO) (which is discussed below).

1246 Emons could not explain why, in July 2000, Watson instructed Ronly to pay different amounts in respect of the inland transport fee,⁸⁸⁷ and claimed he was 'not aware' of any discussions he had with Watson concerning the amounts being paid to Alia at around that time.⁸⁸⁸

1247 Flugge established to my satisfaction that Emons received millions of dollars in

⁸⁸³ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1921, L5-22; Exhibit F30 - Copy of the Arthur Andersen Integrity Risk Review, Appendix 2, email from Watson to Simone Jordan dated 28 January 2000, forwarded to Emons 14 February 2000 (barcode references AWB.011.002.0161 /AWB.0182.0152).

⁸⁸⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1929, L17-18; T1930, L8; concerning email instruction from Emons to Ronly (Erol Yahya cc Watson) in chain of email correspondence commencing with email dated 3 April 2000 at CB 2/975.

⁸⁸⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1930, L5; an amount of USD\$242,718 based on the tonnage of 121,359.

⁸⁸⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1930, L6.

⁸⁸⁷ Of USD\$11, \$14 and \$16.53 per tonne. See Exhibit F29 copy of email from Watson to Simone Jordan 28 July 2000.

⁸⁸⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1930, L29 - T1931, L7.

unexplained circumstances during the period after the inland transportation fees were introduced and Emons leaving AWB. Flugge relied on the following evidence and submissions.

1248 Emons admitted being engaged in a dispute with the Commissioner of Taxation in 2010 concerning unpaid income tax.⁸⁸⁹ The Commissioner served amended assessments on Emons in August 2009 relating to the financial years ended 30 June 1999 to 30 June 2001 for tax, penalties and interest of \$10, 381, 517.00.⁸⁹⁰

1249 Emons admitted providing information to his solicitors for an 'Applicant's Appeal Statement' filed in those court proceedings,⁸⁹¹ which recorded the international transfers made from his London bank accounts to his Australian bank account⁸⁹² during the period 1 December 1998 to 15 June 2000, totalling more than \$2 million.⁸⁹³

1250 Emons' evidence about the source of those funds⁸⁹⁴ was that his mother was the beneficiary of the estate of a lady named 'Joan Smith', and had also accumulated her own wealth.⁸⁹⁵ Emons claimed that Joan Smith left valuable paintings to Emons' mother. Emons claimed his mother sold paintings and other assets and transferred the proceeds into his London accounts, which he then caused to be transferred to his Australian account.⁸⁹⁶

1251 Emons' evidence was that the amounts he received in 1999 totalling \$675,446.00 were

⁸⁸⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1933, L12-13, L22-6.

⁸⁹⁰ Exhibit F33 - Copy of an affidavit of Emons sworn 12 March 2010 [50(a)].

⁸⁹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1933, L27 - T1935, L22.

⁸⁹² Held jointly with his wife.

⁸⁹³ Exhibit F31 - Copy of Emons' appeal statement 29 October 2010.

⁸⁹⁴ With the exception of one payment of \$71,501 on 17 February 2000.

⁸⁹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1935 - T1936. See also Exhibit F31 - copy of Emons' appeal statement 29 October 2010.

⁸⁹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1934, L17-25; T1936, L6-17.

gifts from his mother made while she was alive.⁸⁹⁷ Emons admitted he gave the same explanation in his Appeal Statement to the Federal Court in relation to the amounts that he received in 2000, totalling \$1.58 million.⁸⁹⁸

1252 Flugge says that Emons' evidence is demonstrably false. Emons' evidence was that his mother passed away in 'the last quarter of 1999', although he claimed he could not give a more precise date.⁸⁹⁹ He accepted the affidavit evidence he gave in proceedings bought by the Commissioner of Taxation in the Supreme Court of Victoria stated his mother passed away on 3 December 1999.⁹⁰⁰

1253 After it was put to Emons that, due to his mother's death, she could not have possibly made the final payment to him in 1999 after her death or any of the gift payments in 2000, he said he had taken over sole control of his mother's assets in June 1999.⁹⁰¹ He admits that this information was not provided in his Appeal Statement, which he admitted was incorrect.⁹⁰² Flugge says that this is patently incredible.

1254 Mr Emons' explanation for the receipt of these moneys from London was rejected by the ATO and according to Emons drove him into bankruptcy.

1255 Flugge issued a subpoena to Emons for him to produce documents relating to his receipt of large sums of money during the relevant period. Flugge made the following submissions about Emons' failure to produce a single document.

⁸⁹⁷ See Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1934 - T1935 generally, and T1935, L17-18 specifically.

⁸⁹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1935, L19-22. Note, the appeal statement actually gives that explanation in relation to the amount of \$1.51 million, as a different explanation is provided in relation to a single transaction of \$71,501 on 17 February 2000.

⁸⁹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1936, L21-6.

⁹⁰⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1938, L1 - T1939, L5; see Exhibit F33 - copy of an affidavit of Emons sworn 12 March 2010 [22].

⁹⁰¹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1937, L2-4.

⁹⁰² Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1937, L5-6.

1256 Emons was issued with a subpoena for production of documents dated 15 October 2015 seeking various documents.⁹⁰³ Emons claimed not to have any documents relating to:

- (a) the transfer of the amounts from his mother's account to his London accounts;⁹⁰⁴
- (b) any source of any transfer of overseas funds to his account;
- (c) the purchase or receipt of assets by his mother or her estate, including real estate, cash and the works of art; or
- (d) the disposition of any assets by his mother or her estate including the sale of the works of art,⁹⁰⁵

despite admitting:

- (e) he had sole control of his mother's assets from as early as June 1999;⁹⁰⁶
- (f) he was sole executor of his mother's estate;⁹⁰⁷ and
- (g) the alleged disposal of his mother's assets resulted in payments to him in the millions of dollars.⁹⁰⁸

1257 Emons also claimed not to recall the name of the solicitors who handled his mother's

⁹⁰³ Exhibit F32.

⁹⁰⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1934, L26 – T1935, L3.

⁹⁰⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1941, L5–6; L9–10; L11–12; L15. Being the categories of documents sought in the subpoena served on Emons. Exhibit F32 – Copy of a subpoena for production to the Prothonotary dated 15 October 2015.

⁹⁰⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1937, L2–4.

⁹⁰⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1939, L11–12.

⁹⁰⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1940, L3.

estate.⁹⁰⁹

1258 Emons' Appeal Statement also details receipts in excess of \$50,000, which are described as repayments from Watson.⁹¹⁰ Emons admitted there was no document recording that loan.⁹¹¹

1259 Flugge also relies on Emons' deletion of records and transactions on the last day at work at AWB. Flugge pointed to the following evidence and made the following submissions.

1260 Emons repeatedly denied deleting AWB records when he left the company⁹¹² before subsequently stating, 'My only evidence that I have of deletion of records is a personal computer that was in my possession and was returned to the AWB. Unfortunately, for AWB, they were not able to retrieve any information from that.'⁹¹³ This is despite the finding by Andersen that such records had been deleted.

1261 Emons subsequently said, 'I don't recall deleting any files but I did have a computer in my presence which I removed any documents from.'⁹¹⁴

1262 When Emons was asked to clarify that statement he admitted, 'I did have a computer and I deleted the hard drive because that computer, as I understand it, if I recall, was a personal computer that was asked to be returned to the AWB and on that I had personal documents.'⁹¹⁵

1263 Emons admitted returning all AWB company property when he resigned except for

⁹⁰⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1939, L29.

⁹¹⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1937, L18-19.

⁹¹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1937, L24.

⁹¹² Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1914, L30 – T1915, L1.

⁹¹³ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1915, L2-6.

⁹¹⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1918, L27-30.

⁹¹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1918, L31 – T1919, L4.

his laptop, which he kept for three weeks. Emons admitted he did not travel during that period, and the reason he gave for the delay in returning his computer was because it was 'not high on [his] priority list.'⁹¹⁶

1264 Emons denied the email he sent Watson shortly before he left AWB in which he stated, 'Just have to tidy the cupboard and we can move shop'⁹¹⁷ was a reference to the deletion of emails.⁹¹⁸ Flugge submits that no credible explanation was provided by Emons for this communication to Watson.

1265 The Arthur Andersen Integrity Risk Review identified three payments as having been effected by Emons on his last day of employment without authority, and which included a \$1 million payment to an agent in Pakistan. Emons claimed he did have authority to make those transactions and suggested the Arthur Andersen report was incorrect.⁹¹⁹ Flugge submits that this is implausible.

1266 Emons admitted that the Middle East desk was required to prepare information to be included in the AWB CFO or CEO reports.⁹²⁰ Emons admitted that the report he prepared for Officer to submit to the CEO on 30 July 1999,⁹²¹ which is after he had executed contracts including the new terms and the obligation to pay the inland transport fee,⁹²² did not include any reference to:

- (a) the inland transport fee;

⁹¹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1919, L16–21.

⁹¹⁷ Exhibit F30 – Copy of the Arthur Andersen Integrity Risk Review, Appendix 2, email from Emons to Watson dated 16 June 2000 (barcode references AWB.011.002.0175 / AWB.0182.0166).

⁹¹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1928, L14.

⁹¹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1913, L25 – T1914, L18.

⁹²⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1909, L24–7.

⁹²¹ CB 1/543, CB 1/545.

⁹²² CB 1/399, CB 1/401, CB 1/403.

- (b) payment of a maritime agent;
- (c) concerns regarding US law;
- (d) any issues concerning the UN; or
- (e) any of the points of concern that had been discussed at operational level in email correspondence.⁹²³

1267 Emons was required to attend corporate risk review meetings when he was in Melbourne.⁹²⁴ Emons admitted that he was not aware of the issue of the inland transport fee being raised at any of those meetings,⁹²⁵ nor the issue being proposed as a point of discussion at such a meeting.⁹²⁶

1268 Flugge contends that Emons wanted the inland transport fee to avoid scrutiny. Flugge says that Emons' desire to avoid scrutiny did not stem from the instruction of Flugge or the board. Flugge submits that Emons had a vested interest in the inland transport fee not being questioned because of the scheme he instituted with Watson and Ronly⁹²⁷ whereby they skimmed money from the amounts paid by AWB in respect of the inland transport fee before it was remitted to Alia.

1269 Flugge says that Emons and Watson devised the plan to route the fee through Ronly and arranged for dummy invoices to be issued to facilitate their plan to skim amounts from the fee for each tonne, equating to millions of dollars in the period until Emons left AWB and possibly thereafter. Flugge says that those funds, or a portion of them, were ultimately transferred into Emons' accounts in the UK and then transferred, without disclosure to the ATO, to his Australian account under the guise of lifetime

⁹²³ Transcript of hearing, *ASIC v Geary & Flugge*, (17 November 2015) T1910, L10-23.

⁹²⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1746, L19-21.

⁹²⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1746, L22-3.

⁹²⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1746, L24-7.

⁹²⁷ And which may or may not have involved Alia and/or Iraqi Grains Board, but must certainly have involved Zuhair, whereby the fee presented to AWB was understood was not what would be ultimately remitted to Alia.

gifts from his deceased mother.

1270 Flugge submits that all this evidence reveals Emons to be a liar whose evidence ought not to be accepted. Flugge submits that Emons' evidence concerning the discussions he allegedly had with Flugge about the inland transport fee, or its mechanism of payment, should be rejected. Emons' evidence on this issue, in both the Cole Inquiry and these proceedings, was, Flugge submits, motivated by a desire to conceal his behaviour relating to the payment of the fee and the use of Ronly as a payment conduit.

1271 For the reasons that follow, I do not accept the evidence of Emons unless it is wholly corroborated by other admissible evidence. I found him untruthful and a man whose credit could not be relied on.

1272 In summary, the evidence established that Emons had a close relationship with Ronly, that Watson and Emons in concert were communicating with Ronly through the use of their private emails and warning Ronly not to send communications to them at AWB. The evidence established that Emons colluded with Watson to orchestrate their travel arrangements to London to avoid the scrutiny of their colleagues.

1273 Emons was unable to explain why he instructed Ronly to pay Alia \$10.00 per tonne for inland transport fees when confirming that AWB had remitted \$12.00 per tonne to Ronly. Emons could not explain where the balance of \$2.00 per tonne went.

1274 This evidence has to be viewed in the light of his evidence that Emons received millions of dollars from an art collection and other assets that had been left to his mother. An explanation that was rejected by the ATO.

1275 I do not accept the evidence that Emons gave about moneys received from his mother. His failure to produce a single document without explanation to support his story suggests it was a concoction of lies.

1276 Emons conduct in deleting records and transactions on his last day at work at AWB supports the inferences that arise from the unexplained receipt of millions of dollars

that Emons had corruptly obtained AWB moneys used to pay inland transportation fees. His behaviour in making the payments on his last day of work also support the inference that Emons was corrupt and dishonest.

1277 It is unnecessary for me to conclusively find that Emons and Watson entered into a criminal scheme to skim millions of dollars from the inland transport fees. It is sufficient for me to find, as I do, that Emons was an untruthful witness and, unless corroborated by other evidence, I am unable to accept the evidence of Emons.

1278 Accordingly, I am not satisfied that the conversations alleged in paragraphs 35 to 36 took place.

1279 I am not satisfied that ASIC has made out the allegations in paragraphs 35 and 36.

Flugge's knowledge – Introduction

1280 I have set out the allegations concerning Flugge's knowledge above. ASIC claims that Flugge knew certain matters that should have led him to stopping AWB from paying the inland transport fees to Iraq, or alternatively that if Flugge did not know those matters, he had the means of knowing those matters and had duties to inform himself of those matters which he failed to do.

1281 In summary, I find that Flugge did breach his duties as a director by failing to make inquiries as to whether or not the UN had knowingly approved the payment by AWB of the inland transport fees to Iraq.

1282 Flugge knew about the payment of the inland transport fees soon after they were introduced in 1999. I find that he was informed about them by Officer and was a party to the discussions about their payment in October 1999 with Zuhair of the IGB.

1283 Flugge told both Wells and Dawson about the payment of the inland transport fees. But in each case he told them the payment of the fees had been approved by the UN. Flugge did not give evidence. Evidence about him was given by two of his fellow directors McClelland and Stewart. Both described him as an honourable and honest man. His personal assistant, Goode, described him as very professional and as a man

of good character.

- 1284 I am not satisfied that what Flugge told Wells and Dawson was not what he honestly believed. I accept that Flugge did believe what he told Dawson and Mr Wells.
- 1285 As discussed below, however, I find that Flugge was informed at the Washington meeting in 2000 that a complaint had been made to the UN from another wheat exporting country that AWB was making improper payments to Iraq. I find that Flugge was aware that the payments being referred to were the inland transport fees being paid by AWB in US dollars to Iraq.
- 1286 I find that Flugge was aware that if the payments had not been approved by the UN that the payments of US dollars to Iraq would have been in clear breach of the UN resolutions and contrary to the OFFP.
- 1287 I find that a reasonable director in the position of Flugge would have made reasonable inquiries into the propriety of the inland transport fees being paid by AWB to Iraq. I find that Flugge failed to do so and therefore breached his duties as a director.
- 1288 I find that if reasonable inquiries had been made by a reasonable director in the position of Flugge, the inquiries would have uncovered that at no stage had AWB inquired from the UN whether the payment of the inland transport fees had been knowingly approved by the UN; that the documents submitted to the UN by AWB relating to the sale of wheat to Iraq were misleading in inferring that AWB had an obligation to deliver wheat to silos of all Governates of Iraq; that there was no obligation on Iraq or AWB to spend the inland transportation payments on the inland transportation of wheat; that the UN had not been informed of the actual terms of the contracts between Iraq and AWB; that no legal advice had been sought by AWB as to whether the payment of the inland transport fees complied with the OFFP and UN resolutions calling on member states to not pay international traded currencies to the UN; and that AWB was failing to comply with UN resolutions and the exposure of that fact would have severely damaged AWB's otherwise good reputation and threatened the Single Desk.

US sanctions

- 1289 Before examining the evidence concerning Flugge's knowledge, I need to again refer to the role of US sanctions in the payment of the inland transportation fees. See earlier section at paragraph 725.
- 1290 ASIC contended that the payment of US dollars to Iraq by the payment of the inland transportation fees was contrary to or prevented by UN resolutions. In fact, the UN resolutions called on Australia and other member states to prevent nationals from transferring internationally traded currencies to the government of Iraq or its instrumentalities. Australia had passed no such law. As mentioned, all Australia did in response to the UN resolutions on Iraq was to pass a regulation that prohibited the sale of goods to Iraq without Australian Government consent.
- 1291 Hogan said that the difficulty facing AWB in paying the trucking fee to a nominated maritime agent in Iraq as initially requested by the IGB was US sanctions not the UN resolutions, as explained below. Hogan said that the USA had imposed sanctions on a large number of countries and a large number of markets for wheat that AWB dealt with. Hogan said that under the sanctions, the US banking system blocked any electronic transfers of money to Iraq and other countries, such as Iran.
- 1292 Hogan said that if the AWB sought to transfer funds and made any mention of Iraq, the funds would be blocked and not transferred. In Emons' email to Hogan of 30 September 1999, discussed in paragraph 245, Emons said that because of the US sanctions AWB could not do the payment through an OECD country. No evidence was led by any party explaining the US sanctions other than the passing references by Hogan and Emons and other former AWB employees. I do not know if the sanctions were imposed as a response by the USA to the relevant UN resolutions referred to earlier, or whether the USA imposed the sanctions for other reasons. I have been left with a reference to the US sanctions but an unsatisfactory explanation of how they came about and their content.

Flugge's knowledge of the inland trucking fees

- 1293 Flugge admits that AWB sales of wheat to Iraq under the OFFP was subject to scrutiny and authorisation by the UN.⁹²⁸ The OFFP was introduced in 1995 by UN Resolution 986.
- 1294 In October 1996, after UN Resolution 986 was passed, Flugge travelled to Iraq with Emons and Greg Harvey to re-establish high level contacts with the Iraqi government to attempt to secure sales of wheat by AWB to the IGB. The visit of Flugge followed quickly on the back of an AWB marketing delegation which visited Baghdad a few days after the announcement of UN Resolution 986.
- 1295 As a result of these meetings, AWB and the IGB reached an in-principle agreement for the supply of a minimum of 100,000 tonnes per month of Australian wheat to be shipped to Umm Qasr during the first six months of the operation of the OFFP, with further supply to occur if Resolution 986 was extended. During this visit, Flugge met with the Iraqi Minister for Trade, during which meeting Flugge dispelled the ministers concerns that AWB may lose the Single Desk⁹²⁹ as discussed at paragraph 106.
- 1296 On 10 November 1997, Flugge wrote the letter to the Iraqi Minister for Trade⁹³⁰ referred to above at 114.
- 1297 On 2 April 1998, Flugge wrote to the Honourable Tim Fischer, Minister for Trade, outlining AWB's ongoing concerns as to the future of Australian wheat sales to Iraq, and to seek Mr Fischer's assistance with a visit to Baghdad the following month.⁹³¹ The letter is discussed at paragraph 115.
- 1298 Thus, by June 1999, Flugge was aware that AWB was selling wheat to Iraq under the OFFP that was authorised by UN Resolution 986. Flugge was aware that the sale of wheat by AWB to Iraq was made in accordance with UN requirements. Flugge was

⁹²⁸ FAD [48].

⁹²⁹ CB 1/122-3.

⁹³⁰ CB 1/251.

⁹³¹ CB 1/271.

aware that AWB received payment for the sales of wheat to Iraq from the UN under the OFFP.

1299 As indicated earlier, the IGB first requested the payment of a trucking fee in its tender of 16 June 1999.

TFASOC – paragraph 37

Discussions with Officer

1300 ASIC alleges that in around mid to late 1999, Officer had discussions with Flugge about the imposition of the inland transportation fee, the material effect of which was that:

- (a) Officer expressed the view that AWB had no choice but to pay the \$12.00 fee imposed by the IGB, otherwise AWB would lose wheat sales to their competitors;
- (b) Flugge expressed the view that AWB's role was to maximise the returns to wheat farmers; and
- (c) Flugge did not express any disagreement with the proposition that AWB would have to pay the inland transportation fee.

1301 Flugge denies paragraph 37.⁹³²

1302 Officer gave evidence regarding the events around June 1999. Officer specifically recalled one discussion in his office with Emons, Watson, Rogers, Ingleby and probably Tighe, concerning the free in truck provision. Officer gave evidence that the question of the imposition of the inland transport fee was discussed,⁹³³ as noted above at paragraph 788.

⁹³² FAD [37].

⁹³³ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1192, L9.

- 1303 Officer was not certain whether or not Flugge was in attendance at that meeting in his office.⁹³⁴ However, Officer said that he had a general recollection of discussing the free in truck provision with Flugge. Officer could not say whether it was in his office, Flugge's office or on the phone together with Rogers.⁹³⁵
- 1304 Officer said that he discussed with Flugge that AWB had been requested as a non-negotiable item to include a trucking fee in Iraq contracts, IGB contracts. Officer told Flugge the fee was being paid for inland transport.⁹³⁶
- 1305 Officer said that he did not consider that the issue of the free in truck provision took Flugge by surprise.⁹³⁷ Flugge told Officer in that discussion that AWB was in the business of selling the wheat at the best possible price return and the business should continue.⁹³⁸
- 1306 Officer gave evidence that he discussed the trucking fee issue with Flugge because trucking fee was a deviation from the standard terms and that matters of that sort of deviation would require approval at the more senior levels. Officer said that he informed both Flugge and Rogers of the imposition of the trucking fee. Officer said that it was the first time AWB had encountered a deviation from and conditions of this nature.⁹³⁹
- 1307 Officer recalled Flugge approving the inland transport fees in mid-1999 in a verbal manner.⁹⁴⁰ Officer reported to Emons that Flugge had given his approval to the inland

⁹³⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1331, L15-17 (xxn Dharmananda).

⁹³⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1169, L4-11; T1170, L2-4; T1193, L28-9.

⁹³⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1170, L16-18; T1171, L4-5.

⁹³⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1169, L14-15.

⁹³⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1197, L16-19.

⁹³⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1184, L7-18.

⁹⁴⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1185, L4-15; T1186, L2.

transportation fees in mid-1999 and the business in Iraq continued.⁹⁴¹

1308 Officer gave evidence that he had satisfied himself in his mind that the necessary all clear had been provided by the managing director and the chairman based on his and Emons' discussions with Flugge which Emons reported to Officer.⁹⁴²

1309 Further, ASIC tendered hearsay evidence of Officer to the Cole Inquiry to the following effect:

(a) Both Emons and Officer discussed the issue of the inland transportation fee between themselves and they both discussed the nature of these changes with Flugge, together. Officer said that Flugge regularly visited the Marketing Desk.⁹⁴³

(b) The nature of these payments to Iraq was discussed at higher levels including with the chairman Flugge and Rogers the CEO. Officer said that there were various discussions on this issue. It was a significant change to the way AWB was contracting with an overseas buyer. Officer said that those discussions were done on a more informal basis than on a formal basis, given the nature of the issue. Officer said that the discussions took place at the marketing desk, in Officer's office and also in Flugge's office. Officer recalls being involved in discussions with the chairman Flugge.⁹⁴⁴

(c) Officer told Flugge that this was an imposition that was placed on AWB by the IGB – there was no option – there was no choice – it was \$12.00 or not, or if you don't make that payment, then, of course, there would be no business. That was made very clear. It was in that context that Officer discussed it with

⁹⁴¹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1186, L9-16.

⁹⁴² Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1196, L27 – T1197, L13.

⁹⁴³ Officer Cole statutory declaration [37].

⁹⁴⁴ Cole transcript T2316, L34 – T2317, L13; CB 9/6648.2-3.

Flugge, and that was the nature of those discussions.⁹⁴⁵

- (d) Officer said that he spoke with Flugge about the plan to make payment of the US\$12.00 through Ronly.⁹⁴⁶

Flugge's submissions on Officer's evidence

1310 Flugge contends that, generally, Officer had no recollection of the issues and events put to him in examination.⁹⁴⁷ In particular, some of the pertinent matters Officer could not recall included:

- (a) receiving or reading emails concerning UN sanctions regime;⁹⁴⁸
- (b) the discussions that took place within AWB regarding UN sanctions regime;⁹⁴⁹
- (c) seeing the IGB tender that introduced the inland transport fee;⁹⁵⁰
- (d) receiving or reading emails concerning the inland transport fee and payment mechanism;⁹⁵¹

⁹⁴⁵ Cole transcript T2318, L16-25, CB 9/6648.4.

⁹⁴⁶ Cole transcript T2321, L39-41; CB 9/6648.5.

⁹⁴⁷ Transcript of hearing, *ASIC v Geary & Flugge* T1106, L4, 26, 28; T1107, L6-7; T1108, L11-12; T1110, L22, 24, 27; T1111, L16; T1111, L27-8, 30; T1112, L6, 17, 19, 21, 26; T1116, L15-16; T1117, L13-15; T1117, L30; T1118, L18; T1120, L8-19, 25-6; T1121, L14; T1123, L16; T1125, L2-8, 10-14, 27; T1167, L11, 26; T1171, L2, 6, 11, 22, 25; T1184, L20, 23, 25, 28-9; T1185, L3-5, 29; T1186, L7, 17, 19-20, 22-3, 25; T1187, L19; T1188, L12; T1189, L21; T1190, L21; T1191, L29; T1195, L29; T1198, L24-8; T1200, L16; T1202, L11, 22-5; T1209, L15, 22-3; T1218, L1-2; T1222, L1, 17-20, 21-4, 25-6; T1223, L9; T1223, L24-6, 1224, L4-6; T1224, L18, 31; T1226, L25; T1228, L1-2, 19, 25, 30; T2130, L9-10, 11-15, 22-4; T1231, L11-15; T1234, L3, 7-8, 18; Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1235, L3.

⁹⁴⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1106, L4; T1108, L11-12.

⁹⁴⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1106, L26, 28; T1107, L6-7; T1110, L24, 27; T1111, L16; T1111, L30.

⁹⁵⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1123, L16 [concerning CB 1/359-61].

⁹⁵¹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1167, L11, 26; T1188, L12; T1189, L21; T1192, L6; T1198, L24-8; T1202, L22-5.

- (e) how he became aware of the inland transport fee;⁹⁵²
- (f) the limits on his authority to execute contracts on behalf of AWB;⁹⁵³ and
- (g) the existence of the shared drive used by the IS&M team.⁹⁵⁴

1311 Flugge submits that Officer's lack of independent recollection was coupled with a propensity to speculate and reconstruct his evidence. Flugge submits that Officer consistently gave evidence of what he considered 'would have'⁹⁵⁵ or was 'likely'⁹⁵⁶ to have occurred rather than what he could independently recall as having occurred.

1312 Flugge submits that Officer admitted it was difficult for him to distinguish in his own mind between what he was remembering, and what he was reconstructing from what he had read.⁹⁵⁷ Flugge says that such an admission falls foul of the very danger that requires the Court to treat recollections of conversations from many years ago as suspect, without supporting documentary material. There was no contemporary document supporting Officer's conversations with Flugge.

Officer's evidence before the Cole Inquiry

1313 Extracts from Officer's evidence in the Cole Inquiry concerning alleged discussions were admitted into evidence.⁹⁵⁸ Relevantly, the extracts deal with alleged

⁹⁵² Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1124, L15 - T1125, L16.

⁹⁵³ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1121, L13-15.

⁹⁵⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1112, L5-19.

⁹⁵⁵ See Transcript of hearing, *ASIC v Geary & Flugge* T1111, L4, 6-7; T1115, L23-4, 29; T1116, L2, 5, 6, 18, 26; T1117, L26, 30; T1118, L21; T1119, L13; T1121, L15; T1124, L10, 23; T1169, L8; T1170, L20-1; T1184, L27; T1185, L12-14, 19; T1195, L2; T1196, L17, 20-1; T1197, L3; T1198, L18.

⁹⁵⁶ See Transcript of hearing, *ASIC v Geary & Flugge* T1008, L16; T1112, L31 - T1113, L1; T1113, L15; T1115, L24, 29; T1117, L30; T1118, L10; T1120, L11, 18; T1123, L26; T1124, L26; T1125, L23.

⁹⁵⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1330, L26-30.

⁹⁵⁸ Supplementary Statutory Declaration of Nigel Officer dated 9 February 2006 - paragraphs 1, 2 and 4 at Exhibit F20 and remaining admitted portions of declaration at CB 10/6662-1; Extracts of transcript of examination of M Officer at CB 10/6648-1.

conversations in which Officer says he informally told Flugge:⁹⁵⁹

- (a) the IGB had imposed a fee of \$12.00 per metric tonne and there was no option but to pay the fee in order to retain the business;⁹⁶⁰ and
- (b) there was a plan to pay the fee through Ronly.⁹⁶¹

1314 The allegation as to Officer discussing the involvement of Ronly with Flugge forms no part of ASIC's pleaded case.

1315 The Cole Inquiry evidence was prefaced by Officer's admission that his prior evidence was not given with a 'focused mind', and that his attempt to improve his recollection was undertaken with the benefit of having reviewed documents and other witness' evidence provided to him by the Inquiry, including the documents initially provided, and additional documents provided days before his evidence.⁹⁶²

1316 Flugge submits that Officer's evidence before the Cole Inquiry was reconstructed. Flugge submits that it does not set out Officer's independent recollection from six years prior. Flugge submits that the unreliability of Officer's evidence is demonstrated by the inconsistency between the admitted Cole Inquiry evidence and his testimony in these proceedings.

1317 Officer recalled only one conversation with Flugge concerning the introduction of the inland transport fee,⁹⁶³ which took place in around mid-June 1999.⁹⁶⁴ Officer could not recall the time, date or place of that alleged conversation.⁹⁶⁵

⁹⁵⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2317, L5.

⁹⁶⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2318, L16-25.

⁹⁶¹ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2321, L39-41.

⁹⁶² See paragraph 1, 2 and 4 of Exhibit F20.

⁹⁶³ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1171, L21; Note: the genesis of his recollection is being presented with the email from Hogan dated 24 June 1999 reporting on the June 1999 Iraq trip - CB 1/375. Put to Officer at T1167; T1331, L20-1.

⁹⁶⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1185, L9-11.

⁹⁶⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1169, L4-11; T1171, L22-5; T1185, L5.

- 1318 Officer alleges that the reason that he spoke to Flugge about the inland transport fee was because the inclusion of that term in the contract involved a deviation from AWB's standard contractual terms, which required board approval.⁹⁶⁶ Officer could not recall who informed him that the matter required board approval or whether he advised Flugge that board approval was required.⁹⁶⁷
- 1319 Officer then claimed he could not recall if he ever checked if board approval had been granted following his discussion with Flugge,⁹⁶⁸ before admitting that he did in fact not check.⁹⁶⁹
- 1320 Officer had no recollection of exactly what he said to Flugge in their single conversation,⁹⁷⁰ except that he informed him that the IGB had sought to include a non-negotiable trucking fee in their contracts,⁹⁷¹ and that the purpose of the fee was for inland transport.⁹⁷²
- 1321 Officer did not recall telling Flugge about the amount of the fee,⁹⁷³ how it was going to be paid,⁹⁷⁴ or that there was any connection made between UN sanctions and the inland transport fee in that discussion.⁹⁷⁵
- 1322 Flugge submits that Officer's evidence regarding Flugge's response is contradictory.

⁹⁶⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1184, L13-18.

⁹⁶⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1184, L19-24.

⁹⁶⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1186, L21-5.

⁹⁶⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1187, L31 - T1188, L1.

⁹⁷⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1337, L19-23; T1345, L11-13.

⁹⁷¹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1170, L16-18.

⁹⁷² Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1171, L5.

⁹⁷³ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1171, L2.

⁹⁷⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1171, L9.

⁹⁷⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1170, L12-14.

Officer initially said he could not recall Flugge's response,⁹⁷⁶ before claiming Flugge responded by approving the inland transport fee.⁹⁷⁷ Officer could not recall what Flugge said when allegedly giving his approval.⁹⁷⁸ He was asked by Mr O'Bryan about the form in which Flugge gave approval, and his response was:

It would have been, as I recall, in a verbal manner and it would have been on the basis of there is – this is a non-negotiable scenario...⁹⁷⁹

1323 Flugge submits that Officer's evidence in that regard ought to be rejected on the basis that it entirely involves speculation.

1324 The premise on which Officer claimed to have held that conversation, and which formed the basis of Flugge's alleged authorisation of the fee was that the fee was non-negotiable.⁹⁸⁰ Officer subsequently admitted having no recollection of anyone using the expression 'non-negotiable', or being advised that there was no alternative but to pay the inland transport fee.⁹⁸¹

1325 Officer admitted that any conversation he did have with Flugge in or around mid-1999 concerning the inland transport fee and its payment was in the context that he believed the fee had been approved by the UN.⁹⁸²

Ronly Holdings Limited

1326 During examination in these proceedings Officer's only recollection of Ronly being discussed as a payment conduit was at a meeting that took place in his office in around

⁹⁷⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1171, L6.

⁹⁷⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1185, L4; T1197, L5–8.

⁹⁷⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1186, L5–6.

⁹⁷⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1185, L12–15.

⁹⁸⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1170, L16–18.

⁹⁸¹ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1185, L24–9.

⁹⁸² Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1337, L10–18.

July 1999 with Tighe, Watson, Ingleby and Emons.⁹⁸³ He does not recall Flugge attending that meeting.⁹⁸⁴

1327 Officer then agreed that documentary evidence⁹⁸⁵ put to him clearly indicated that discussions to use Ronly to pay the inland transport fee did not commence until around March 2000.⁹⁸⁶ Flugge submits that Officer's admission demonstrates his previous claim, including at the Cole Inquiry, of having discussed that matter with Flugge the year before is incorrect.

The absence of evidence of approval casts doubt on Officer's evidence

1328 Flugge submits that in his evidence, Officer repeatedly claimed that a deviation from AWB's standard contract terms required approval from Rogers and Flugge.⁹⁸⁷ Officer also said he was aware of the authority levels of officers in AWB in 1999,⁹⁸⁸ and that he was familiar with the authorisations and delegations provision of the AWB International Marketing Procedures Manual 1994⁹⁸⁹ (which applied in 1999). However, Officer was unable to direct the Court to any provision in that policy section that required the chairman's approval.⁹⁹⁰

1329 Officer admitted that the normal process at AWB in relation to seeking authorisation for a term such as the inland transport fee was to prepare a report for the managing

⁹⁸³ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1168, L25 – T1169, L2; T1190, L15–16; T1217, L17–28.

⁹⁸⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1169, L1–2; T1190, L9.

⁹⁸⁵ CB 2/911.

⁹⁸⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1347, L10–19. Officer accepts the documentary evidence put to him in that regard.

⁹⁸⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1337, L13–17; T1338, L30 – T1339, L2.

⁹⁸⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1337, L25.

⁹⁸⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1338, L20–6.

⁹⁹⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1339, L3–8.

director prior to a board meeting.⁹⁹¹ Officer admitted that he did not prepare any memorandum or briefing paper in relation to the change in contractual terms concerning inland transport,⁹⁹² nor did he ever instruct anyone else to do so.⁹⁹³ That is despite the high importance Officer attributed to deviation from standard terms.⁹⁹⁴

1330 Flugge submits that Officer was unable to point to any email, memorandum or other document generally which seeks the authority of either Rogers or Flugge in relation to any aspect of the inland transport fee.⁹⁹⁵

1331 Flugge submits that such reports as were provided, conveyed in draft by email,⁹⁹⁶ did not mention the amount of the trucking fee, the payment method, or any issue or concern about UN sanctions.⁹⁹⁷

Flugge's conclusion as to Officer's evidence

1332 Flugge submits that Officer's evidence as to the content and nature of the conversations he is alleged to have had with Flugge should not be accepted. Flugge says that the inconsistent and contradictory nature of his evidence makes it entirely unreliable. Flugge submits that it is entirely unsupported by any note, email, memorandum or other record.

1333 Furthermore, Flugge submits that Officer repeatedly stated that he had no recollection of events. Flugge says that of the matters that he did claim to recall, it was evident that he was often reconstructing his evidence from superseding events and documents he had read in the last 16 years rather than speaking of from his uncontaminated independent recollection. Flugge says that Officer accepted the difficulty he had in

⁹⁹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1339, L28 - T1340, L1.

⁹⁹² Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1340, L6-8, 21.

⁹⁹³ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1340, L23-4.

⁹⁹⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1197, L8.

⁹⁹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1339, L2-27.

⁹⁹⁶ CB 1/543.

⁹⁹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1340, L31 - T1341, L1-25.

his own mind making the distinction between recollection and reconstruction.

1334 Flugge submits that Officer's evidence of his alleged conversation with Flugge should be disregarded as his evidence concerning the premise of the conversation and what was said is inconsistent, contradictory and unreliable. Flugge contends that to the extent that any of the evidence is accepted, it must be on the basis that nothing Officer recalls saying would have given rise to any cause for concern or suspicion in Flugge's mind about the propriety of the inland transport fee.

1335 Flugge submits that I should exercise caution in receiving the hearsay evidence of Officer and the handwritten notes made by the three solicitors (Leon Zwier (Zwier), Leonie Thompson (Thompson) and Quennell) that I discuss below.

1336 Flugge refers to s 165 of the *Evidence Act 1995* (Cth) that provides in a jury trial that if evidence is led to which Part 3.2 applies, a party is entitled to request the judge to warn the jury that such evidence may be unreliable, and the judge must do so unless satisfied that there are good reasons for not doing so.

1337 Flugge also urges I exercise caution as evidence given at the Cole Inquiry should not be equated with evidence given to a Court.

1338 I agree with Flugge that Officer's evidence should be approached with caution. I find that Officer's memory of the relevant events was poor, as one might expect after such an elapse of time. I find Officer had difficulty in separating what he could remember and what had been put to him at the Cole Inquiry and in the hearing before me.

1339 I accept Officer's evidence that he spoke with Flugge about the IGB requiring the payment of inland transportation fees. I am not satisfied that Officer sought Flugge's approval to pay the trucking fees. I accept that Officer told Flugge in substance that the fee was not negotiable and that if it was not paid, then sales of wheat to Iraq would be lost. I am not satisfied that Flugge agreed that the trucking fees should be paid in the circumstances to continue the sale of wheat to Iraq by AWB.

1340 As discussed above, on 14 July 1999, AWB entered into a contract with the IGB for the

sale of 700,000 tonnes of wheat. Both the long-form and short-form contracts provided that the discharge cost would be a maximum of US\$12.00 and should be paid by the sellers to the nominated maritime agents in Iraq. Delivery of the wheat was to be made during the period 1 October to 31 December 1999.

1341 As discussed above, by the end of September 1999, AWB had still not resolved how it could pay the trucking fee to the nominated maritime agents in Iraq.

1342 In any event, it is clear as discussed below, that by 9 October 1999, Flugge was aware that AWB had agreed to pay the inland trucking fee on contracts entered into with the IGB since July 1999.

1343 As to the particular pleas, ASIC has satisfied me that in around mid- to late-1999, Officer had a discussion or discussions with Flugge about the imposition of the inland transportation fee. I am not satisfied, however, that the material effect of these conversations were as alleged. I base my findings on observing Officer's demeanour in the witness box. I drew the distinct impression that Officer was not repeating his actual recollection but was merely speculating from general impressions he retained from the relevant time, some 16 years previously.

1344 The supplementary statutory declaration filed with the Cole Inquiry does not assist in establishing the pleas in (a), (b) or (c). The transcript of Officer's oral evidence suggests that Officer was not recalling the conversation with Flugge but rather speculating as to what was said in view of his recollection of the 'context' in which discussions took place with Flugge.

1345 I also find, as Officer admitted, that any conversation he did have with Flugge in or around mid-1999 concerning the inland transport fee and its payment was in the context that he believed the fee had been approved by the UN.⁹⁹⁸

⁹⁹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1337, L10-18.

TFASOC – paragraphs 38–40

Flugge's visit to Baghdad October 1999

1346 ASIC alleges in paragraph [38] that in early 1999, Flugge led an AWB delegation to Iraq, which comprised Flugge, Rogers and Hogan. ASIC alleges that whilst in Iraq, prior to the meeting with the Director General of the IGB, Zuhair, Flugge was briefed by Hogan on the issues likely to arise at the meeting, including the payment of the inland transport fee and the mechanism and time by which such payments were to occur. ASIC alleges that the visit took place on or about 8 to 10 October 1999. ASIC alleges that as a director and chairman of AWB, Flugge was the most senior officer within the AWB delegation.

1347 ASIC alleges in paragraph 39 that whilst in Iraq, Flugge, Rogers and Hogan had a meeting with Zuhair, in which they had discussions in relation to the inland transport fee as follows:

- (a) Zuhair informed the AWB delegation that a contract for the supply of 2000 metric tonnes of wheat under the next phase of the OFFP would include in its price an inland transport fee of US\$12.00 per metric tonne;
- (b) Hogan suggested to Zuhair that an alternative barter system be employed, whereby AWB would supply additional wheat to the IGB instead of paying the proposed inland transport fee;
- (c) Zuhair rejected Hogan's suggestion and stated that the payment of the inland transport fee was a result of presidential decree and that if it was not paid, ships would not be unloaded in Iraq;
- (d) Zuhair stated that the inland transport fee would be payable in advance, based on the weight of the wheat as shown on the Bill of Lading at the point of the loading;
- (e) Hogan objected to the means of calculation and payment of the inland transport fee due to the foreseeable delay in AWB obtaining payment in relation to the

inland transport fee from the UN escrow account; and

- (f) Zuhair stated he would advise AWB of the details of the bank account in Jordan into which the inland transport fee should be paid.

1348 ASIC relies on the facsimile dated 11 October 1999 from Daryl Borlase to Zuhair (see paragraph 254 above), the email dated 10 October 1999 from Hogan to Emons and others, and the email dated 11 October 1999 from Hogan to Emons and others all discussed below.

1349 ASIC alleges in paragraph 40 that while in Iraq, following the meeting with Zuhair, Flugge discussed the matters raised with Zuhair further with Hogan and Rogers.⁹⁹⁹

1350 ASIC alleges that the discussion occurred on or about 9 October 1999. ASIC alleges that during the discussions, Rogers asked Hogan to explain again the barter system proposed by Hogan as alleged at paragraph 39(b) above, and Hogan explained the barter system again to Rogers and Flugge.

1351 As to paragraph 38, Flugge:

- (a) admits that he visited Iraq as a member of an AWB delegation;
- (b) admits that the main purpose of his visit was to open a technical grains conference;

otherwise Flugge denies paragraph 38.

1352 As to paragraph 39, Flugge admits that he had a meeting with Zuhair and others in Iraq; and otherwise denies paragraph 39. Flugge denies paragraph 40.

The relevant emails relied on

1353 On 11 October 1999, Borlase sent a facsimile to Zuhair, signed by Emons, the subject of which was 'Wheat Offer' which as discussed at paragraph 254, makes reference to recent discussions with Hogan, Flugge and Rogers, but does not refer to the content

⁹⁹⁹ TFASOC [40].

of those discussions.

- 1354 The email of 10 October 1999 from Hogan to Emons and others is discussed below.
- 1355 The email of 11 October 1999 from Hogan to Emons, the subject of which was 'Iraq – FIT' is actually dated 12 October 1999 and is discussed below.
- 1356 Hogan gave no oral evidence of any discussions he had with Flugge prior to the meeting with Zuhair on 8 to 10 October 1999. No written record of any discussions as alleged in paragraph 38 was tendered.
- 1357 Hogan was asked did he recall talking to anybody, specifically Emons, Flugge or Rogers about the issue of the payment of the inland trucking fee and how to pay it. Hogan said he did not speak to anybody about it.

ASIC's submissions on the October 1999 Iraqi trip

- 1358 ASIC's submissions on the events that transpired on the October 1999 Iraqi trip are as follows.
- 1359 On 9 October 1999, Hogan, Flugge and Rogers met with the Zuhair in Zuhair's office in Baghdad. The meeting and the related trip report are discussed at paragraphs 714 and 715.¹⁰⁰⁰
- 1360 ASIC submits that the following idea was discussed during the Zuhair discussion: 'A brilliant idea how to settle the US\$12 free in truck payment to transport companies. We do a contract with them when enough equity was built up then they sell to IGB and IGB pay them in US dollars via the 986 system.' During this discussion, Flugge was sitting a metre away from Hogan, focused on Zuhair and was awake.¹⁰⁰¹
- 1361 ASIC submits that during the Zuhair discussion, Zuhair said, 'The president has issued to all ministers bringing product into Iraq, suppliers must pay the US\$12 before

¹⁰⁰⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) Also referred to at T938, L7 – T939, L3.

¹⁰⁰¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T940, L20–5.

ship arrives so that unloading could proceed. If the US\$12.00 was not in place then the vessel would not be unloaded.’ Flugge was at this meeting sitting across from a desk from Zuhair.¹⁰⁰²

1362 ASIC submits that after the Zuhair discussion in the car park of the Al Rasheed hotel, Hogan, Rogers and Flugge had a discussion standing in a circle in which Rogers asked Hogan to explain the barter system of giving the Iraqis a Panamax of wheat – effectively a \$10 million vessel of wheat – which was Hogan’s brilliant idea. Hogan said that because of the issues of paying the inland transport fee, this was one way around it. Hogan cannot recall any further comment about his idea from Rogers or from Flugge.¹⁰⁰³

1363 Hogan told Emons about the Zuhair discussion, and that the discussion had revolved around tonnage, the shipment period, the methodology and the price. The methodology referred to the price and trucking payment which Hogan said was for further discussion within the staff: Owen, Aucher, Officer, ‘basically across the board.’¹⁰⁰⁴

1364 ASIC submits that Flugge’s diary contains entries for the following meetings and events scheduled for 9 October 1999.¹⁰⁰⁵ ASIC says that there is no question that Flugge was present at the Zuhair discussion. The cross-examination of Hogan proceeded on the basis that Flugge travelled to Baghdad primarily to open a conference, not to discuss contract issues, and that Hogan did not have an independent recollection of events.¹⁰⁰⁶ ASIC submits that it is plain, both in evidence in chief and on cross-examination, that Hogan had a clear and detailed visualisation

¹⁰⁰² Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T940, L26 – T941, L1; T941, L8-9.

¹⁰⁰³ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T941, L14 – T942, L21.

¹⁰⁰⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1713, L9-28.

¹⁰⁰⁵ CB 2/655.

¹⁰⁰⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1043, L17 – T1050, L12.

of the meetings on 9 October 1999.¹⁰⁰⁷

1365 The Zuhair discussion, its attendees and its content are also referred to and corroborated by the following correspondence exchanged soon after the meeting:

- (a) an email dated 10 October 1999 from Hogan to Emons and others headed 'Note from Iraq' which makes reference to a request from the IGB for various shipments at certain times and states that 'Zuhair said we could load all in Oct-Dec, but vessels will wait (would cost us not Iraq).'¹⁰⁰⁸ The email also makes reference to 'supply 200K Jan... at USD 155.00 FIT';
- (b) a facsimile dated 11 October 1999 from Borlase to Zuhair the subject of which was 'Wheat Offer' which makes reference to 'recent discussions with Dominic Hogan, AWB Chairman Trevor Flugge and AWB Managing director Murray Rogers' but does not otherwise refer directly to the content of those discussions. However, under the heading 'Shipment' the document states that 'The cargo will be discharged free into truck to all silos within all Governates [sic] of Iraq...The discharge cost will be a maximum of USD12.00...';¹⁰⁰⁹ and
- (c) an email dated 12 October 1999 from Hogan to Emons, Owen and Borlase the subject of which was 'Iraq - FIT' discusses the US\$12.00 inland transport fee and mechanisms for payment, and makes reference to Zuhair advising that 'the President has issued [sic] to all ministers bringing product into Iraq that suppliers must pay the USD12.00 [Free In Truck payment] before ship arrive so that unloading could proceed. If the USD12.00 was not in place then the vessel would not be unloaded.'¹⁰¹⁰ This email outlined other ideas as to how to get the US\$12.00 per tonne to the IGB, including 'do a contract with [the transport

¹⁰⁰⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1047, L31 – T1048, L20.

¹⁰⁰⁸ CB 2/659.

¹⁰⁰⁹ CB 2/661.

¹⁰¹⁰ CB 2/665.

company] when enough equity was built up and then they sell to IGB and IGB pay them in USD (via 986 system) ... (other option is to use Maritime agents/vessel owners account/or buy a very large suitcase'; and led to further discussions between Owen, Emons and Hogan regarding how the US\$12.00 per tonne could be paid to the IGB.¹⁰¹¹

Flugge's submissions on the October 1999 Iraqi trip

1366 Flugge submits that ASIC relies on the evidence of Hogan in relation to allegations as to what was told to or said in Flugge's presence during a trip to Iraq in early October 1999.¹⁰¹² Hogan, Flugge and Rogers were on that trip. Rogers has not been called to give evidence. Flugge submits that a *Jones v Dunkel* inference ought to apply.

1367 Flugge says that Hogan gave evidence concerning his knowledge and understanding of the inland transport fee, and the knowledge and understanding of AWB, including Flugge. Flugge says that Hogan's evidence is that he held a genuine belief that the inland transport fee was approved by the UN; he knew of no impropriety concerning the inland transport fee at the time he attended a conference in Iraq in October 1999; and that he did not engage in any discussions or meetings with Flugge that would have led Flugge to believe otherwise.

1368 Flugge says that Hogan repeatedly stated his belief that the inland transport fee would be, or had been, approved by the UN.¹⁰¹³ Flugge submits that Hogan held that belief from prior to the first fee being paid¹⁰¹⁴ until after Flugge ceased holding office as AWB Chairman.¹⁰¹⁵

¹⁰¹¹ CB 2/667, 671.

¹⁰¹² TFASOC [38]-[40].

¹⁰¹³ Generally see - Transcript of hearing, *ASIC v Geary & Flugge* T944, L16-21; T949, L26-31; T951, L17-25; T961, L11-25; T974, L22; T985, L5-22; T1006, L23-6; T1037, L26 - T1038, L1; T1053, L10-11; T1058, L3-26; T1059, L8-10; T1091, L16-26; T1094, L7-9; T1095, L29 - T1096, L7; T1096, L29 - T1097, L5; T1097, L23 - T1098, L25; T1098, L28-9.

¹⁰¹⁴ See generally above.

¹⁰¹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1058, L3-26; T1006, L23-6.

1369 Hogan gave the following evidence of the assessment that underpinned this belief:

- (a) He knew the initial \$12.00 fee had been expressly included in contracts submitted to the UN,¹⁰¹⁶ and the contracts also expressly stipulated the term 'free in truck' to all governorates of Iraq.¹⁰¹⁷
- (b) He was told by the IGB prior to the fee being introduced that the IGB had submitted the term to the UN for approval,¹⁰¹⁸ and was subsequently told by the IGB, that it had been approved by the UN.¹⁰¹⁹
- (c) Hogan was aware that other global grain traders were trading with Iraq on the same terms,¹⁰²⁰ and he knew the 'free on truck' delivery terms with Iraq were a matter of industry¹⁰²¹ and public knowledge, and were reported in MarketWise.¹⁰²²

1370 Flugge relies on Hogan's evidence as to why he was not otherwise alerted to any concern as to the propriety or legality of the inland transport fee.

- (a) He considered the fee reasonable in comparison to inland transport charges in other markets; an assessment he based on comparable charges that AWB would pay in Australia, and the cost of transporting wheat to Iraq from other Middle East ports.¹⁰²³

¹⁰¹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T951, L17–25.

¹⁰¹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T952, L8–14; T1096, L3–5.

¹⁰¹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1102, L1–3.

¹⁰¹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T967, L23–8.

¹⁰²⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1053, L5–11.

¹⁰²¹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1099, L12–13.

¹⁰²² Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1053, L11–14; T1058, L10–12; T1099, L12.

¹⁰²³ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T954, L17 – T955, L9.

- (b) His suspicions were not aroused by the fee increases, which simply brought the charges into line with other markets.¹⁰²⁴ Even when it was suggested the fee might increase to \$35.00 per metric tonne, Hogan's 'complete understanding' was that the inland transport fee was pre-determined and approved by the UN for each phase of the OFFP.¹⁰²⁵
- (c) Hogan personally observed a lot of trucks at Umm Qasr that were available to transport wheat.¹⁰²⁶

The October 1999 meeting with the IGB revealed no impropriety

- 1371 Flugge also seeks to establish that the trip to Iraq did not disclose an impropriety. Flugge contends that he attended that trip in a 'ministerial role' for the purpose of opening a grains conference near Baghdad.¹⁰²⁷ Hogan was clear that neither Rogers nor Flugge were involved in any discussions concerning the AWB's wheat contract, nor any contractual negotiations.¹⁰²⁸
- 1372 Flugge says that Hogan had no recollection of the specific conversation that took place during the meeting with Zuhair or the words spoken.¹⁰²⁹ Flugge says that Hogan's evidence was a matter of reconstruction in reliance on an email¹⁰³⁰ presented to him, which he at first said transcribed exactly what was discussed at the meeting.¹⁰³¹

¹⁰²⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T954, L17 - T955, L9.

¹⁰²⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T961, L18-22.

¹⁰²⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T960, L1-2.

¹⁰²⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1043, L17-21; T1045, L14-19; T1049, L28 - T1050, L6.

¹⁰²⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T1049, L25-6.

¹⁰²⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T938, L12-16; T1037, L7-8; T1049, L22-3.

¹⁰³⁰ Email dated 10 October 1999 CB 2/659.

¹⁰³¹ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T939, L19-26.

- 1373 Flugge says that the email does not make any reference to any discussion concerning the method of payment of the inland transport fee. When later taken to the email in cross-examination, Hogan accepted that it did not record verbatim what was discussed at the meeting with Zuhair. The email contained his own thoughts, and in some respects he could not comment one way or another about what was said.¹⁰³²
- 1374 Flugge says that Hogan could not recall if Flugge was paying attention during the meeting,¹⁰³³ nor during the discussion Hogan says he had with Rogers after the meeting (that is in the car park of the hotel).¹⁰³⁴
- 1375 Flugge says that Hogan was clear in his evidence that nothing said during that meeting would have put Flugge (or a reasonable person in his position) (or Rogers) on notice of any activity that was improper, illegal or in breach of sanctions,¹⁰³⁵ and he reiterated the fact that he was not aware of any such breach, believing as he did at that point that the inland transport fee was UN approved.¹⁰³⁶
- 1376 Flugge says that other than at or around the meeting with Zuhair, Hogan confirmed that there were no other discussions concerning the inland transport fee during that trip¹⁰³⁷ and that no contracts were signed during the trip.¹⁰³⁸

Findings on the October 1999 Iraqi trip

- 1377 By the end of September 1999, AWB had still not determined how it was going to pay

¹⁰³² See Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1051, L12–31; T1052, L1–24.

¹⁰³³ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T940, L21–2; T941, L9–11.

¹⁰³⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T942, L20.

¹⁰³⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1037, L9–15; see also question put at T1036, L14–20.

¹⁰³⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T944, L16–21; T1096, L27 – T1097, L5; T1097, L23 – T1098, L25.

¹⁰³⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T946, L19–21.

¹⁰³⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1042, L24–6.

the US\$12.00 per tonne trucking or discharge fee. As mentioned above, the contract provided for it to be paid to a maritime agent in Iraq.

1378 As mentioned above, on 30 September 1999, Emons emailed Hogan providing him with information relevant to the meeting he was to have with Zuhair in October 1999 in Baghdad.¹⁰³⁹ The email discloses that AWB had not determined on a method of paying the discharge or trucking fee and asked that Hogan raise the matter with Zuhair at the proposed meeting. Emons' email is copied above at paragraph 245.

1379 As stated in the email, Emons suggested that Hogan discuss this with Zuhair (presumably when Hogan was in Iraq with Flugge and Rogers).

1380 It should be recalled that Officer gave evidence of a meeting held in late June 1999 to discuss the imposition of the inland transport fee at which Emons, Watson, Ingleby and probably Tighe attended.¹⁰⁴⁰

1381 Accordingly, at this stage it appears AWB were proceeding on the basis that the UN had approved the payment of the inland transport fee.

1382 As discussed above, Hogan gave evidence of the meeting he attended with Rogers (the then managing director of AWB) and Flugge with Zuhair at Zuhair's office in Baghdad on 9 October 1999. The meeting was diarised in Flugge's diary. Hogan said that he could not recall the specific conversations at the meeting but that he made an email after the meeting reporting on the meeting that included his recollection of what was discussed.

1383 Hogan said that he, Flugge and Rogers sat opposite Zuhair at his desk at the IGB, with himself and Flugge across from Zuhair with the standard Arabic table in between them where tea was served. Hogan said that Rogers sat at the end of the small table.

1384 Hogan said that they discussed everything that is included in his trip report (that is included in his email of 10 October 1999) that was regarding their objection to paying

¹⁰³⁹ CB 2/653.

¹⁰⁴⁰ See paragraph 788.

the US\$12.00, his great idea to not pay the US\$12.00 but to give the IGB free wheat and they discussed some of the pricing. Hogan said they discussed a small amount they wanted to clean up from an old phase [that is a phase of the OFFP] and there were, as per Emons' email and his trip report, discussion regarding the 200,000 tonne contract [entered into in July 1999] which included the transport fee.

1385 In his evidence, Hogan was taken to his email of 10 October 1999 addressed to Emons, Borlase, Geary, Richardson, Sara McCartney, Watson, Mike Alexandra, Rowland and Lister, headed 'Note from Iraq'.¹⁰⁴¹ Hogan confirmed that the email contained his recollection of what was discussed at the meeting attended by Flugge with Zuhair. The email made reference to a request from the IGB for various shipments at various time. The email makes reference to a contract at 'USD 155.00 FIT= USD 122.00 FOB.' Also to supply '200K Jan ... At USD 155.00FIT.' Hogan said that this contract was discussed at the meeting.¹⁰⁴²

1386 The email foreshadowed a more detailed report when Hogan had time to prepare the same. Hogan identified this as his email of 12 October 1999 to Emons, Borlase and Owen.¹⁰⁴³ The text of Hogan's email is copied above at 256.

1387 Hogan said that what he wrote was a reflection of the meeting.

1388 When asked, Hogan confirmed that the idea to settle the US\$12.00 Free In Truck payment via the '986 system' was discussed at his meeting with Zuhair.¹⁰⁴⁴ I accept that this idea was discussed with Zuhair, as Hogan had informed Zuhair that AWB was not able to pay the trucking fee to the maritime agent in Iraq because of the US sanctions on the transfer of money to Iraq. As mentioned above, Emons had suggested in his email to Hogan of 30 September 1999 that Hogan raise the method of payment issue with Zuhair. Hogan said that he was the only one discussing commercial terms

¹⁰⁴¹ CB 2/659.

¹⁰⁴² Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T940.

¹⁰⁴³ CB 2/665.

¹⁰⁴⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T940.

at the meeting.

1389 Hogan was asked whether Flugge was paying attention at the time Hogan was having his conversation with Zuhair at the meeting in Baghdad. Hogan said that couldn't say whether Flugge was but said that Flugge was sitting a metre away from Hogan and that Flugge was focused on Zuhair. Hogan was asked whether Flugge was awake and he said yes.

1390 Hogan was asked did he observe Flugge listening at the time. Hogan said:¹⁰⁴⁵

Flugge was at the meeting sitting across from a desk from Zuhair. I wasn't specifically focused on Flugge but I can only assume he was focussed on the meeting.

1391 Hogan said that Rogers was definitely focused on the meeting, as Rogers asked Hogan a question after the meeting with Zuhair. Hogan said that when he, Flugge and Rogers arrived back at the Al Rasheed Hotel where they were staying and they got out of the car provided by the IGB to bring them back to the hotel, Rogers asked Hogan if he could please explain the barter system of where Hogan wanted to just give the Iraqis a Panamax of wheat, Hogan said, that this was his brilliant idea (to get around US sanctions).¹⁰⁴⁶

1392 Hogan said that Flugge was standing with Rogers and him in a circle, face to face. Hogan was asked to repeat as best he could what Rogers asked him.

1393 The transcript records as follows:¹⁰⁴⁷

Rogers wanted me to explain what I was offering to Zuhair in giving them, effectively a \$10 million vessel of wheat. It sparked his interest.

What did you respond to Mr Rogers? --- I responded to say that because of the issues with paying - to the best of my knowledge, the issues in paying the inland transport fee, that this was one way around it.

I, sorry, was one? --- This was one way of doing - or around it.

¹⁰⁴⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T941.

¹⁰⁴⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T941.

¹⁰⁴⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T942.

By way of alternative? --- Yes.

Did Flugge comment on that? --- Not that I can recollect that, no.

- 1394 Was that the end of that interaction between the three of you? Yes.
- 1395 Hogan was asked whether it was discussed at the meeting that AWB create an account in Jordan and that funds from this account be transferred to an IGB nominated account for each vessel. He said that he could not be sure that was actually discussed. He said he thought that suggestion was one from Owen to establish an account. As seen above, this was the suggestion of Owen as communicated to Hogan by Emons when Emons was providing information to Hogan for the purpose of the meeting with Zuhair.
- 1396 Hogan said that he thought that came from the ANZ, to establish an account in Jordan, a separate account. He said that may have been his own reflection of what might be possible.
- 1397 Hogan was asked why it was a concern that there might be an apparent link with the funds going into Iraq, as noted in his email of 12 October 1999. Hogan said that because of US sanctions on Iraq, the United States had sanctions on a large number of countries and a large number of markets that the AWB dealt with. He said that anything that made reference to those countries, for example Iran, was a market that had US sanctions on it.
- 1398 Hogan said that if AWB mentioned Iran in any of the vessels, the LCs or anything, the actual transfer of funds was blocked through the US banking system. Hogan said it would be the same if AWB put anything with Iraq on it. The funds would be blocked. He said that you could not call it the Iraqi transport account. He said the funds would not transfer electronically. They would be blocked.
- 1399 Hogan was asked was it also a concern that the UN had passed a resolution forbidding the UN member states from transferring any hard currency to Iraq. Hogan said that at that stage, AWB had been advised that it was approved under the OFFP deal. I infer from this answer that Hogan did not believe that the trucking fee was contrary

to the UN resolutions.

1400 Hogan said he thought the idea of using the maritime agents might have been raised at another time and not at the 9 October 1999 meeting. Hogan explained that the very large suitcase referred to a method of payment used prior to the OFFP, where the sanctions imposed by the USA meant that AWB could not do any transactions with Iraq in US currency between 1991 and 1996.

1401 As discussed above, in November 1999, AWB and the IGB had still not resolved how the US\$12.00 per tonne was to be paid and the first shipment was about to arrive in Umm Qasr. As mentioned, AWB had considered making the payment to the shipper and have the shipper pay the maritime agent.

1402 Finally, Zuhair directed the payment be made to Alia and gave Emons the bank account details of Alia. AWB objected that this method was a little too direct, but Zuhair said that the issue was a one off. As discussed above, the payment was made by AWB directly to Alia's account. At this stage there was no agreement with Alia to do anything for AWB or be involved in any transport of wheat. Alia was simply nominated, as AWB could not make the payment direct to a maritime agent in Iraq because of US sanctions.

Resolution of paragraphs 38, 39 and 40

1403 I am not satisfied that ASIC has established the allegations in paragraph 38.

1404 As to paragraph 39, I am not satisfied that Flugge had any discussions as alleged with Zuhair. I am satisfied that in substance any discussions which were held were conducted between Hogan and Zuhair. Hogan gave evidence that he was the only one discussing commercial terms at the meeting.

1405 As to paragraph 39 (a), I am satisfied that Zuhair informed Hogan in the presence of Rogers and Flugge that a contract for the supply of 200,000 metric tonnes of wheat under the next phase of the OFFP would include in its price an inland transport fee of US\$12.00 per metric tonne.

1406 As to paragraph 39(b), I am satisfied that Hogan suggested an alternative barter system as alleged.

1407 As to paragraph 39(c), I am not satisfied that Zuhair rejected the alternate barter system. I find that Zuhair said that he would approach the minister for a special concession for AWB. I am satisfied that Zuhair said in substance that the President had issued to all ministers bringing product into Iraq that suppliers must pay the US\$12.00 before the ship arrived so that unloading could proceed.

1408 As to paragraph 39(d), I am satisfied that Zuhair said that the inland transport fee would be payable in advance before the ship arrived. I accept that it is implicit that the fee would be calculated on the weight shown on the Bill of Lading at the point of loading.

1409 As to paragraph 39(e), I am satisfied that Hogan objected as alleged.

1410 As to paragraph 39(f), I am not satisfied that Zuhair stated that he would advise AWB of the details of a bank account in Jordan into which the inland transport fee should be paid.

1411 As to paragraph 40, I am satisfied that Flugge was in attendance when Rogers asked Hogan about the alternate bartering system and Hogan explained the system to Rogers. Otherwise, I am not satisfied Flugge discussed the matters alleged in paragraph 39 as alleged following the meeting with Zuhair.

TFSAC – paragraph 41

The Washington meeting

1412 ASIC alleges that on or about 9 March 2000, Flugge, accompanied by McConville and Snowball of AWB, met and had a discussion with Nicholas of the Australian Trade Commission in Washington DC. The discussion was to the following effect:

- (a) the UN had concerns about alleged irregularities in AWB's contracts and dealings with Iraq under the OFFP;

- (b) Nicholas advised that another country had alleged to the UN that AWB was making irregular payments at the request of the IGB;
- (c) Nicholas informed Flugge, Snowball and McConville that it was important for AWB to provide to the UN all contractual terms that existed between AWB and the IGB, and that a failure to provide the information sought by the UN could jeopardise future sales under the OFFP;
- (d) Nicholas further informed Flugge, Snowball and McConville that if the matter were not resolved, the other country (referred to in subparagraph (b) above) could raise a formal complaint and then it would become a much bigger issue; and
- (e) Flugge informed Nicholas that his request would be taken very seriously and a full response would be provided to the UN Office of the Iraq Programme.

1413 ASIC alleges that the meeting is recorded in an email from Snowball dated 15 March 2000 which was sent to Emons and in a telex dated 11 March 2000 sent by Nicholas, copies of which are available for inspection upon reasonable notice.

1414 As to paragraph 41, Flugge admits that he attended a meeting with Nicholas of the Australian Trade Commission in Washington DC on or about 9 March 2000; and otherwise does not admit paragraph 41.

The Washington meeting in March 2000

1415 The circumstances surrounding the meeting in March 2000 suggest that Canada complained to the UN in approximately January 2000 about inappropriate payments being made by the AWB to Iraq in respect of their sale of wheat to the Iraq. As can be seen, this complaint arose not long after the first payment was made in November 1999 by AWB to Alia for the benefit of Iraq.

1416 On 9 March 2000, Flugge in the company of Snowball and McConville met with Nicholas at the Australian Embassy in Washington DC. The meeting was held at the

request of Nicholas.

Evidence of Mr Alistair Nicholas

1417 Nicholas gave evidence.¹⁰⁴⁸ Nicholas said that he was employed by the Australian Trade Commission between February 1996 and October 2000. In 1997, Nicholas was appointed Australia's trade commissioner to Washington DC. As trade commissioner Nicholas was located in the Australian Embassy in Washington DC.

1418 Nicholas said that in his role as the Australian trade commissioner in Washington DC he had dealings with AWB on three occasions. Nicholas said that the third one was in relation to the OFFP and to do with some irregularities in contracts that had been raised by the UN with him.

1419 Nicholas said that within a short time of his meeting with the UN, he met with Flugge, McConville and Snowball who were visiting Washington with Flugge.

1420 Nicholas said that the meeting was held at the Australian Embassy. He was asked what topics were discussed at the meeting. Nicholas said that 'the topic that was discussed was the that the UN had raised with me concerns that had been raised by a third country about possible irregularities in the contract that the AWB had with the UN and the existence of what they termed a parallel contract.'

1421 Nicholas says that after 16 or 17 years it was hard to recall the exact words that were spoken. Nicholas said that:

...the substance of it was that the UN had raised with me on an informal sort of basis that they were concerned about the fact that there might be a parallel contract and that it needed to be cleared up. I can recall that I was quite concerned about it because I felt it could jeopardise our wheat exports to Iraq under the Oil-For-Food Program and I remember being concerned that the issue that I was raising, the concerns that I was raising were perhaps not being taken as seriously as they should have been.

1422 Thus, I infer that Nicholas identified the concern as that AWB might have a parallel contract. Nicholas was asked whether he remembered the substance of what was said

¹⁰⁴⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (23 November 2015) T2130.

to him in response to him raising those concerns. He replied:

Initially, I think it was along the lines of, there is nothing out of order or nothing irregular in the contracts, that there's nothing to be concerned about, that the AWB perhaps did not need to respond to the UN's concerns.

I remember having to put quite forcefully that I thought there was something that had to be responded to and eventually there was a sense that from Andrew McConville and Trevor Flugge that they would respond to the UN's concerns.

1423 Nicholas said that he would have taken notes of the meeting while he was sitting there. He said that was his practice but he did not know where they were. Nicholas said that he called his supervisor, Michael Johnston, who was based in Los Angeles to tell him about his concerns that maybe the matter he raised with AWB would not be taken seriously. Nicholas said that Michael Johnston instructed him to write to the deputy managing director of Austrade, to raise the concerns with him and to also suggest that it may need to go to ministerial level.

1424 Following the meeting, Nicholas spoke with Moules. The substance of their conversation was recorded by Moules in a cable to DFAT Canberra dated 10 March 2000:¹⁰⁴⁹

Our REFTEL reported on information which the office of the Iraq Program (OIP) drew to the mission's attention earlier this year concerning possible irregularities in the way the AWB may have received payment for wheat supplied to Iraq under the Oil-for-Food program. You will recall that the possible irregularity had been drawn to OIP's attention by a third country (whose identity the OIP was not at liberty to reveal), the third country claiming to have been told by the Iraqi Grain Board that the AWB had concluded contracts involving irregular payment methods. We noted your response (REFTEL).

2. Austrade Commissioner in Washington (Nicholas) has advised that in a routine meeting with the OIP late last week, the OIP (Johnston, Chief, Contracts Processing Section) again raised the matter. Johnston noted that the third country which claims it has failed to secure contracts with the Iraqi Grain Board on the grounds that it is not prepared to enter into contracts involving irregular payment methods (methods which, it claims, the AWB has been involved in) remained concerned about the matter.

3. Johnston mentioned to Nicholas an additional point which the OIP had not previously raised with the Mission. The customs area of OIP had recently noticed that the standard contract used by the AWB and the Iraqi Grain Board

contained a paragraph which implied additional conditions were attached to the contract, but not included in the paper submitted to the UN. The relevant paragraph is the one at the end of the one-page standard contract used by the AWB/Iraqi Grain Board and reads as follows: 'All other terms and conditions as per AWB Limited and Grain Board of Iraq standard terms and conditions for Australian wheat of which the parties admit they have knowledge and notice, to apply to this contract where not inconsistent with the above'.

4. While the 'standard terms and conditions' are doubtless just that (i.e. 'standard'), Johnston asked Nicholas if it would be possible to obtain a copy of the 'standard terms and conditions' as, strictly speaking, this was required for the UN's customs clearance process (although it had not previously been picked up by the OIP). We followed-up separately with Johnston on this point, who confirmed that, irrespective of the third country issue, the OIP having now noticed this paragraph in the AWB/Iraqi Grain Board contract, is legally obliged to clarify it.

5. Nicholas had a meeting on 9 March with visiting AWB Ltd Chairman (Flugge) and AWB Ltd New York office vice chairman (Snowball) (the meeting having been arranged prior to Austrade's meeting with OIP). At the 9 March meeting, Nicholas took the opportunity to advise the AWB of the information which OIP had drawn to his attention. AWB said this was not an issue, but undertook to consult with their headquarters and provide a response. Based on discussions we subsequently had with Nicholas and AWB's New York Office, we understand AWB's preference is that follow-up discussions be pursued with DFAT, but with Austrade kept in the loop.

6. While all indications from the AWB are, as expected, that the concerns of the OIP and the third country have no basis, until we are able to provide a formal reassurance of this, there will remain a question mark over the matter from the point of view of both the OIP and the third country referred to above. The fact that the OIP has recently picked up what they see as a potentially anomalous element of the AWB/Iraqi Grain Board contract confirms that a formal response (from UNNY to OIP) including a copy of the 'standard terms and conditions', will be needed to clarify the matter.

7. If for any reason it is not possible to provide a copy of the 'standard terms and conditions', we/AWB would still need to provide some assurance to the OIP as to their contents (i.e. something more than the reference in the paragraph in question to conditions applying 'where not inconsistent with the above'), though we assume that for legal reasons we would need to be cautious about any undertaking to provide assurances concerning business contracts.

8. Please note that Nicholas is reporting separately to Austrade Canberra on his meetings with OIP and AWB, noting the understanding regarding follow-up discussions as referred to in para 5 above.

1425 It is important to note that Moules refers to a further concern that AWB contracts with IGB involved 'irregular payment methods' in addition to the non-disclosure by AWB of standard terms in contracts for the sale of wheat to the IGB to the OIP.

1426 On 11 March 2000, Nicholas sent a cable to Austrade in Canberra, and to Ms Penny

Wensley at the Australian mission to the UN, reporting on his meetings with both Johnston and the representatives from AWB.¹⁰⁵⁰ The purpose of this cable was:

... to alert Austrade Deputy Managing director Langhorne of the situation. Although the matter is being handled by the Mission to the UN and DFAT in Australia, the Deputy Managing director may see fit to advise the Minister for Trade.

1427 The cable commenced with a summary in the following terms:

Trade Commissioner Washington met with Australian Wheat Board representatives who were visiting Washington on other business to advise them of UN concerns about suspected irregularities in AWB contracts with Iraq under the Oil for Food Program. Trade Commissioner is concerned that AWB do not understand the seriousness nor the urgency of the matter. It may be necessary to advise the minister of the situation.

1428 As to his discussions with Johnston, Nicholas reported:

2. I met with Office of the Iraq Program (OIP) (Johnston, Chief Contracts Processing Section) in New York last week. Johnston advised that OIP had informally raised concerns about irregularities in AWB contracts with the Australian Mission to the UN in January however, Johnston said she had received an insufficient response to enable her to close the matter (refer cables 0.UN8311 of 13 January and 0.CE987696 of 18 January.) Johnston said there were continuing concerns by the Mission of a third country that the AWB had agreed to the irregular payment terms required by the Grain Board of Iraqi (GBI). She said that it was conceivable that the AWB had entered into irregular terms 'unknowingly'. Johnston referred to a clause in AWB contracts with the GBI that implied there was a separate contract in place and of which the OIP had not been made aware.

3. Johnston asked whether we (Austrade) could follow up with the AWB and obtain a copy of any 'parallel' contracts for the perusal of the OIP. Johnston emphasised that it was imperative that this matter be 'put to rest' before the mission of the third country makes a formal complaint against the AWB.

1429 It should be noted that in this cable Nicholas acknowledges that he knows of OIP's concerns that AWB had agreed to irregular payment terms required by the IGB.

1430 Nicholas then reported on his discussions with the representatives of AWB:

5. AWB assured us there were no irregularities in their dealings with Iraq, but I emphasised that AWB needed to provide copies of any other contracts in order to ease the concerns of the OIP. Snowball expressed the view that all clauses in the contract were standard and that it was not necessary to provide

additional information to the OIP.

6. After the possible consequences of not providing OIP with the requested information was explained, McConville and Flugge expressed the view that this would be taken seriously by AWB and that a full response would be forthcoming for the UN.

7. I advised AWB that it could respond to the OIP either via Austrade Washington or via DFAT and our mission to the UN.

1431 He concluded his cable:

8. This matter has been discussed by Mission and Austrade Washington and we have agreed to keep each informed of developments.

9. Austrade Washington is concerned to ensure that the AWB follow through and provide OIP copies of any other contracts in place with the Grain Board of Iraq and that the Trade Minister is advised of the situation if necessary.

1432 Under cross-examination, Nicholas confirmed that his cable of the 11 March was, so far as he could recall, a record of what was discussed at the meeting. Nicholas was also asked as follows:¹⁰⁵¹

So far as you are able to recollect now, the contract prices were not mentioned in your discussion?---As far as I can recall, I had no knowledge of contract pricing. There was no discussion of discharge costs?---No, there was not.

There was no discussion of trucking fees?---No, there was not.

The focus of the discussion was irregularities and the possibility of parallel contracts?---Correct.

Evidence of Tim Snowball

1433 Snowball gave evidence. Snowball commenced employment with AWB in November 1987 and left AWB in late 2006. In June 1992, Snowball was appointed marketing officer in international marketing in Melbourne. In 1998, Snowball was appointed manager of the New York office replacing Geary.

1434 Snowball reported to Officer. In that position he had dealings with Moules. Snowball was shown many emails which were sent or copied to him concerning the wheat sale contracts with Iraq and the trucking fees. Snowball professed he had no memory of

¹⁰⁵¹ Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T2135.

any of them.

1435 Snowball was shown extracts from a note book that he made entries in. Snowball was taken to an entry as follows:

Mayo Schmidt - Iraq

- Trevor wants to keep alongside them

-see if we could help them

Call & get the back ground - mkts to put the cargoes into

Leave voicemail with Nigel

1436 Snowball said that he thought Mayo Schmidt was with the Saskatchewan Wheat Pool. Snowball was not sure the 'Trevor' referred to was Flugge.

1437 Snowball said that Flugge would visit the USA each year and that if he was going to Washington that Snowball would accompany him. Snowball guessed that Flugge visited the US twice a year.¹⁰⁵²

1438 Snowball was taken to another page of his note book. He agreed that the note recorded 'Feb, Mch' with Feb circled. Below that the note said:

Chairman's visit In Wed 8th, out 11th in WDC (a reference to Washington DC), then to Canada?

1439 Snowball was taken to another page of his note book and to a passage that read:

Can - vessels rejected at Umm Qasr rejected for E.coli.

-asked about trucking fee.

AWB pays the Jordan trucking co.

1440 Snowball professed not to know the circumstances that caused him to write that note. I did not believe him.

1441 Snowball said that he knew Nicholas and had met him soon after he started at the

¹⁰⁵² Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2108.

New York Office.¹⁰⁵³ Snowball said that the second time he met Nicholas was at a meeting with Flugge and McConville in Washington.

1442 On 16 March 2000, Snowball sent an email to Emons also reporting on the meeting held on 9 March 2000 with Mr Nicholas. Snowball said:¹⁰⁵⁴

Following on from my discussion with you last week, here is a recap of what happened and the follow up:

Alistair Nicholas, Austrade asked to meet with us in WDC (Trevor, Andrew McC, myself)

Alistair had visited the UN in NY the week before. A UN official had asked him for clarification of the following wording in our short form contract with the grain Board of Iraq

'All other terms and conditions as per AWB Limited and Grain Board of Iraq Standard Terms and Conditions ...'

Alistair mentioned that some[one] at the UN was asking him quietly/inform[al]ly about payments AWB was making to Iraq for discharge/trucking. Alistair suggested to us that the request for information on the above contract clause was linked to this discharge/trucking payment issue.

3. *We played down the issue* and said we would look at the UN request.

4. I called the Aust Mission to the UN and asked Bronte Moules to speak to UN to make sure UN had actually requested some information. I also asked Bronte to call Alistair.

5. Bronte confirmed that the UN were asking for information on the contract clause above. She has put this request through to DFAT in Canberra and DFAT will contact you. *If all the UN wants is some understanding on standard terms and conditions in AWB contract then I think we have nothing to worry about.* We should ensure that we do provide something to DFAT when they contact you.

I deal solely with Bronte on UN/Iraq, and see no role for Austrade. Alistair is always trying participate ... I think Bronte is the better option for us anyway. We do not want Alistair sticking his nose into our Iraq business and causing us problems. If this was a big issue he should have picked up the phone straight after his visit to the UN to tell me rather than waste our Chairman's time in Washington!!

1443 Snowball was taken to his email to Emons of 16 March 2000. Snowball said that he did not know whether it accurately reflected the meeting. Snowball denied knowing

¹⁰⁵³ Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2108.

¹⁰⁵⁴ CB 2/923 [emphasis added by ASIC].

what 'We played down the issue' related to. I did not believe him.

1444 Snowball was taken to a letter from McConville to Snowball that said:

Tim,

Spoken with Canberra – they are OK with waiting for Mark's OK.

Message was if he is OK, could you then deliver copy of Terms & Conditions to our UN Mission.

1445 Snowball agreed that he had noted on the letter: 'OK make sure Mark is comfortable.'

1446 Snowball was taken to an email that he sent to on 6 April 2000 to Emons and copied to McConville, subject Iraq standard terms that said:¹⁰⁵⁵

Mark

I sent the contract standard terms and conditions via Aust Mission to the UN. The UN has now confirmed that everything in the contract is fine and there is no issue.

Regards

Tim

1447 Snowball was taken to an email that he sent on 11 July 2000 to Scales. In that email Snowball said:¹⁰⁵⁶

The UN's stance on this oil for food program is: Iraq agrees to a contract for supply of wheat from Australia. This is a commercial agreement and had no involvement from the UN. UN will not arbitrate/influence the terms and conditions of the contract so long as there is not threat of the oil money being used for things like purchasing weapons.

1448 Snowball was taken to a the note in his note book purportedly recording the conversation he had with Moules on 26 March 2001. The text of the note is copied at paragraph 493.

1449 Snowball did not recall the circumstances in which this was written.

1450 Under cross-examination by Mr Dharmananda, Snowball when shown Flugge's diary

¹⁰⁵⁵ CB 2/971.

¹⁰⁵⁶ CB 2/1158-1.

for 8 to 9 March 2000, agreed that on the day of the Washington meeting Flugge had a busy day attending a number of meetings.

1451 During a relatively long examination in chief and cross-examination, Snowball constantly contended that he could not recall matters put to him. I gained the distinct impression that Snowball was being less than frank with his denials. I formed the view that he knew a lot more than he let on.

Evidence of Felicity Jane Johnston

1452 Johnston, a consultant to the United Nations OFFP, gave evidence.¹⁰⁵⁷ From July 1999 to November 2003, Johnston acted as a consultant to the United Nations OFFP and was engaged by the OIP in its Contracts Processing and Monitoring Division (CPMD) on secondment from British Customs.

1453 Johnston served in CPMD as deputy chief customs expert from July 1999 to November 1999, and thereafter as chief customs expert. Johnston reported to the director of the CPMD, John Almstrom (Almstrom) until early February 2000, and Farid Zarif (Zarif) from mid-February 2000 until her engagement ceased. Throughout this time, Johnston's status with the UN was that of a consultant and not a UN staff member.

1454 On or about 23 December 1999, Johnston contacted Lt Colonel Saunders (Saunders) of the Canadian Permanent Mission to the UN. During the conversation:

- (a) Saunders told Johnston that the Canadian Wheat Board, in the course of negotiating a contract for the supply of wheat to Iraq, had been requested to remit money to a Government of Iraq bank to a bank account in Jordan to cover inland transportation costs;
- (b) Saunders told Johnston that the Government of Iraq had stated that the bank account details would not be made available before the contract was signed; and

¹⁰⁵⁷ Statement of anticipated evidence of Felicity Jane Johnston Exhibit P31; T1761, L85.

- (c) Johnston told Saunders that such a payment would not fit within the OFFP and suggested alternative measures such as delivery to Umm Qasr at a lower price per metric tonne.

1455 On or around 4 January 2000, Almstrom, the director chief of the contracts processing section of the Office of the Iraqi Programme, provided Johnston with a copy of a note from him to Benon Sevan (Sevan), the executive director of the OIP, dated 4 January 2000 and asked her to investigate. In the note Almstrom reports:¹⁰⁵⁸

CONFIDENTIAL

Note to Mr Sevan

Irregularity in Iraqi Contracting

On 21 December 1999 I received a query from Mr. Berne Saunders at the Canadian permanent mission pertaining to a contract between the Ministry of Trade and the Canadian Wheat Board in which the seller is required to deposit \$700,000 in a Jordanian bank account, allegedly to cover 'transport costs in Iraq for 141 MT of wheat.

1456 The reference in Almstrom's note to transport costs for '414 MT' of wheat was likely a typographical error as subsequent communications refer to costs of '\$14/MT' of wheat.

1457 Almstrom reported that he had advised Saunders:

[T]hat all payments for procurement by the Government of Iraq under the 'oil for food' programme were to be made to the United Nations Iraq Account in New York. Were the contract to pass through the Canadian government and be submitted to OIP, we would therefore return it for amendment to payment terms.

1458 As indicated above, Almstrom provided a copy of this note to Johnston on 4 January 2000 and asked her to investigate Saunder's query.¹⁰⁵⁹

1459 Johnston was engaged by the OIP in its Contracts Processing and Monitoring Division on secondment from British Customs. She was employed as chief customs expert, having previously acted as deputy chief customs expert from July to November 1999.

¹⁰⁵⁸ CB 2/809.

¹⁰⁵⁹ Exhibit P31 at CB 10/8109.

The customs experts were responsible for reviewing contracts submitted under the OFFP for 'price, value and conformity with the resolutions and guidelines of the 661 Committee.'¹⁰⁶⁰

1460 On 13 January 2000, Johnston telephoned Saunders and discussed with him the query he had raised with Almstrom. During the conversation Saunders said words to the effect that:

- (a) the Canadian Wheat Board had followed Johnston's suggestion of offering to deliver the grain at a lower cost per metric tonne for delivery to Umm Qasr, and the Government of Iraq had refused to finalise the contract; and
- (b) the grain board of Iraq has indicated that similar arrangements were made with the Australian Wheat Board in relation to a recent large contract and with various suppliers from Thailand.¹⁰⁶¹

1461 Following her conversation with Saunders, Johnston asked a member of her staff to obtain the most recent AWB contract. Johnston was subsequently provided with the file for AWB short-form contract for contract OC4988, which had recently been approved by the UN 661 Committee on 5 January 2000.¹⁰⁶² Upon her review, this contract appeared to Johnston to be standard for an AWB contract. She found no evidence of any irregular activity in this contract.¹⁰⁶³

1462 The contract Johnston reviewed was AWB contract A4821 dated 14 October 1999.¹⁰⁶⁴ It was approved by the UN as a 'make-up' contract under Phase IV of the OFFP and so was one in respect of which no inland transportation fee was payable. The short-

¹⁰⁶⁰ Exhibit P31 at CB 10/8106.

¹⁰⁶¹ CB 2/827.

¹⁰⁶² CB 2/829 - OIP file for contract A4821. Note that some pages (e.g. the first two) post-date Johnston's enquiries and so would not have been on the file as seen by her); CB 2/833.

¹⁰⁶³ Exhibit P31 at CB 10/8110.

¹⁰⁶⁴ CB 2/833, Johnston Statement (Exhibit P31) at CB 10/8110.

form copy of the contract that Johnston reviewed thus did not have the clause providing for the payment of a 'discharge cost' to 'nominated Maritime Agents in Iraq' that appeared in AWB contract A4822 also dated 14 October 1999,¹⁰⁶⁵ and in the three earlier Phase VI contracts dated 14 July 1999.¹⁰⁶⁶

1463 Johnston saw no evidence of irregular activity in contract A4821, and reported accordingly.¹⁰⁶⁷ Following her review of the AWB contract on 13 January 2000, Johnston telephoned Moules.¹⁰⁶⁸ Moules was posted at the Australian mission between January 1999 and January 2002, initially as first secretary and subsequently as counsellor, and during that time had primary responsibility within the mission for the OFFP.¹⁰⁶⁹

1464 Moules made a note of the conversation with Johnston in a cable that Moules sent to DFAT on the same day as the conversation. The cable is set out in paragraph 1496. According to the evidence of Moules, Johnston informed Moules that she wished to draw the Australian mission's attention to information received about possible irregularities in the way AWB may have received payment for wheat supplied to Iraq under the OFFP. Johnston then recounted to Moules the substance of Saunder's query, although without identifying the mission from which that query had emanated.¹⁰⁷⁰

1465 At the conclusion of her conversation with Moules, Johnston asked Moules to make some discrete, high-level inquiries at AWB 'to ensure that the AWB is not inadvertently involved in any payment scheme which might be in breach of the Iraq sanctions regime.'¹⁰⁷¹

¹⁰⁶⁵ CB 2/683.

¹⁰⁶⁶ CB 1/399, 401, 403, Johnston (Exhibit P31) at CB 10/8109.

¹⁰⁶⁷ See CB 8/827 - Johnston's internal report noting no evidence of financial irregularity.

¹⁰⁶⁸ CB 10/8110.

¹⁰⁶⁹ CB 10/8690.2.

¹⁰⁷⁰ CB 2/827.

¹⁰⁷¹ CB 2/875.

1466 Following that telephone call, Johnston drafted a note to Almstrom dated 13 January 2000. The note is as follows:

To Mr John Almstrom
From Ms Felicity Johnston
Date: 13 January 2000
Subject Irregularity in Iraqi contracting

Further to your note to Mr Seven of 4 January, on 23 December I confirmed to Mr Berne Saunders at the Canadian permanent mission that money should not be paid to a Government of Iraq bank account in Jordan for transport costs of wheat within Iraq. The details of the bank account concerned are not available. The supplier was advised that notification of the banking details would be available upon signature of the contract. I suggested that the supplier could perhaps appease the Grain Board of Iraq by offering to accept a lower value per metric ton for delivery of the goods to Umm Qasr and that lower value could equate to the \$700,000 transportation cost quoted by the Grain Board of Iraq. The supplier followed this course of action and has not been awarded the contract.

Mr Saunders stated that the grain board of Iraq has indicated that similar arrangements were made with the Australian wheat board in relation to a recent large contract and with various suppliers from Thailand.

QC 4988 was issued 5 January 2000 in relation to an Australian Wheat Board contract for 25,000 metric tons of wheat. If the same "transport costs" are applied to this contract, the Grain Board of Iraq will benefit by \$350,000. There is no evidence of any irregular financial activity associated with this application.

I have spoken to Ms Bronte Moules at the Australian permanent mission. Without indicating my source, I have asked her to enquire at the Australian permanent mission. Without indicating my source, I have asked her to enquire, discreetly, at a senior level, within the Australian Grain Board if any financial arrangements have been made outside the BNP Iraq account with the Government of Iraq.

I have made no approach to the permanent Mission of Thailand. I note that this Mission has not submitted, to date, an application for export of wheat to Iraq. Applications from the permanent mission of Thailand fall into two categories, rice and medical supplies.

I will report on Ms Moule's findings when she reverts.

1467 Paragraphs 1 and 2 of that note summarise Johnson's discussions with Saunders.

1468 As part of her inquiry, Johnston asked a member of her staff to obtain the most recent AWB contract, contract number A4821 (COMM. No. 4988), including the related

application, customs report and correspondence for her to review.¹⁰⁷² It appeared to Johnston to be standard for an AWB contract and she found no evidence of any irregular activity in the contract.

1469 Within a month of Johnston's inquiry, Moules telephoned Johnston in response to the issues that she had raised. Moules stated that inquiries had been made at the highest level and AWB had 'categorically denied' making any payments outside the escrow account.

1470 It is unclear why Johnston did not ask Moules whether any payments were made to the Jordanian account from moneys from the escrow account.

1471 In about early March 2000, Johnston attended a meeting with Nicholas at the UN Headquarters in New York. Johnston said that she raised with Nicholas the same concerns that she had previously raised with Moules. (As indicated above, these concerns are fully described in Moules cable to DFAT which appears at paragraph 1496 below). Johnston believed that she advised Nicholas that she still had outstanding concerns in regard to those matters. Johnston raised concerns about the discharge costs term and the standard terms and conditions.

1472 Johnston raised with Nicholas that the standard contract used by AWB and the IGB contained a paragraph which implied additional conditions were attached to the contract, but not included in the paper submitted to the UN. Johnston provided Nicholas with a copy of the short-form contract.¹⁰⁷³ She referred Nicholas to the paragraph at the end of the AWB short-form contract which reads:

All other terms and conditions as per AWB Limited and Grain Board of Iraq standard terms and conditions for Australian wheat of which the parties admit they have knowledge and notice, to apply to this contract were not inconsistent with the above.

¹⁰⁷² CB 2/829

¹⁰⁷³ CB 7/4822.

1473 Johnston requested a copy of these standard terms and conditions.

1474 On 5 April 2000, Johnston received a fax from Moules enclosing a copy of a fax from AWB enclosing AWB's standard contract terms and conditions.¹⁰⁷⁴ In the fax, Moules refers to Johnson's request for a copy of the Standard Contract Terms and Conditions between AWB and the IGB and provides a copy. Moules said:

Please note that AWB Ltd has advised that the standard terms and conditions apply except as and when these are in contraction to UN policy on trade with Iraq. This is pertinent to the clauses covering demurrage/despatch and the cross referencing clause guaranteed a minimum discharge rate. As the UN contract specifically excludes such contractual conditions, the terms and conditions which follow are superseded in these respects.

1475 On 6 April 2000, Johnston sent a fax to Saunders, together with the fax received from Moules on 5 April 2000 with the enclosed AWB standard terms and conditions.¹⁰⁷⁵ Johnston also had earlier conversations with Saunders where she had kept him informed of developments concerning the inquiry including the AWB managers' categorical denial of payments outside the OFFP. Saunders asked her to send him something in writing so that he could close his file. Johnston does not recall having any more conversations with Saunders on this issue after sending this fax.

1476 Based on the denial received from AWB via Moules and the fax from AWB, Johnston concluded that AWB was not making any payments outside of the OFFP.

1477 Johnston met with Moules of the Australian Mission on 26 March 2001 and discussed port fees. This meeting is documented in an email dated 26 March 2001.¹⁰⁷⁶

1478 Under cross-examination by Mr Dharmananda, Johnston agreed that she had sought legal advice from the Office of Legal Affairs about the OFFP. Johnston said it was not about the matter that in December (which I took to be the issues raised by the Canadian Mission.) Also Johnston could not remember if it was specifically about

¹⁰⁷⁴ CB 2/957, 951, 953.

¹⁰⁷⁵ CB 2/961, 963, 965, 967.

¹⁰⁷⁶ CB 3/1583.

inland transport. Johnston said:¹⁰⁷⁷

[T]he advice was in and around small services provided at a local level in Iraq and our lawyers advised that it was understandable and reasonable that from time to time that suppliers would have to require services to be performed in Iraq and that provided the costs were reasonable and were paid in local currency, that those matters were not considered to be outside the scope of resolution 986.

1479 Johnston was asked her view on whether payment for inland transport was not outside UN sanctions and she replied:¹⁰⁷⁸

My view would have to mirror the view of the Office of Legal Affairs from the United Nations at the time, that it would be reasonable for small amounts of monies to be paid for services performed at a local level but that monies should not be paid under the sanctions regime to the government of Iraq or any of its departmental entities.

1480 Johnston agreed that she had some discussions with Moules in or around the beginning of 2000. Johnston agreed that she met Nicholas. Johnston was asked how she came to have a meeting with Nicholas. Johnston said:¹⁰⁷⁹

Nicholas was visiting New York and had requested an appointment with the Office of the Iraq Program and prior to his arrival I had received some assurances from Ms Moules that everything was in order with the Iraq contracts that AWB held and some clarification that payments were not being made to the government of Iraq but I had also reviewed the contracts again and could see that there were some clauses that, in retrospect, made me feel a little bit uncomfortable in the contracts, so I took the opportunity of that meeting to raise the matter with Mr Nicholas.

1481 Johnston agreed her concern was with respect to the reference to the standard terms and conditions and she saw Nicholas' visit as an opportunity to do that.

1482 Johnston agreed that she kept an irregularities file during her period in the Office of the OFFP. Johnston was asked whether, on the basis of the documents and material that she had access to and the various investigations that she had undertaken, Johnston was not able to form a view that there was tangible evidence about kick-

¹⁰⁷⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1772.

¹⁰⁷⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1772.

¹⁰⁷⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1774, L5.

backs so far as AWB was concerned.

1483 Johnston said that she took the view that she did not have tangible evidence, but part of the conclusion that she reached was based on the information that was provided to her by the Australian Government.¹⁰⁸⁰

1484 In re-examination, Johnston was taken to the advice of Hans Correll (Correll) the Under-Secretary-General for Legal Affairs, of 22 June 1998 that advised, inter alia, on payments by parties exporting goods and services to Iraq under the OFFP.

1485 Correll said in his advice:¹⁰⁸¹

The overriding purpose of the measures which the Security Council has imposed in respect of Iraq should also be borne in mind. Any duties or charges which might be levied in respect of the transit itself should accordingly not be of such a level as to represent a source of income to the Iraqi State and should, in principle, be limited to charges for transportation, such as road tolls, levied on non-discriminatory basis, and to charges which are commensurate with whatever administrative expenses might reasonably be entailed by the occurrence of the transit. Any charges should also be payable in Iraqi diners only.

1486 Johnston agreed that the view expressed by Correll accorded with her views at the time and with subsequent legal advice that Johnston received.

Evidence of Bronte Nadine Moules

1487 Moules gave evidence by an affidavit sworn 23 November 2015.¹⁰⁸² Moules was not cross-examined. Moules gave evidence that she had been employed by the Department of Foreign Affairs and Trade (DFAT) since 1990 and held a Bachelor of Arts in International Relations. Moules is currently the Australian Acting High Commissioner to Papua New Guinea.

1488 Between January 1999 and January 2002, Moules was posted by DFAT to Australia's Permanent Mission to the United Nations (UN Mission), in New York, United States

¹⁰⁸⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1775.

¹⁰⁸¹ CB 2/823.

¹⁰⁸² Exhibit P50.

of America. At the beginning of that period, she was the first secretary to the UN Mission and was later promoted to the role of counsellor to the UN Mission. Her duties remained essentially the same after her promotion.

1489 Moules was the person primarily responsible for the UN OFFP within the UN Mission. This responsibility accounted for approximately 10 per cent of her duties at the UN Mission. Moules received administrative assistance in relation to the OFFP from Penny Holliday, and (less frequently) Cath Rosevear, both locally-engaged staff (LES) of the UN Mission.

1490 Moules' role and responsibilities in relation to the OFFP covered: the UN Mission processing of OFFP applications, working with a LES member at the UN Mission; reporting to Canberra on developments in the OFFP; and responding to queries from AWB and other potential exporters and to tasking from DFAT Canberra.

1491 Moules gave detailed evidence on the UN approval process of export contracts to Iraq.

1492 Moules gave evidence about the allegations made by Canada concerning the alleged irregular payments by AWB to Iraq. Moules became aware of the allegation made by a government to the UN in January 2000 regarding AWB having agreed to make payments to a bank account in Jordan controlled by the Iraqi government outside of OFFP.

1493 The allegation was raised with her by the chief of contracts processing section, Johnston in OIP. Moules deposed that the issue was that OIP had been contacted by a third country's UN Mission in New York advising that its national wheat board had been asked to agree to a payment system whereby USD\$14.00 per metric tonne of wheat be paid 'outside of the OFFP.'

1494 Moules deposed that the third country was to have been provided with the details of a bank account outside Iraq, namely in Jordan, into which the additional money was to be paid. The third country had said when it declined to participate in such a payment system that the IGB had told the third country that 'other companies' – the

AWB and one other country had been mentioned – had agreed to contracts similar to the one which had been requested of the third country.

1495 Moules deposed that Johnston referred this matter to her by telephone. In response to the information Johnston provided, Moules deposed that she cabled DFAT Canberra with the details the same day, 13 January 2000.¹⁰⁸³

1496 The cable contains the matters referred to above. In addition, the cable of Moules said:¹⁰⁸⁴

While the OIP does not have precise details, they understand the arrangement was to have been for the wheat supplier to be paid using funds from the UN's Iraq account, but at a slightly inflated price. The supplier would then – in a highly irregular move – pay a return percentage of the value of the contract, in USD, to the Non-Iraqi account. In short, it appears to be a system designed to generate illegal revenue in USD. The OIP believes the company involved in the scheme is owned by the son of Saddam Hussein.

The OIP told us that the country of the wheat board concerned, having drawn the matter to the UN's attention and ascertained that such forms of payment were not permissible under the Oil-For-Food Program, had declined the Iraqi request and was, as a consequence penalised by Iraq – ie the country concerned failed to secure contracts apparently because of its refusal to become involved in the kickback scheme. The country in question told the OIP that, when it declined the Iraqi request, the Iraqi Grain Board had indicated that "other companies" – the AWB and another country were specifically mentioned had concluded contacts similar to the one which had been requested of this country.

The OIP noted it had no way of judging the accuracy or otherwise of the claims the Iraqi Grain Board is alleged to have made about the AWB. However, given the highly irregular nature of the transactions cited, and the possibility of a company's agreeing to a payment system and being unaware of its irregularity, the OIP asked if Australia could make some discreet, high-level inquiries to ensure that the AWB is not inadvertently involved in any payment scheme which might be in breach of the Iraq sanctions regime.

1497 On 18 January 2000, Bowker of DFAT sent a cable to Moules responding to her cable of 13 January 2000.¹⁰⁸⁵ His response to Moules was twofold. First, he advised that DFAT in Canberra would follow up her inquiry 'in discussions with AWB when a

¹⁰⁸³ CB 2/875.

¹⁰⁸⁴ Exhibit BNM 1 to the affidavit of Bronte Moules.

¹⁰⁸⁵ CB 2/877.

suitable opportunity arises.’

1498 Second, Bowker responded to the substance of the query. He wrote:

2. At this stage, we think it unlikely that AWB would be involved knowingly in any form of payment in breach of the sanctions regime. We had reason last month to discuss AWB strategy regarding Iraq at senior level (Nigel Officer, General Manager, Global Sales and Marketing). We were told that while competition in the Iraq market was growing, and AWB had concerns about the effect on their long-term dealings with the Iraq Grains Authority of the imminent retirement of a key contact, AWB was confident its overall position would remain strong. It was fully aware of, and respected, Australian Government obligations and UN Security Council sensitivities and would act accordingly.
3. For your information, AWB confirmed our understanding that it had been approached by an international oil trader seeking AWB’s assistance in gaining access to Iraqi oil. AWB advised it had not rejected the idea, but had taken the position that any such arrangements would only be considered by AWB after sanctions were lifted.

1499 Moules deposed that the Australian Trade Commissioner, Washington, Nicholas subsequently contacted her by telephone and advised her that in a routine meeting with OIP, Johnston had again raised the issue of the third country concerns and had raised an additional point about the standard terms and conditions of AWB’s contracts with the IGB.

1500 Moules reported this to Canberra in the cable dated 10 March 2000, (see above in paragraph 1424),¹⁰⁸⁶ in which she requested follow-up discussions between DFAT Canberra and AWB so that the UN Mission could further respond to OIP.

1501 Bowker from DFAT Canberra advised the UN Mission in a cable dated 17 March 2000 that the OIP concerns would be addressed with AWB the following week. Bowker advised that initial contacts had confirmed advice already provided by AWB General Manager Americas.¹⁰⁸⁷

¹⁰⁸⁶ Exhibit DNM-1, CB 2/917.

¹⁰⁸⁷ Exhibit DNM-1, CB 2/937.

- 1502 Moules deposed that Bowker of DFAT Canberra provided a cabled response dated 22 March 2000 advising of AWB's agreement to provide a copy of the documentation requested by the OIP and requesting the UN Mission to follow up with AWB's New York office to obtain the documents for forwarding to the UN.¹⁰⁸⁸
- 1503 On 3 April 2000, Moules received from Snowball a fax (see paragraph 1446 above) attaching a copy of the 'standard terms and conditions' between AWB and the IGB as requested by the UN. Moules then forwarded those standard terms and conditions to the OIP.
- 1504 Moules deposed that on the basis of this response and the provision to OIP of a copy of the standard terms and conditions of AWB contracts, OIP confirmed in a telephone conversation with her that the issues they had raised with the UN Mission had now been clarified and therefore they considered the matter closed. Moules reported this to DFAT Canberra in the cable dated 5 April 2000.¹⁰⁸⁹
- 1505 Moules deposed that from time to time the UN Mission would deal with enquiries from AWB regarding the OFFP. In each such instance, Moules said that she sought to ensure that the UN Mission communicated the matter to the OIP in a completely transparent manner, and that AWB was advised in full of the OIP's response. One such enquiry arose in March and April 2001: AWB claimed that port fees were being imposed on them by the Iraq State Port agents and sought advice on how to proceed. Moules deposed that she sought advice from the OIP and relayed that advice to AWB, and reported this to DFAT Canberra by cable.
- 1506 Moules deposed that to the best of her recollection, during her tenure at the UN Mission, AWB did not seek advice in relation to:
- (a) the making of separate payments under their wheat contracts (with the exception of the port fees); or

¹⁰⁸⁸ Exhibit DNM-1, CB 2/939.

¹⁰⁸⁹ Exhibit DNM-1, CB 2/959.

- (b) the use of trucking companies, or any matter involving reference to 'Alia' or 'Alia for Transportation and General Trade'.

Evidence of Graeme Robert Tangye Bowker

- 1507 Bowker gave his evidence in chief by confirming an affidavit he made¹⁰⁹⁰ and was cross-examined.
- 1508 Bowker is an adjunct professor in the Centre for Arabic Islamic studies at the Australian National University. Bowker was the Director of the Middle East Section (MEA) of the Department of Foreign Affairs and Trade (DFAT) from 30 January 1995 to 28 July 1996 and from 8 February 1999 to 5 January 2001.
- 1509 Bowker frequently acted as Assistant Secretary of the Middle East and Africa Branch (MAB) during both of those periods. Bowker had an active involvement in matters relating to Iraq until approximately July 2000. Thereafter, from time to time, Bowker signed export permits relating to exports to Iraq in the absence of other senior officers in MEA or MAB.
- 1510 Among other duties, including the management of Australia's dealing with countries in the Middle East and the development and implementation of Australian Middle East policy, Bowker's responsibilities as Director of MEA and Acting Assistant Secretary of MAB, in regard to the OFFP and departmental systems and practices, were to satisfy himself that applications to the UN for approval to export goods to Iraq were permissible in terms of Australian government policy and met the requirements of UN bodies charged with evaluating such applications.
- 1511 Australia's various overseas missions within this geographic area reported to MAB. One of these was Australia's Mission to the United Nations (UN Mission) in New York.
- 1512 Bowker gave evidence on the procedure followed in granting permission to the AWB

¹⁰⁹⁰ Exhibit P24.

to export wheat to Iraq under the Customs Regulations.

1513 Bowker also gave evidence on the third party allegations. In January 2000, Bowker became aware of a third country complaint that AWB had agreed in its wheat contracts to make a payment to a bank account in Jordan outside the OFPP.

1514 The allegation was raised with DFAT Canberra by Moules in the UN Mission in a cable dated 13 January 2000 (see paragraph 1495 above). In the cable, as noted above at paragraph 1496, Moules noted that the UN OIP:

...asked if Australia could make some discreet, high-level inquiries to ensure that the AWB is not inadvertently involved in any payment scheme which might be in breach of the Iraq sanctions regime.

1515 Bowker responded to Moules' cable on 18 January 2000 advising that Canberra would follow up on the matter (see paragraph 1497 above). Bowker's note about AWB being unlikely to be involved is set out above at paragraph 1498.

1516 Bowker said that the cable referred to a meeting he had with Officer in December 1999 in AWB's Melbourne office. One of the purposes of the meeting was to discuss AWB's wheat trade with Iraq. Bowker deposed that at the meeting, Officer did not discuss with Bowker, or seek his (or DFAT's) advice about internal or inland transport or trucking, or payments for inland transport or trucking under the OFFP. Bowker said that there was no discussion about the use of Jordanian trucking companies. There was no mention of a company called Alia.

1517 Bowker deposed that about one week after 18 January 2000, he telephoned McConville and raised with him the detail of the third country complaint. Bowker deposed that McConville's reply was 'this is bullshit' and he went on to further emphatically deny the allegations. Bowker deposed that McConville indicated that AWB would continue to uphold its responsibilities towards the Australian Government in regard to Iraq.

1518 Bowker deposed that on 10 March 2000 DFAT Canberra received a cable from Moules (see paragraph 1500 above) which again raised the issue of the third country concerns

and raised an additional point about the standard terms and conditions of AWB's contracts with the IGB. Moules requested follow-up discussions between DFAT Canberra and AWB so that the UN Mission could further respond to OIP. Bowker deposed that he advised the UN Mission in a cable dated 17 March 2000 the action being pursued as follow up to the allegations. (See paragraph 1501 above).

1519 Bowker deposed that in March 2000, following his receipt of the 10 March 2000 cable, he had a further conversation with McConville; Bowker deposed that he raised the issue about AWB's standard terms and conditions referred to in the contracts. Bowker deposed that McConville advised that AWB was happy to provide a copy of the standard terms and conditions.

1520 Bowker provided a cabled response to the UN Mission dated 22 March 2000 advising of AWB's agreement to provide a copy of the documentation requested by the OIP and requesting the UN Mission to follow up with AWB's New York office to obtain the documents for forwarding to the UN.

1521 Bowker deposed that Moules reported to DFAT Canberra in the cable dated 5 April 2000 that OIP had confirmed in a telephone conversation with Moules that, as a result of the provision to OIP of a copy of the standard terms and conditions of AWB contracts, the issues they had raised with the UN Mission had now been clarified and therefore they considered the matter closed. Bowker said that he became aware of this cable at the time it was received by DFAT Canberra.

1522 Bowker was cross-examined extensively on the procedures followed within DFAT in approving wheat exports to Iraq by AWB but added little on the third party complaints.

ASIC submissions on Washington meeting

1523 ASIC contends that it follows that after their meeting with Nicholas, each of Flugge, McConville and Snowball were aware that:

(a) There had been earlier concerns on the part of the OIP concerning irregular

- payment terms between AWB and Iraq.
- (b) These concerns had not been addressed to the satisfaction of the OIP.
 - (c) The OIP wished to have those concerns addressed.
 - (d) The OIP was also concerned that there was a separate contract in place between AWB and Iraq of which it was not aware.
 - (e) The OIP wanted to be provided with any parallel contracts or additional terms of which it was not aware.

1524 Moules was made aware of similar allegations to those she was told in January 2000, as well as the additional issue of standard terms and conditions of AWB's contracts with the IGB which she reported to DFAT Canberra.¹⁰⁹¹

1525 Emons spoke with Snowball about the Canadian complaint and that the Canadian government had taken action within the UN to discover the manner of AWB payments.¹⁰⁹² That discussion suggests that the OIP's concerns, as reported to AWB at the Washington meeting, specifically concerned payments being made by AWB to the IGB.

1526 Snowball recounted the meeting in an email to Emons dated 16 March 2000). In his email of 15 March 2000,¹⁰⁹³ (discussed below at paragraph 1534) Snowball suggests that the references to 'discharge' and 'trucking' were from Nicholas.

1527 ASIC says that two notes in Snowball's notebook indicate that, prior to his meeting with Nicholas on 9 March 2000, he was not only aware that AWB was paying a trucking fee to a Jordanian trucking company but also that Canada had raised a query with the UN about trucking fees.

¹⁰⁹¹ Moules' affidavit [27], CB 10/8690.8.

¹⁰⁹² Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1739, L31 - T1740, L3.

¹⁰⁹³ CB 2/923.

1528 ASIC says that the first note is of a conversation that Snowball had with Mayo Schmidt of the Saskatchewan Wheat Pool (Canada) in early March 2000, in which he had been told by Mr Schmidt that the Canadian government had disrupted or delayed a Canadian Wheat Board sale because of the trucking payment.¹⁰⁹⁴ The note, which appeared at an angle towards the foot of the page, read:

*Can Govt disrupted/delayed
a CWB sale – because of trucking payment.*

1529 ASIC says that the second note was of another conversation that Snowball had had.¹⁰⁹⁵ The note read:

Can – vessels rejected at Umm Qasr rejected for E-coli
- *asked about trucking fee*
- *AWB pays the Jordan trucking co.*

1530 ASIC submits that while the telexes sent by Nicholas refer to discussions of ‘irregular payments’, the Snowball email suggests that trucking fees were expressly mentioned. ASIC submits that either term should have put those at the meeting on notice that the UN’s concerns related to payments that were, or might be, inconsistent with the requirements of the OFFP and therefore as chairman of AWB, it was incumbent on Flugge to ensure that the issue was properly and thoroughly investigated to ensure that AWB was not engaging in any impropriety in connection with the OFFP.

1531 ASIC submits that such an investigation would have revealed that AWB was making irregular payments to Iraq in the form of the IGB fees. ASIC says that there is no evidence that Flugge took any such steps. Rather, ASIC contends the later correspondence suggests that AWB buried the issue by providing the UN with standard terms and conditions only.

1532 In around March 2000 (approximately) (ASIC contends probably after Nicholas

¹⁰⁹⁴ CB 2/925.

¹⁰⁹⁵ CB 2/924.1

meeting) Snowball's notebook states, '... Mayo Schmidt - Iraq - Trevor wants to keep alongside them - see if we could help them call and get the background.'¹⁰⁹⁶

1533 Emons was first informed about the Canadians seeking assistance following a discussion with Officer and Flugge. This conversation occurred in around March 2000. Flugge asked Emons to contact Benuit and to offer advice or help if possible on the issue of the vessels being rejected by Iraq and their ongoing business with Iraq.¹⁰⁹⁷

1534 Prior to 15 March 2000, Snowball contacted Moules to confirm what information was requested by the UN. Moules confirmed that the UN was seeking information on the contract clause. Snowball reported on his conversation with Moules in his email of 15 March 2000¹⁰⁹⁸ (discussed below). Snowball also spoke by telephone with Emons.

1535 Following his conversation with Snowball, on 15 March 2000 Emons sent a facsimile to IGB to the attention of Abdul-Rahman.¹⁰⁹⁹ It was headed 'UN enquiry concerning trucking fee' and read:

We wish to advise that the office of AWB Ltd in New York has been approached by the Customs office of the United Nations who are questioning the payments by AWB to the Jordanian trucking company.

We are very concerned to learn from the UN that the Canadian Government has taken action within the United Nations to discover the manner of AWB payments.

We ask your assistance in this matter and would ask that no information of a confidential nature is released.

We will be seeking your understanding on this matter when AWB visit's Iraq in April.

We thank you in anticipation.

¹⁰⁹⁶ CB 2/925, Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2107, L8. An approximate date is inferred from entries a few pages earlier (CB 2/927); one dated '25 Feb', and another which refers to the three Iraq contracts (confirmed in early Feb) as 'being processed, no problem'.

¹⁰⁹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1735, L16-28.

¹⁰⁹⁸ CB 2/923.

¹⁰⁹⁹ CB 2/929.

- 1536 The IGB responded that 'the necessary action have already been taken.'¹¹⁰⁰ ASIC submits that this 15 March 2000 exchange between Emons and the IGB makes plain that AWB and the IGB had a common interest in ensuring that the UN did not find out about AWB's payment of the trucking fees – the IGB because it was a source of illegitimate income; AWB because it was a means by which it could ensure that the Iraq trade would not be lost to other, more conscientious, suppliers.
- 1537 On 15 March 2000, Snowball sent an email to Emons, reporting on his discussions with both Nicholas and Moules.¹¹⁰¹ It was not received in Melbourne until early the following morning 16 March 2000, after Emons had sent his facsimile of 15 March 2000 to the IGB. Snowball's email is copied at paragraph 1442. ASIC says that it is apparent from Snowball's use of the phrase 'discharge/trucking' in this email that he related the discharge fee referred to in the early AWB contracts to the trucking fee that AWB was paying, and that he related the inquiry that Nicholas made to AWB's payment of a trucking fee.
- 1538 On 17 March 2000, DFAT recorded that the OIP's concerns about possible irregularities would be addressed with AWB in the following week.¹¹⁰²
- 1539 ASIC submits that AWB was trying to alleviate this concern in relation to the UN request for information by only supplying the standard terms and conditions.¹¹⁰³ That is because the standard terms and conditions did not change when the IGB imposed the trucking fee requirements and therefore no suspicion would be cast on AWB of impropriety through the supply of those terms.
- 1540 AWB ultimately provided a copy of the standard terms and conditions to the OIP,¹¹⁰⁴ which solely addressed the issue of the reference to standard terms and conditions,

¹¹⁰⁰ CB 2/931.

¹¹⁰¹ CB 2/923.

¹¹⁰² CB 2/937.

¹¹⁰³ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1739, L15–17.

¹¹⁰⁴ CB 2/939–67.

but which revealed nothing about the irregular payments being paid by AWB in connection with its trade with Iraq.

Flugge's submissions on the Washington visit

1541 Flugge contends that ASIC alleges at paragraph 41 of the TFASOC that he was informed of particular matters on a trip to Washington on or about 9 March 2000. Flugge says that ASIC relies on an email from Snowball of 16 March 2000¹¹⁰⁵ and a telex of 11 March from Nicholas.¹¹⁰⁶ Flugge says that Nicholas wrote his telex shortly after the meeting. Flugge submits that those documents do not record the same information. Snowball had no recollection of what was discussed at the meeting and was prepared to accept that he had no basis to challenge Nicholas' record of the meeting as set out in his cable.

1542 Flugge submits that Snowball had no actual recollection of events in 2000. Flugge says that Snowball remarked numerous times that he did not remember or could not recall events and discussions that occurred in and around 2000¹¹⁰⁷ and agreed that he did not have any actual independent recollection of conversations that occurred in 2000.¹¹⁰⁸

1543 Flugge argues that after being taken to a schedule of meetings that Snowball attended with Flugge for the period 8 and 9 March 2000,¹¹⁰⁹ Snowball conceded that he did not have any independent memory of the meetings that occurred on that day.¹¹¹⁰

1544 In particular, Snowball stated that he did not recall what was discussed at the meeting

¹¹⁰⁵ CB 2/923.

¹¹⁰⁶ CB 2/921.

¹¹⁰⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2109, L7, 15, 17, 23; T2110, L9, 16.

¹¹⁰⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (23 November 2015) T2114, L27.

¹¹⁰⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2114, L31; Exhibit F37.

¹¹¹⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2115, L24.

with Flugge and Nicholas.¹¹¹¹ Despite being shown an email he wrote about the meeting,¹¹¹² Snowball could not recall whether the email was an accurate reflection of what occurred at the meeting, as he did not recall what was discussed.¹¹¹³

1545 Flugge says that Snowball was taken to the cable written by Nicholas of the meeting occurring on 9 March 2000.¹¹¹⁴ Snowball agreed that he had no independent memory that would cause him to disagree with the substance of this cable.¹¹¹⁵

1546 Flugge submits that in view of Snowball's apparent lack of recollection, and the clear evidence of Snowball's other discussions about inland transport,¹¹¹⁶ the better source of information to consider what was discussed at the meeting is Nicholas' cable and his evidence. For reasons discussed below, I do not agree with Flugge's submission.

1547 Flugge submits that in the telex of 11 March 2000 (see paragraph 1426 and following),¹¹¹⁷ Nicholas records a discussion that he had with Johnston about concerns raised by the mission of a third country that the AWB had agreed to the irregular payment terms required by the 'Grain Board of Iraqi [sic]'. She said it was conceivable that the AWB had entered into irregular terms 'unknowingly.' Johnston referred to a clause in AWB contracts with the IGB that implied there was a separate contract in place, and of which the OIP had not been made aware.

1548 Flugge submits that Nicholas then records that he met with an AWB delegation to Washington and refers to the fact that he met with Flugge, McConville and Snowball. Importantly, at paragraph 3, Nicholas records that he was asked by Johnston to follow up with AWB and obtain a copy of any parallel contracts for the perusal of the OIP.

¹¹¹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2109, L7.

¹¹¹² CB 2/923.

¹¹¹³ Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2109, L9.

¹¹¹⁴ CB 2/921.

¹¹¹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (19 November 2015) T2116, L8.

¹¹¹⁶ See, for example, CB 1/367, CB 1/381 and CB 1/385.

¹¹¹⁷ CB 2/921.

He states Johnston emphasised that it is imperative that this '*matter*' be put to rest before the mission of the third country makes a formal complaint against the AWB. It is in that context that Nicholas reported that he met with the AWB delegation to inform them of the '*matter*'; that is the issue that Nicholas takes up with the AWB delegation.

1549 Flugge contends that Nicholas also reports that McConville and Flugge expressed the view that the matter would be taken seriously and that a full response would be forthcoming. Such a response was, indeed, given.¹¹¹⁸

1550 Flugge argues that ASIC's insistence that the cable reveals that matters other than parallel contracts were raised at the meeting is inconsistent with the text of the telex, and the evidence given by both Nicholas and Johnston. As explained below, I do not accept this argument.

1551 Flugge submits, as set out in paragraphs 1552 to 1889 below, that there was no discussion about trucking fees at the Washington meeting.

1552 Nicholas was called by ASIC to give evidence of his interactions with Flugge whilst he held the position as Australia's trade commissioner, working with Austrade, in Washington DC.

1553 Nicholas essentially carried out a role as a trade facilitator. As part of his role as trade commissioner, officers or persons from Australian companies who were coming through Washington could request meetings with him, and he could in turn issue a request to meet with visitors at the Embassy.¹¹¹⁹

1554 Nicholas met with Flugge, McConville and Snowball in Washington on 9 March 2000 during his time as Australia's trade commissioner.¹¹²⁰

¹¹¹⁸ Cable from Moules dated 10 March 2000, CB 2/917; fax from Snowball to Moules, CB 2/951.

¹¹¹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (23 November 2015) T2134, L3-19.

¹¹²⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (23 November 2015) T2131, L19-23.

- 1555 The topics discussed during this meeting were concerns about ‘possible irregularities in the contract’ and the possibility of there being a ‘parallel contract’.¹¹²¹ Nicholas stated that so far as he was aware, there was no discussion of contract pricing, including discharge costs or trucking fees during the meeting.¹¹²²
- 1556 Nicholas could recall discussion of ‘irregularities’ with Flugge, McConville and Snowball in Washington and on three occasions, confirmed that he understood that these related to ‘parallel contracts’.¹¹²³
- 1557 Johnston only raised ‘standard terms’ when she met Nicholas. Prior to Johnston’s meeting with Nicholas in March 2000, Johnston identified that there was a reference to standard terms and conditions in AWB’s contracts with the IGB.¹¹²⁴ Johnston raised this with Nicholas during their meeting.¹¹²⁵ It was simply because the opportunity arose.¹¹²⁶
- 1558 Once it is understood what was discussed by Nicholas at the meeting on 9 March 2000, there is no basis to conclude that the meeting gave rise to any knowledge of impropriety on the part of Flugge or that it enabled Flugge to have knowledge as alleged in paragraph 48(i) of the TFASOC.
- 1559 Cables passing between Johnston and Moules cannot be used to explain what was discussed in the meeting between Nicholas, Flugge, McConville and Snowball. Further, whatever Snowball may have known by reason of his involvement and participation in email discussions about the inland trucking fee cannot be taken as the

¹¹²¹ Transcript of hearing, *ASIC v Geary & Flugge*, (23 November 2015) T2131, L28 – T2132, L2; T2132, L8–18.

¹¹²² Transcript of hearing, *ASIC v Geary & Flugge*, (23 November 2015) T2135, L11–19.

¹¹²³ Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T2131, L28 – T2132, L2; T2135, L18–19; T2135, L26 – T2136, L5.

¹¹²⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1775, L4–6.

¹¹²⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1775, L7–8.

¹¹²⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1775, L7–8.

basis for what was discussed at the meeting between Nicholas and the AWB representatives.

1560 On the other hand, ASIC submitted that Flugge was confronted 'point blank with the impropriety of the fees behaviour.'¹¹²⁷ Flugge submits that such a submission ignores the reality of what was discussed with Nicholas at the end of a long day of meetings for Flugge.¹¹²⁸

1561 A suggestion that, in the meeting with Nicholas, Snowball pretended to take matters seriously but went down a path of deception was never put to Snowball who was called by ASIC.¹¹²⁹ Without raising the matter in the examination of Snowball and to make such submissions is inappropriate and unfair.

1562 Flugge says that if, as ASIC urges, the true purpose of Nicholas' meeting with the AWB representatives was to raise more than a matter of parallel contracts, why did the Australian Mission in New York and the UN treat the matter as closed when the standard terms and conditions were provided? Why did no person from the UN or the Australian Mission raise, in writing, the issues about the Canadian complaint?

Summary of evidence on Washington meeting

1563 At the risk of repeating the evidence referred to above, it is useful if I summarise the relevant events in a chronological order.

1564 The relevant events commence on 21 December 1999, when Almstrom, Johnston's boss at the OIP, received a query from Saunders of the Canadian Mission to the United Nations pertaining to a contract between the Ministry of Trade and Canadian Wheat Board in which the seller was required to deposit \$700,000 in a Jordanian bank account allegedly to cover costs in Iraq for 141 MT of wheat.

¹¹²⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (10 December 2015) T2936, L17-18.

¹¹²⁸ See Exhibit F37.

¹¹²⁹ See Transcript of hearing, *ASIC v Geary & Flugge*, (10 December 2015) T2938 - T2941.

1565 On about 23 December 1999, Johnston spoke to Saunders. During the conversation, Saunders told Johnston that the Canadian Wheat Board, in the course of negotiating a contract for the supply of wheat to Iraq had been requested to remit money to a Government of Iraq to a bank account in Jordan to cover inland transportation costs. In the conversation, Saunders told Johnston that the Government of Iraq had stated that the bank account details would not be made available before the contract was signed. Johnston told Saunders that such a payment would not fit within the OFFP and suggested alternative measures such as delivery to Umm Qasr at a lower price per metric tonne.

1566 On or around 4 January 2000, Almstrom provided Johnston with a copy of a note from him to Sevan dated 4 January 2000 and asked her to investigate. The note recorded the query referred to above in paragraph 1564.

1567 On or about 13 January 2000, Johnston Saunders had a telephone conversation. During the conversation Saunders said words to the effect that:

- (a) the Canadian Wheat Board had followed Johnston's suggestion of offering to deliver the grain at a lower cost per metric tonne for delivery to Umm Qasr, and the Government of Iraq had refused to finalise the contract; and
- (b) the grain board of Iraq has indicated that similar arrangements were made with the Australian Wheat Board in relation to a recent large contract and with various suppliers from Thailand.

1568 Following the conversation, Johnston telephoned Moules of the Australian Mission. Johnston asked Moules to enquire discreetly within AWB if any financial arrangement had been made outside the BNP Iraq account with the Government of Iraq.

1569 On 13 January 2000, Johnston drafted a note to Almstrom that recorded her conversation with Saunders and Moules. The note is set out above at paragraph 1466.

1570 Moules also made a record of the information she obtained from Johnston in a cable that she sent to DFAT on 13 January 2000, set out at paragraph 1496 above. It is

apparent from this record that Johnston passed on more detail about the Canadian complaint that she recorded in her own report to Almstrom dated 13 January 2000 that is set out above at 1466.

1571 The substance of Moules' record of the complaint is as follows.

1572 The Office of the OIP had received a complaint about possible irregularities in the way the AWB may have received payment for wheat supplies to Iraq under the OFFP.

1573 The Office had been contacted by an unnamed Mission in New York.

1574 The Mission had advised that its national wheat board, when recently negotiating a contract with the IGB under the OFFP, had been asked to agree to a payment system whereby USD 14 per metric tonne of wheat would be paid 'outside the OFFP.'

1575 The supplier was to have been provided with the details of a bank account outside Iraq in Jordan, into which the additional money was to be paid.

1576 The OIP understood the arrangement was to have been for the wheat supplier to be paid using funds from the UN's Iraq account (in other words the Escrow Account).

1577 The funds for the payment to the bank account in Jordan would be obtained by inflating the price of the wheat.

1578 The supplier of the wheat would then pay a return percentage of the contract in USD to the non-Iraqi account.

1579 The system was designed to generate illegal revenue in USD.

1580 The OIP believed that the company involved in the scheme was owned by the son of Saddam Hussein.

1581 The country of the wheat board concerned had been informed by the OIP that such forms of payment were not permissible under the OFFP.

1582 That country had declined the Iraqi request concerned and failed to secure contracts

apparently because of its refusal to become involved in the kickback scheme.

1583 The country told the OIP that, when it declined the Iraqi request, the IGB had indicated that 'other companies' – the AWB and one other country were specifically mentioned – had concluded similar contracts to the one which had been requested of the complaining country.

1584 The OIP noted it had no way of judging the accuracy or otherwise of the claims the IGB is alleged to have made about the AWB.

1585 However, given the highly irregular nature of the transactions cited, and the possibility of a company's agreeing to a payment system and being unaware of its irregularity, the OIP asked if Australia could make some discreet, high-level inquiries to ensure that the AWB is not inadvertently involved in any payment scheme which might be in breach of the Iraq sanctions regime.

1586 As noted below, this record was seen by Bowker of DFAT on 13 January 2000. Moules' record of the conversation with Johnston is an important record as it is the source of AWB's initial knowledge about the complaint by the Canadian Mission about AWB's conduct under the OFFP. As indicated below, the information went from Saunders, to Johnston, to Moules, to Bowker at DFAT and then from Bowker to McConville of AWB.

1587 On 18 January 2000, Bowker responded to Moules' cable containing details of the complaint concerning the AWB. Bowker said that he would follow up the matter.

1588 Bowker said that they would discuss with AWB when a suitable opportunity arose. Bowker doubted that AWB would be involved knowingly in any form of payment in breach of the sanctions regime.

1589 About a week after receiving the cable from Moules concerning possible irregular payments by AWB, Bowker had a conversation with McConville of AWB Government Relations and raised with him 'the detail' of the third country complaint about AWB's conduct in relation to wheat sales to Iraq. Bowker says that McConville replied 'this

is bullshit' and went on further emphatically denying the allegations.

1590 McConville was present at the Washington conference. Thus the matters raised at the Washington meeting concerning the complaint of the third country would not have been news to him.

1591 Before moving on to the Washington meeting, it is important to observe that there is no evidence that satisfies me that Snowball was aware of the complaint when it was raised at the Washington conference. ASIC referred to notes in Snowball's notebook that suggest Snowball had been in contact with Canadian officials and had made entries that suggested the Canadian official asked about the trucking fee and about 'AWB pays the Jordan trucking co.' Snowball professed to have no recollection why he made those notes. I did not believe him.

1592 Nevertheless there is no evidence that permits me to make a finding that these notes were made before the Washington conference rather than after the conference.

1593 Before the Washington meeting was held, at the request of Nicholas, in early March 2000, Nicholas had been to New York and met with Johnston. As indicated above, this meeting is referred to in the evidence of Johnston, Nicholas, Moules and Snowball. The evidence is discussed above.

1594 I am satisfied that at this meeting with Johnston, Nicholas was informed as follows:

1595 Johnston informed Nicholas of the substance of the complaint by the third country that is recorded in the cable from Ms Moules to DFAT of 13 January 2000 (see paragraph 1496 above). The content of the conversation is also supported by the report of it given by Nicholas to Moules (see paragraph 1467 above). Johnston also raised concerns about discharge costs.

1596 Johnston also raised with Nicholas a separate issue that the standard contract used by AWB and the IGB contained a paragraph which implied additional conditions were attached to the contract, but not included in the paper submitted to the UN. Johnston provided Nicholas with a copy of the short-form contract. She referred Nicholas to the

paragraph at the end of the AWB short-form contract noted above at paragraph 1472.

1597 Johnston requested that Nicholas obtain a copy of these standard terms and conditions.

1598 After the meeting between Nicholas and Johnston in New York, at some point prior to 9 March 2000, Nicholas telephoned Moules at the Australian Mission and informed her that in a routine meeting with the OIP, Johnston had raised the issue of the third country concerns that AWB was making irregular payments outside the OFFP and had raised an additional point about the standard terms and conditions of AWB's contracts with the IGB.

1599 Evidence on the meeting in Washington on 9 March 2000 and what was said was provided by Nicholas, Snowball and Moules. Moules' evidence is second hand and is of what Nicholas told her after the conference. Snowball's evidence is in an email that he sent to Emons, and is not intended to be a full record of the meeting.

1600 The meeting was scheduled for half an hour and followed a very heavy day of meetings by Flugge that began with a breakfast meeting with Snowball. The meeting was followed by a dinner that evening at the Australian embassy. The previous evening Flugge had arrived in Washington and dined with Snowball.

1601 The meeting had been arranged prior to Nicholas' meeting with Johnston in New York.

1602 Snowball had no recollection of the meeting. Flugge did not give evidence, nor did McConville. Neither ASIC nor the defendants asked me to draw any inferences from the failure of the other party to call McConville.

1603 I do draw an inference from Nicholas' record in his cable to DFAT that he met with the AWB representatives to advise them of UN concerns about suspected irregularities in AWB contracts with Iraq under the OFFP.

1604 Nicholas acknowledged that he was concerned that AWB did not understand the

seriousness nor the urgency of the matter and it may be necessary to advise the Minister. The inference I draw is that as this record was made after the meeting was held, that Nicholas did in fact advise the meeting of the UN concerns about suspected irregularities in AWB contracts with Iraq under the OFFP.

1605 I accept that under cross-examination Nicholas agreed that as best he could recall trucking and discharge was not discussed at the meeting. I prefer, however, to accept the evidence in the contemporaneous record made by Snowball.

1606 I am satisfied that the following matters were discussed at the Washington meeting.

1607 Nicholas informed the meeting that the UN had reported to him that the UN had concerns about suspected irregularities in AWB contracts with Iraq under the OFFP.

1608 Nicholas advised the meeting that irregularities related to payments AWB was making to Iraq for discharge/trucking.

1609 Nicholas raised a further concern that the UN had that AWB may have had a parallel contract with the IGB and asked for a copy of the standard terms and conditions referred to in the written contracts submitted to the OIP.

1610 Nicholas suggested that the request for information on the contract clause that referred to standard terms and conditions was linked to the discharge/trucking payment issue.

1611 Nicholas was told by an unidentified member or members of the AWB representatives that there were no irregularities in their dealings with Iraq. There is no evidence that Flugge said any such thing to Nicholas.

1612 As mentioned above, McConville knew that the issue that the UN was concerned about, regarding payments by AWB to Iraq, were initially raised by the Mission of a third party country to the UN.

1613 Although Nicholas was informed by Johnston that the details of the complaint were provided by the Mission of a third country, I am not satisfied that Nicholas expressly

told the meeting that the issue that the UN was concerned about had in fact been raised by the Mission of a third party. Neither Nicholas nor Snowball say that he did.

1614 I am satisfied that McConville and Flugge said that Nicholas' request would be taken seriously by AWB and that a full response would be forthcoming to the UN.

1615 I am not satisfied that McConville and Flugge were referring to responding to the UN concerns about irregular payments. Rather, I am satisfied that they were referring to the request for information on the standard terms and conditions of the AWB sales contracts. I am reinforced in my finding by the fact that after the meeting the only follow-up made by AWB was to provide the standard terms and conditions referred to in the contracts submitted to the OIP. There was no evidence of AWB being concerned to provide any other information to the UN.

Findings on ASIC pleading in TFASOC [41]

1616 I am satisfied that the discussion was to the following effect alleged:

- (a) the UN had concerns about alleged irregularities in AWB's contracts and dealings with Iraq under the OFFP;¹¹³⁰
- (b) Nicholas advised that another country had alleged to the UN that AWB was making irregular payments at the request of the IGB;¹¹³¹
- (c) Nicholas informed Flugge, Snowball and McConville that it was important for AWB to provide to the UN all contractual terms that existed between AWB and the IGB, to ease concerns of the UN;¹¹³²
- (d) Nicholas further informed Flugge, Snowball and McConville that if the matter were not resolved the other country (referred to in subparagraph (b) above) could raise a formal complaint and then it would become a much bigger issue;

¹¹³⁰ TFASOC 41(a).

¹¹³¹ TFASOC 41(b).

¹¹³² TFASOC 41(c).

and

- (e) Flugge informed Nicholas that his request would be taken very seriously and a full response would be provided to the UN Office of the Iraq Programme.

1617 Accordingly I am satisfied that ASIC has made out the allegations in paragraph 41.

TFASOC – paragraph 42

Flugge raises issue of trucking fees for Emons to raise with IGB

1618 ASIC pleads that in late March or early 2000, Flugge told Emons that AWB should continue paying the inland transport fee and should be accommodating to the Iraqis so that AWB's business in Iraq did not come under threat.

1619 ASIC pleads that the discussion is recorded in an email dated 4 April 2000 sent by Emons to Watson. The email is copied at paragraph 367.

1620 On 5 April 2000, Emons sent an email to Abdul-Rahman the Director General of the IGB.¹¹³³ The email advised Abdul-Rahman of changes in the travel arrangements and a change of meeting dates.

1621 The email advised Abdul-Rahman that AWB General Manager, Laskie, would carry a personal message to Minister Saleh that AWB's chairman, Flugge, would like to pass to Abdul-Rahman.

1622 The email said:

Our Chairman has asked me to discuss with you while I am in Baghdad the issue of the position of the United Nations on trucking fee and also future phases of the Food for Oil pro[g]ram.

1623 Emons said in evidence that he did not recall a discussion with Flugge about the subject of the UN on trucking fees and the future phases of the OFFP.

1624 Flugge made submissions about this alleged conversation as follows.

¹¹³³ CB 2/977.

Emons gave evidence concerning a discussion he claimed to have had with Flugge about the 'finer points' of the trucking fee, as referred to in an email to Mr Watson on 4 April 2000.¹¹³⁴ Emons evidence was that the discussion was 'a very informal discussion across the floor on level 6' and it was a short nature, quick, of the nature that was one that said, 'Okay, let's get on with and get it done.'¹¹³⁵

When he was asked to clarify what was actually discussed, Emons gave a dissembling answer which was inconsistent with a discussion of the 'short' and 'quick' nature he had described.¹¹³⁶ His description of what was discussed was, essentially, incomprehensible. Importantly, he made no reference to the inland transport fee forming part of the discussion. In any event, he admitted he could not recall precisely what was said.¹¹³⁷

Findings on TFASOC 42

1625 In view of my findings on the credit of Emons, I am not satisfied that Emons' note is an accurate recording of any conversation that he had with Flugge. I accept the submissions of Flugge on this plea.

1626 I am not satisfied that ASIC has made out the allegations in paragraph 42.

TFASOC – paragraph 43

Iraq trip report in February 2001

1627 ASIC pleads that on 7 February 2001, Flugge received an email from Borlase of AWB attaching a document titled 'Iraq Trip Report' prepared by Hogan and Borlase which included the reference copied at paragraph 483 and following.

1628 Flugge denies paragraph 43.

1629 I accept that, on 7 February 2001, Borlase circulated an 'Iraq Trip Report' prepared by Hogan and himself.¹¹³⁸ The report was widely circulated including to Goode, Flugge's

¹¹³⁴ CB 2/945.

¹¹³⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1741, L25–9.

¹¹³⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1741, L14–25.

¹¹³⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1742, L2–4.

¹¹³⁸ CB 3/1557 (email); CB 3/1559 (report).

personal assistant.

1630 ASIC submits that the trip report tells the reader that:

- (a) the IGB fees are rorting the OFFP and the UN escrow account;
- (b) the Canadian Wheat Board had changed its position in relation to its willingness to pay the IGB fees to gain market share in Iraq.

1631 ASIC contends that both Hogan and Borlase held the view that 'the increases in trucking fee and the addition of the service charge [was] a mechanism or extracting more dollars from the escrow account.'

1632 ASIC contends that it is highly likely that Goode would have passed the email and the trip report onto Flugge. ASIC contends that it should be inferred that Flugge received this email and its contents and absorbed the messages contained in them, particularly as he failed to give evidence to the contrary.

1633 Goode gave evidence that she worked as Flugge's personal assistant between mid-2000 to early 2001.¹¹³⁹ Flugge lived in Western Australia. Flugge was not computer literate. Goode said that Flugge was not in the office very much. Goode said that if she thought Flugge needed to see something she would print it out and leave copies in his office and also then at the end of a week or a fortnight she would package those up with other correspondence that she thought he needed to see and literally send those to him in Western Australia.¹¹⁴⁰

1634 Goode could not remember sending the trip report to Flugge.

1635 ASIC contends that:

- (a) Whether or not the Court is satisfied that Flugge actually read the trip report,

¹¹³⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2233; Affidavit of Jane Goode sworn 26 February 2015.

¹¹⁴⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2234–T2235.

three further matters should be inferred from the fact that it was sent to Goode:

- (i) First, Flugge was perceived by IS&M employees as a person who took an interest in operational matters and would therefore be interested in receiving the report. This is consistent with other evidence indicating that Flugge discussed 'coal face' issues with IS&M staff including Emons, Officer and Hogan.
- (ii) Second, the width of distribution of the report, and the fact that it was specifically sent to Flugge and Lindberg via their assistants, demonstrates that IS&M staff were making no efforts to keep their activities in Iraq secret within AWB – to the contrary, they were keen to communicate these matters to the highest levels within the company.
- (ii) Third, if Flugge did not read the report, he had the opportunity to do so. Flugge was ultimately responsible for what information he received – if, having personally discussed and endorsed the payment of the inland transportation fees through Ronly, Flugge then chose to disregard further information received by him on that issue (or put in place measures to ensure such information did not reach him), that is a matter which the Court should take into account in determining whether – on the alternative 'means of knowledge' case – Flugge was wilfully blind (s 181) as opposed to simply negligent (s 180).¹¹⁴¹

1636 Flugge submitted that I should find that ASIC has not established that Flugge received and read the trip report. Flugge submits as follows:

Whatever the effect of such words found buried within the body of a report, the important fact is that Flugge was in Tokyo on or about 7 February 2001.¹¹⁴² Moreover, there is simply no evidence from which it may be concluded that Flugge ever received or read the relevant Iraq trip report.

¹¹⁴¹ PCS 860.

¹¹⁴² CB 12/9832.

Ms Goode gave evidence generally that, given the passage of time, the likelihood of her remembering events such as the Iraq trip email were poor.¹¹⁴³

Further, Ms Goode stated that she followed a procedure whereby she would initially read Flugge's emails, and, if she felt he 'needed' to see any of them, she would print them out and leave copies in Flugge's office.¹¹⁴⁴

She said that 'because of [Flugge]'s position as chairman', she would 'briefly skim the subject matter' before sending the email to him and would omit matters which were 'very mundane or some things that were relatively unimportant.'¹¹⁴⁵

Ms Goode said that she 'marked for [Flugge's] attention' only those emails or documents which 'he would definitely need to see.'¹¹⁴⁶

Ms Goode's evidence supports a strong inference that Flugge did not receive the email or the trip report dated 7 February 2001.

Ms Goode could not recognise or recollect the Iraq trip report or email.¹¹⁴⁷

Further, she was unable to recall the capacity in which she received the email. She was unsure whether she received it as part of her role with Mr Fuller or Flugge and said 'I'm not sure why they would have sent it to me.'¹¹⁴⁸

Most significantly, in terms of the inference to be drawn that the email was not directed to Flugge and that he would not have received it, Ms Goode's evidence of practice was that:

- (a) first, to her knowledge the email concerned an operational matter and that, accordingly, operational matters such as those contained in the email would not, in practice, be directed to Flugge in an email.
- (b) second, Flugge would receive briefings on matters such as those contained in the email¹¹⁴⁹ directly from management¹¹⁵⁰ and not in an email directed to a large number of recipients.¹¹⁵¹

¹¹⁴³ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2237, L31 – T2238, L4.

¹¹⁴⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2234, L24 – T2235, L6.

¹¹⁴⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2235, L7–18.

¹¹⁴⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2240, L26 – T2241, L5.

¹¹⁴⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2242, L28–31.

¹¹⁴⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2236, L22 – T2237, L4.

¹¹⁴⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2241, L11–13, L21–3.

¹¹⁵⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2241, L26–8.

¹¹⁵¹ Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2241, L29–30.

- (c) third, in practice if an email were directed to Flugge it would have included his email address in the 'to' field of the email, which is not the case in the 7 February 2001 email.
- (d) fourth, that in her memory and in practice, her email address, as Flugge's personal assistant, would have been in the carbon copy or 'cc' field of the email,¹¹⁵² which is not the case in the 7 February 2001 email.

The Court cannot be satisfied in view of the evidence that Flugge did, as ASIC alleges, receive the email from Borlase attaching the trip report.

Notably, Borlase was not called by ASIC. Nor was his absence explained. A *Jones v Dunkel* inference ought to apply.

1637 In substance, I accept the submissions of Flugge.

1638 ASIC has not satisfied me that, on 7 February 2001, Flugge received and read an email from Darryl Borlase attaching a document entitled 'Iraq Trip Report' as alleged.

TFASOC – paragraph 44

The Single Desk and the risk of harm to AWB if it was lost

1639 ASIC pleads that at all material times, AWB and its wholly-owned subsidiary AWB held a statutory monopoly for the export of wheat from Australia, which monopoly was known as the 'single desk.'

1640 Flugge admits paragraph 44 and further refers to paragraph 19 of his FAD. (See 1055 and following.)

1641 I am satisfied that ASIC has established the allegations in paragraph 44.

TFASOC – paragraph 45

1642 ASIC pleads that the single desk was of great financial and commercial value to AWB. Flugge does not admit this fact.

1643 ASIC provides extensive particulars in support of the allegation as follows:

¹¹⁵² Transcript of hearing, *ASIC v Geary & Flugge*, (24 November 2015) T2241, L17–20.

- (a) The single desk enabled AWB to aggregate the output of thousands of wheat producers across Australia, market those outputs strategically to around 50 countries worldwide and manage the risks associated with this process.
- (b) Under the single desk, AWB was responsible for marketing all bulk exports of Australian wheat that growers delivered to the National Pool.
- (c) The role of a single desk was to maximise net returns to wheat growers who delivered to the National Pool while providing a management fee to AWB for the provision of certain services to operate the National Pool. From 2001, the management fee was performance-based, comprising a base fee and an out-performance incentive. AWB's revenue from the management fee (including both the base fee and out-performance incentive) was as follows in each financial year from 2002 to 2007:

Financial Year	Management Fee (AUD\$)
2002	\$68.3 million
2003	\$77.1 million
2004	\$98.5 million
2005	\$100.9 million
2006	\$92.4 million
2007	\$ 46.3 million

- (d) From 2001 until the single desk was abolished in July 2008, around 90% of all bulk wheat exported from Australia was exported by AWBI under the single desk or equivalent arrangements. The single desk ensured that AWB was able to sell Australia's wheat crop at premium prices into world markets that were distorted by the high levels of subsidies by the governments of other exporting nations. In 2002, a study of AWB National Pool prices by Econtech found that, as the single desk manager, AWB achieved on average a premium of \$13 per tonne on National Pool export sales. It also ensured that AWB did not face any competition in the international wheat markets from any other source in Australia. Australia is one of the largest wheat producers and exporters in the world. The AWB single desk facilitated the export of up to 17 million tonnes of wheat valued at up to \$5 billion annually.
- (e) Managing exports through the single desk marketing system also enabled AWB to deliver value other than simple market premiums. This value related to research and development, logistics capacity and efficiency, superior information, economies of scope and scale, integration of the value chain, strong customer relationships, continuity of supply, consistent quality, reliable performance and effective risk management.
- (f) The single desk achieved a level of international market power that individual growers in Australia could not achieve.
- (g) The value to AWB of the single desk also included a variety of indirect benefits including:
 - a. a benefit due to reduced financing costs for the activities of AWB and its subsidiary AWB Harvest Finance Ltd;

- b. a likely benefit due to the economies of scope between AWB's operations as manager of the single desk and its other grain trading operations such as its domestic trading operations;
- c. a likely benefit due to increased profitability of AWB's harvest financing operations; and
- d. a likely benefit due to AWB achieving supra-competitive profits through the self-supply of inputs used in the wheat export supply chain.

1644 I am satisfied that AWB has established the allegations alleged in paragraph 45.

TFASOC – paragraph 46

1645 ASIC pleads that by reason of the matters alleged in paragraphs 44 and 45, the risk of harm or substantial threat to AWB's standing or reputation as an exporter of wheat constituted a risk to AWB's right to operate the single desk and was therefore a serious threat to AWB as a whole.¹¹⁵³

1646 Flugge does not admit this allegation.

1647 I am satisfied that ASIC has established the allegations alleged in paragraph 46. I am satisfied that the truth of this proposition has been confirmed by the events that befell AWB after its payment of the inland transport fees was exposed to the public.

TFASOC – paragraph 47

Harm arising out of the revelation of AWB's conduct

1648 ASIC pleads that revelation of AWB's conduct of the sorts alleged in paragraphs 24 to 29 and 34 of the TFASC, and referred to in the trip report alleged at paragraph 43 of the TFASOC herein was likely to cause and in fact caused substantial and enduring harm to AWB.

1649 ASIC provides the following particulars to support this allegation:

Trade with Iraq worth as much as US\$470 million per annum was forfeited following the decision by the Iraqi Government in 2006 to suspend purchases of AWB wheat during the Inquiry into Certain Australian Companies in relation to the United Nations Oil-for-Food Programme conducted by

¹¹⁵³ TFASOC [46].

Commissioner the Hon Terence RH Cole AO, RFD, QC (Cole Inquiry).

On 20 December 2006, the United States Department of Agriculture (USDA) announced the immediate suspension and debarment of AWB and its affiliates from participating in US government programs and contracting with the US government. In a letter dated 28 November 2005 from Lindberg on behalf of AWB to Deputy Prime Minister Vaile, Lindberg referred to a previous decision by the USDA to so suspend AWB (which decision had been reversed with the assistance of the Australian government) and acknowledged that the suspension had caused significant problems for AWB.

The revelation that AWB had engaged in the very conduct which the UN Resolutions called on member states to prevent resulted in the resignation of Lindberg as Managing director in 2006, the departures of Charles Stott (Stott) (resigned on 15 June 2006), Paul Ingleby (Ingleby) (redundant on 30 October 2006), James Cooper (Cooper) (resigned on 15 April 2006) and Peter Geary (Geary) (redundant on 3 November 2006), substantially harmed AWB employee morale and led to an increase in voluntary turnover requiring a workforce re-engagement programme being implemented within AWB.

AWB incurred significant costs associated with the Cole Inquiry. For the 2006 financial year, AWB reported costs of \$23.7 million associated with the Cole Inquiry in its accounts and a further \$6.6 million in the 2007 financial year.

In addition to costs associated with the Cole Inquiry, AWB incurred substantial costs in responding to investigations and litigation arising out of the revelation that AWB had engaged in the very conduct which the UN Resolutions called on member states to prevent. In the 2008 financial year, those costs were \$13.4 million. In the 2009 financial year those costs were \$18.6 million. In the half year ended 31 March 2010, those costs were \$6.525 million.

AWB was required to undertake significant remedial work to improve, and restore investor confidence in, its governance practices, internal reporting structures, corporate practices and international marketing activities; namely:

- (a) During 2006, KPMG was engaged by AWB to consider the current governance, internal reporting structures and practices of AWB which engagement resulted in a report by KPMG recommending fundamental changes to corporate practices within AWB including changes to promote ethical and responsible decision making within the Board and executive management of AWB; and
- (b) During 2006, PWC was engaged by AWB to conduct a review into AWB's international marketing activities.

1650 Consequent upon the revelations of AWB's conduct in relation to the payment of the inland transportation fee, AWB was sued, suffered attacks on its credit and incurred other damage as set out above at paragraphs 640–685. Flugge denies paragraph 47 of the TFASOC and says further that ASIC does not plead, and has not shown, that the alleged actions or inactions alleged to constitute contraventions caused any of the

specific harm alleged.

1651 Flugge submits that there is no evidence that Flugge's alleged breaches caused the harm ASIC alleges. Flugge submits that the causal connection is not proved.¹¹⁵⁴ Flugge denies that the revelation of AWB's conduct caused harm, and further disputes that his own conduct – if established – has any connection to any harm subsequently suffered by AWB.¹¹⁵⁵

1652 That the public revelation of AWB's conduct in connection with the OFFP caused harm to the company cannot reasonably be in dispute, and was readily acknowledged by the former Chairman, Stewart, both at the time of the Cole Inquiry and in his evidence in these proceedings. Nonetheless, since it is disputed by Flugge, it is necessary for me to examine the manner in which AWB's conduct was revealed, and the harm that series of revelations caused to the company and its shareholders.

1653 As to Flugge's plea that there is no nexus between the conduct alleged against him and the harm caused to AWB, ASIC submits that:

(a) The conduct of AWB that was revealed by the Volcker report, the Cole Inquiry and later the Cole Report, and which led to the harm to the company particularised below, comprised:

- (i) the IGB fees wrongdoing;
- (ii) the Tigris wrongdoing; and
- (iii) the iron filings wrongdoing;

of which the first (resulting in \$223 million of humanitarian funds being channelled to the government of Iraq) was undoubtedly the most damaging;

(b) The conduct of AWB that Flugge had a duty to take reasonable steps to prevent,

¹¹⁵⁴ FFS [592].

¹¹⁵⁵ FAD [47].

and in respect of which he failed to take such reasonable steps, comprises:

- (i) the IGB fees wrongdoing; and
- (ii) any other conduct that resulted in the payment of hard currency to Iraq, or the receipt of funds from the UN escrow account other than on account of OFFP humanitarian goods.

1654 There was no real contest on the factual matters alleged in the particulars to paragraph 47. The real issue I must determine is whether revelation of the conduct alleged was likely to cause and in fact caused substantial and enduring harm to AWB. I find that the conduct alleged was a cause of the harm alleged. Whether the harm was contributed to by the nature of the Cole Inquiry or Government policy to remove the Single Desk from AWB in any event, is not necessary for me to decide. In fact no such contention was made by Flugge.

1655 ASIC submits that I should find that the public revelation of the IGB fees wrongdoing through the Cole Inquiry was likely to cause, and in fact, caused substantial and enduring harm to AWB including:

- (a) loss of approximately \$781 million in market capitalisation (if regard is had only to the share price loss in January-February 2006),¹¹⁵⁶ or approximately \$1.1 billion (if regard is had to the entire year following the start of the Cole Inquiry's public hearings);¹¹⁵⁷
- (b) approximately \$110 million in legal costs and settlements paid out between the announcement of the Cole Inquiry and the settlement of the Watson class

¹¹⁵⁶ In this short period, AWB's share price fell from \$6.37 to \$4.10, a decrease of \$2.27 or 36 per cent (Sission report at CB 8334). At the start of the 2006 financial year there were 344,402,649 shares (increased to 346,327,737 later in the year): CB 8/5444. Using the lower figure, the loss of market capital is over \$781 million.

¹¹⁵⁷ In the period 13 January 2006 to 1 February 2007, AWB's share price fell from \$6.37 to \$3.16, a decrease of \$3.21 or 50 per cent. At the start of the 2006 financial year there were 344,402,649 shares (increased to 346,327,737 later in the year): CB 8/5444. Using the lower figure, the loss of market capital is over \$1.1 billion.

- action;
- (c) approximately \$32 million¹¹⁵⁸ paid out in redundancy and restructuring costs as a consequence of the replacement of the management team and the loss of the Single Desk;
 - (d) loss of the Single Desk itself, valued between \$10 million and \$69 million per year to AWB.

Altogether, the evidence shows that the direct financial harm to AWB arising from the revelations of its misconduct under the OFFP is likely to have been in excess of \$150 million, and the loss of market capitalisation to have been at least \$781 million.¹¹⁵⁹ In addition, following the revelations at the Cole Inquiry, AWB suffered the following intangible or immeasurable harms:

- (e) a 'shattered' reputation and loss of relationships with investors, farmers, government, and customers in the US and Iraq;
- (f) loss of corporate knowledge with the departure of almost the entire senior management team during 2006;
- (g) loss of morale and reduced employee engagement;
- (h) reduced credit ratings for AWB and AWB Harvest Finance, and a corresponding increase in borrowing costs;
- (i) cost of employee re-engagement programme, KPMG corporate governance review and PWC risk review.

1656 The plea does not allege that Flugge's conduct had any causal connection to the harm alleged. The plea is about AWB's conduct of the sorts alleged in paragraphs 24 to 29

¹¹⁵⁸ CB 8/5463 (\$10.2 million) – for financial year ended 30 September 2006, and CB 8/5970 (\$21.9 million) – for financial year ended 30 September 2007.

¹¹⁵⁹ Using the most conservative estimates of the loss of market capitalisation and value of the single desk, and assuming that the single desk would otherwise have been retained only for a further two years – i.e. up until the next scheduled review in 2010.

and 34 and referred to in the trip report alleged in paragraph 43 was likely to cause and in fact caused the damage alleged. There is no allegation concerning Flugge's conduct in the paragraphs alleged, save that he received the email referred to in paragraph 43.

1657 I am satisfied that ASIC has established the allegations in paragraph 47 as alleged.

TFASOC – paragraph 48

Flugge's knowledge

1658 ASIC relies on particulars to support an inference that Flugge knew the matters alleged in paragraph 48 of the TFASOC. Alternatively, if it is found that Flugge did not know the matters alleged, ASIC relies on the particulars in support of the allegations in paragraph 51 of the TFASOC, that Flugge had the means of knowledge of the matters alleged.

1659 Flugge admits that he knew the matters alleged in paragraph 44 and sub-paragraph 48(d); he admits that he knew that, in the period from 1 October 1999 to 30 September 2002, Iraq was one of the largest markets for wheat exported by AWB; he admits that in the period 19 December 2001 to 15 March 2002 he was aware that:

- (a) AWB needed to obtain approval from the Department of Foreign Affairs and Trade and the UN in respect of its contracts with the IGB; and
- (b) AWB contracts with the IGB included a component in respect of inland transportation;

he otherwise denies paragraph 48.

Interviews and admissions by Flugge

1660 ASIC relies on certain admissions and conversations Flugge had about his knowledge of the OFFP program and the conduct of AWB.

The August 2002 delegation to Iraq

- 1661 Flugge ceased to be a director in March 2002. ASIC, however, rely upon a brief prepared for a delegation from AWB that went to Iraq to discuss the Iron Filings claim. The report contained a reference to the payment of inland transport and port fees to the Ministry of Transport in Iraq. I do not see how such a brief has any relevance to the alleged breaches against Flugge.
- 1662 If the report is relevant, it does not take Flugge's knowledge beyond that already established.

Discussions with Wells and Dawson in 2003

- 1663 I have already canvassed these conversations in the evidence above. I have found that Flugge was aware that AWB was paying Iraq fees for inland trucking and that Flugge believed that the UN had approved the payments under its OFFP.
- 1664 ASIC says that these conversations were held before payment of the IGB fees came to light as a result of the investigations by the USA and the UN.
- 1665 ASIC seek the Court to infer that Flugge was concerned that AWB's payments of the IGB fees was likely to come to light when US officials examined the AWB's conduct under the OFFP.
- 1666 I do not infer that Flugge was concerned that the AWB payments would come to light. Rather, I draw the inference from the conversations that Flugge believed that the IGB fees would come to light and he was concerned to ensure that the Government was aware that he believed that the payments had been sanctioned by the UN.

Flugge's telephone conference with Chris Quennell and James Cooper on 30 April 2004

- 1667 On 30 April 2004, Quennell and Cooper had a telephone conference with Flugge. Prior to the conference Flugge was provided with a number of documents by email from Quennell.¹¹⁶⁰

¹¹⁶⁰ CB 6/4233, 4235, 4237, 4239, 4241, 4243, 4245.

1668 Neither Quennell nor Cooper gave evidence. Quennell was a member of BDW. In June 2003, BDW were retained by AWB to assist it to investigate allegations contained in a letter from the US Wheat Associates. Quennell was instructed by Cooper to assist him in his investigation. The investigation was code-named 'Project Rose.'

1669 As part of his instructions, Quennell interviewed Flugge. Cooper made a record that a meeting occurred.¹¹⁶¹ Quennell's file note of the conference records Flugge as stating the following:¹¹⁶²

- (a) 'I can recall talking to management team (Mark Emons). Some discussion re transport thing.'
- (b) 'Effectively we paid money back to IGB then they did inland transport - we paid it back through Ronly - they paid Alia Transport.'
- (c) 'I remember discussions with Emons - in contract - yes we can do this - never detailed discussion - not issue for board - management issue.'
- (d) 'I recall this payment would be made through Ronly - my suspicions were it was a set-up between Emons & Ronly. Once AL [Mr Lindberg] came on board - clean out of staff - we were paying Alia direct - life went on.'
- (e) 'I thought it was approved by UN - always upfront - money went for inland transport.'
- (f) 'I have no idea where money actually went - some money would have been spent on inland transport.'
- (g) 'IGB had no money - need for infrastructure to be built - needed source of income to do that - Extensive bunker building programme IGB were involved in. Even Umm Qasr itself port improvements.'
- (h) 'We're all looking for "hidden dollar" - most of money legitimately spent.'
- (i) 'This comes from hindsight now as opposed to the time.'
- (j) '15/3/00 AWB - IGB fax:¹¹⁶³ there was a discussion with Austrade - it

¹¹⁶¹ CB 6/4247.

¹¹⁶² CB 6/4249 (handwritten); CB 6/4253 (typed).

¹¹⁶³ This is a reference to a facsimile from Emons to the IGB (CB 2/929) which materially states:
We wish to advise that the office of AWB Ltd in New York has been approached by the Customs office of the United Nations who are questioning the payments by AWB to the Jordanian trucking company.
We are very concerned to learn from the UN that the Canadian Government has taken action within the United Nations to discover the manner of AWB payments.

was information raised as a concern but not something to get worked up about. Austrade may have a record.'

1670 ASIC sought to tender Quennell's notes under s 69 of the *Evidence Act 2008* (Vic), being the exception to the hearsay rule for business records. I ruled that the notes were admissible as evidence of the following four asserted facts:¹¹⁶⁴

During a conversation with Flugge on 30 April 2004 Flugge stated words to the following effect:

- 1 'Effectively we paid money back to IGB then they did inland transport - we paid it back through Ronly, they paid Alia Transport.'
- 2 'I recall talking to Mark Emons. There was some discussion about transport.'
- 3 'I recall this payment would be made through Ronly.'
- 4 'IGB had no money. They needed money for infrastructure to be built. They needed a source of income to do that.'

1671 ASIC also sought to tender the notes under s 63 of the *Evidence Act 2008* (Vic). I refused the application.

1672 ASIC contends that I should find that Flugge had this state of knowledge (the four asserted facts) while he was Chairman of AWB. In my opinion, the inference is open that he had this knowledge while he was Chairman. The inference is supported by the evidence of Flugge's knowledge that I have considered to date. I am more readily able to draw this inference under the *Jones v Dunkel* principles as Flugge could have rebutted the inference in evidence but chose not to do so.

1673 Accordingly, in so far as these asserted facts are evidence of Flugge's knowledge, I find that he had that knowledge at the time he was Chairman of AWB and before his office as Chairman was concluded.

Interview with ABL solicitors in 2005

1674 On 28 February 2005 – two days before Flugge was due to be interviewed by investigators from the IIC – ABL solicitors Thompson and Zwier, Blake Dawson

¹¹⁶⁴ Ruling 10, 3 December 2015.

solicitor Quennell, and AWB in-house counsel Cooper spoke with Flugge by telephone. Notes were taken of that meeting by both Thompson and Zwier.¹¹⁶⁵

1675 ASIC contends that I should infer that the purpose of the conference was to proof Flugge prior to the IIC interview.

Leonie Thompson notes

1676 Thompson's notes included the following:

Trucking – part of contract we had with Grains Board and that UN were aware of it

Not in detail – aware of UN resolutions

-Knew about trucking when we was working with Iraqi

-fairly common to have transport arrangements to move grain

-part of deal

Grain board had no money to ship grain we paid

-aware of \$ after fact – detail wouldn't have got into

-grains board money

-wasn't our money

-why would we investigate

-not surprised to know that 90 % paid up front.

Didn't know about increase in trucking fees

One group we dealt with at one stage concerns

Ronly – agent for us – aware b/c told that they were making payments to Alia

Don't recall details

Delay in paying our account an issue

Raised with UN – trying to improve the time we were paid

-didn't discuss trading or Canadian complaints

Encourage UN at highest level to pay more quickly

¹¹⁶⁵ CB 7/4736.3, also Zwier Affidavit, Exhibit P35 at CB 10/8781, [3]-[8].

Chris - meeting with Alistair Nicholas

Trevor - do recall now the meeting - remember meeting people then Canadian wheat Board & Austrade people talking about it but no recollection now.

1677 ASIC sought to admit the notes under s 69 of the *Evidence Act 2008* (Vic) as they had done with O'Connell's notes.

1678 I admitted the notes under s 69 as evidence of the following asserted facts:¹¹⁶⁶

That during a discussion with Zwier, Quennell, and Cooper, Thompson and Flugge on 28 February 2005, one of the participants to that discussion, said words to the following effect:

- 1 'Trucking was part of the contract we had with the grains board, and the UN were aware of it.'
- 2 'I knew about trucking when we were working with Iraqis. It was fairly common to have transport arrangements to move grain. It was part of the deal. Grains board had no money to ship grain. We paid.'
- 3 'It was grains board money, not our money - why would we investigate?'
- 4 'One group we dealt with at one stage was Ronly. Ronly was the agent for us. I was told that they were making payments to Alia.'

1679 I also accepted the tender of the document as evidence of the asserted fact: 'Ronly acted as agent for AWB. Ronly made payments to Alia on behalf of AWB.'

1680 I was satisfied that the ultimate source of this asserted fact was someone who had personal knowledge of the asserted fact for the purposes of s 69(2)(b) of the *Evidence Act 2008* (Vic).

1681 ASIC submits that I should infer that it was Flugge who said words to the effect referred to in paragraph 1678. In my opinion the inference is open as this was an interview with Flugge in preparation for the evidence he was to give, that it was Flugge who said words to that effect. I am more readily open to draw the inference under *Jones v Dunkel* as Flugge chose not to give evidence to rebut that inference.

1682 Accordingly, I am satisfied that it was Flugge who said words to that effect.

¹¹⁶⁶ Ruling 10, delivered 3 December 2015.

1683 ASIC also sought to tender Thomson's notes under s 63 of the *Evidence Act 2008* (Vic) where it was agreed that Thomson was not available to give evidence about an asserted fact. I admitted the notes under s 63 as evidence of the following asserted fact:

During the conversation with Flugge on 28 February 2005, Quennell referred to a meeting with Alistair Nicholas, following which Flugge stated words to the effect of "I do now recall the meeting. I remember meeting people from the Canadian Wheat Board, and Austrade people talking about it.

1684 ASIC contends that I should find that Flugge had this state of knowledge while he was Chairman of AWB. In my opinion, the inference is open that he had this knowledge while he was Chairman. The inference is supported by the evidence of Flugge's knowledge that I have considered to date. I am more readily able to draw this inference under the *Jones v Dunkel* principles as Flugge could have rebutted the inference in evidence but chose not to do so.

1685 Accordingly, in so far as these asserted facts are evidence of Flugge's knowledge, I find that he had that knowledge at the time he was Chairman of AWB and before his office as Chairman was concluded.

Leon Zwier's notes

1686 Zwier made handwritten notes during the telephone conference with Flugge.

1687 I admitted the notes as notes under s 69 as evidence of the following asserted facts:

During a discussion between Zwier, Cooper, Quennell and Flugge on 28 February 2005, one of the participants to that discussion said words to the following effect:

- 1 'Trucking was part of the contract we had with the Grains Board.'
- 2 'I knew about trucking when we were working with Iraqis. It was fairly common to have arrangements to move grain. It was part of the deal. The Grains Board had no money to ship grain we paid.'
- 3 'AWB paid the trucking company on behalf of IGB. Why would I look at it?'
- 4 'Ronly was a group of the UK that acted as agent for AWB. Ronly was brought in to make payments for AWB.'

1688 Flugge says that Zwier was the only solicitor called to give evidence. In relation to his notes, he gave evidence that:

- (a) they were not prepared as a 'record' of the discussion;¹¹⁶⁷
- (b) it was not possible to tell from the notes 'who said what' during the course of the discussion;¹¹⁶⁸ and
- (c) to the extent that the notes recorded some words spoken by Flugge, he could not form a view as to whether it recorded Flugge's view at the time of the discussion or from the time he was a Chairman.¹¹⁶⁹ Zwier agreed that he could not form a view by looking at his notes as to whether they indicated that Flugge was speaking by reference to the notes.

1689 Accordingly, Flugge says that Zwier's notes have effectively no probative value.

1690 On the other hand, ASIC submits that I should find that Flugge said the words to the effect referred to in paragraph.

1691 In my opinion the inference is open as this was an interview with Flugge in preparation for the evidence he was to give, that it was Flugge who said words to that effect. I am more readily open to draw the inference under *Jones v Dunkel* as Flugge chose not to give evidence to rebut that inference.

1692 I am satisfied that it was Flugge who said words to that effect.

1693 ASIC also contends that I should find that Flugge had this state of knowledge while he was Chairman of AWB. In my opinion, the inference is open that he had this knowledge while he was Chairman. The inference is supported by the evidence of Flugge's knowledge that I have considered to date. I am more readily able to draw this inference under the *Jones v Dunkel* principles as Flugge could have rebutted the

¹¹⁶⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T1981, L15-19.

¹¹⁶⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T1982, L2-4; T1982, L12-15.

¹¹⁶⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T1982, L5-11.

inference in evidence but chose not to do so.

1694 Accordingly, in so far as these asserted facts are evidence of Flugge's knowledge, I find that he had that knowledge at the time he was Chairman of AWB and before his office as Chairman was concluded.

Interview IIC investigators in 2005

1695 On 2 March 2005, Flugge was interviewed by investigators from the IIC.¹¹⁷⁰ During the interview, Flugge stated that:

- (a) he had contact with the Government of Iraq during the period between 1995 and 2002 and had visited Iraq on three or four occasions;
- (b) AWB had always perceived Iraq as a 'high reward, high risk' market;
- (c) he had been aware that contracts with Iraq had included a transportation component;
- (d) he had no idea who was responsible for inland transportation arrangements for Australian wheat sold to Iraq;
- (e) he had no knowledge of what AWB or the wheat board would or would not have discussed with DFAT or the UN.

He did not wish to comment and could not comment on any matters relating to AWB following his departure in 2002.

1696 ASIC submits that as Flugge did not wish to comment on matters relating to AWB following his departure in 2002, I should infer that his statements on his knowledge refers to knowledge he held prior to his departure in 2002. I accept that submission.

General submissions by ASIC on Flugge's knowledge

1697 Before dealing with the pleaded allegations concerning Flugge's knowledge or means

¹¹⁷⁰ CB 7/4737 - IIC summary, CB 7/4741 - notes of Cooper.

of knowledge, it is appropriate to set out some general submissions of ASIC on Flugge's knowledge.

1698 ASIC accepts that a key issue is whether Flugge knew or had the means of knowing key facts regarding the IGB fees wrongdoing and that public revelation of this wrongdoing was likely to cause substantial and enduring harm to AWB.

1699 ASIC says in response to Flugge's contention that in order to succeed in the present proceeding, ASIC must establish in full each of the allegations of knowledge pleaded against Flugge in paragraph 48 of the Flugge statement of claim. ASIC says that proposition as put does not withstand scrutiny.

1700 ASIC accepts that it needs to establish that Flugge had at least a substantial part of the knowledge (or, in the alternative, means of knowledge) pleaded in paragraph 48 in order to establish that he had the duties pleaded in paragraph 49. However, ASIC submits that the pieces of knowledge pleaded against Flugge are not elements of a contravention.

1701 ASIC says that should it fail to make out some aspect of the knowledge pleaded in paragraph 48, it does not follow that the Court cannot find that Flugge had sufficient knowledge to found the duties as set out in paragraph 49. ASIC accepts that whether the knowledge established against Flugge is sufficient to found the duties in paragraph 49 is ultimately a matter for the Court to consider in all the circumstances of the case.

1702 ASIC says that in any event, in relation to Flugge, the evidence supports a finding that from as early as June 1999, and in any event by April 2000, Flugge knew that the arrangements between AWB and IGB included the payment by AWB of a US\$12.00 per tonne fee, that the fee was imposed by decree of the President of Iraq, that the fee was included in the contract price, that the fee was to be paid ultimately to an Iraqi entity, that because payments in US dollars were not possible as a result of the US sanctions, a method had to be found to make the payments and that Ronly had offered to be a conduit for the payments.

1703 ASIC says that the following supports that finding:

- (a) The evidence of Emons in relation to discussions that occurred with representatives of Ronly at the IGC in London in June 1999, which included an offer from Ronly to help AWB pay the fees to Iraq.
- (b) The evidence of Hogan, and contemporaneous reports, concerning the meeting between Flugge, Rogers, Hogan and Zuhair in Baghdad in October 1999. ASIC submits that the evidence suggests that the fee and the problems posed by its payment were the most significant matters discussed at the meeting. It was made clear that AWB ships would not be able to unload if the fee were not paid. ASIC submits that the payment of such a fee was unique, if not extraordinary, for AWB.
- (c) The evidence relating to the Canadian complaint. By March 2000, Flugge was aware of the Canadian complaint which made it clear that the UN were concerned about – and were therefore unlikely to have authorized – irregular payments being made by AWB at the IGB's behest.
- (d) The evidence from Officer, the 2002 'Amarantos' correspondence and the Quennell notes (discussed above) from which it can be concluded that Flugge was aware in 2000 that AWB had engaged Ronly to act as a conduit for payments to Alia because AWB was concerned 'at whether payments which they were making for inland trucking in Iraq were in breach of UN sanctions against Iraq.' Correspondence from Ronly in 2002 shows that Flugge was aware of the arrangements between AWB and Ronly. When issues later arose in relation to the agreement between AWB and Ronly in the context of a claim by Ronly concerning the vessel *Amarantos*, Flugge told Long that he wanted to 'distance himself' from the matter.
- (e) The evidence that in March 2000, shortly after Flugge became aware of the Canadian complaint, Emons discussed trucking fees in Iraq with Flugge, recording such discussion in in an email dated 4 April 2000 sent by Emons to

Watson,¹¹⁷¹ copied at paragraph 367.

- (f) The evidence that Flugge signed a letter to Iraqi Minister Medhi Saleh dated 5 April 2000, concerning UN enquiries about trucking fees and expressing AWB's 'intention to remain committed to the terms of trade agreed between IGB and AWB.'
- (g) The notes taken by Quennell of a conversation with Flugge, during which Flugge discloses his recollection of discussions with Emons regarding inland transportation, the payment of trucking fees through Ronly and the later decision to pay them (more) directly through Alia.

1704 I deal with each of these items of evidence below in dealing with the allegations in paragraph 48.

1705 ASIC contends that Flugge knew of the IGB fees wrongdoing because he had an active interest in the Iraq market, he participated in a number of conversations within AWB and with external parties concerning the payments of the IGB fees, and as a matter of inference because of numerous documents and correspondence that he received, and from the fact that the IGB fees wrongdoing was well known within AWB. As discussed above, I find that the IGB fees wrongdoing was not well known within AWB. On the contrary, what was commonly believed was that the fees had been approved by the UN.

1706 ASIC submits that if the Court is not satisfied that Flugge had actual knowledge, it is plain that he had the means of knowing these things which a reasonable chairman in his position and in AWB's circumstances should have inquired into.

1707 As discussed below, I am not satisfied that Flugge did have actual knowledge, but I am satisfied that he had the means of knowing of the wrongful conduct and a reasonable chairman in his position and in AWB's circumstances should have

¹¹⁷¹ CB 2/945.

inquired into.

TFASOC – paragraph 48(a)

1708 ASIC pleads that at all material times, Flugge knew the following facts:

(a) each of the matters alleged in paragraphs 44 to 46 inclusive.

Knowledge of paragraph 44

1709 ASIC pleads that at all material times Flugge knew that at all material times, AWB and its wholly-owned subsidiary AWB held a statutory monopoly for the export of wheat from Australia, which monopoly was known as the Single Desk.

1710 Flugge admits that he knew the matters alleged in paragraph 44.

Knowledge of paragraph 45

1711 ASIC pleads that at all material times Flugge knew that the Single Desk was of great financial and commercial value to AWB.

1712 Flugge denies the allegation.

1713 ASIC alleges that Flugge's knowledge is to be inferred from the matters alleged in paragraphs 4 to 6 of the TFASOC, and from the matters particularised in paragraphs 9 and 11 of the particulars.

1714 Paragraph 9 sets out an extract from the 1999 Annual Report. Paragraph 11 refers to an extract from the AWB annual report by the chairman and chief executive.

1715 In view of the observations made by in those reports, I am satisfied that Flugge had the knowledge alleged.

Knowledge of paragraph 46

1716 ASIC alleges that at all material times, Flugge knew that by reason of the matters alleged in paragraphs 44 and 45 of the TFASOC, the risk of harm or substantial threat to AWB's standing or reputation as an exporter of wheat constituted a risk to AWB's

right to operate the single desk and was therefore a serious threat to AWB as a whole.

1717 Flugge denies this allegation.

1718 The particulars relied upon are referred to when dealing with the knowledge of paragraph 45.

1719 Flugge was aware that the Single Desk system was a Government mandated monopoly that was subject to review as to its competitive advantage. It was a system that could be readily withdrawn by the Government. I am satisfied that Flugge would have known that misfeasance by AWB could put the Single Desk at risk. I am satisfied that Flugge would have known that the risk of harm or substantial threat to AWB's standing or reputation as an exporter of wheat would have constituted a risk to AWB's right to operate the Single Desk and would have been a threat to AWB as a whole. I am not satisfied that he did know, as distinct from would have known, as I am not satisfied that he did know of the risk of harm or of a substantial threat to AWB's standing as alleged.

1720 I am not satisfied that ASIC has made out the allegation with respect to paragraph 46.

TFASOC – paragraph 48(b)

1721 ASIC alleges that at all material times Flugge knew that AWB's wheat sales to Iraq constituted a substantial part of AWB's overall annual wheat sales and were highly profitable for AWB and, therefore, commercially, Iraq was a crucial market for AWB.

1722 ASIC alleges that Flugge's knowledge is to be inferred from the matters alleged as to his position and responsibilities at AWB at paragraphs 4 and 6 of the TFASOC, from the matters alleged as to his knowledge of and experience in the grain market in Iraq as in paragraph 5 of the TFASOC, and from the matters particularised in the particulars provided.

1723 Flugge admits that, in the period 1 October 1999 to 30 September 2002, Iraq was one of the largest markets for wheat exported by AWB. AWB received commission from AWBI, that managed the pool, for sales of the pool wheat that was made on behalf of

the pool. AWB acted as the agent for AWBI and provided services to it. In October 2000, Flugge wrote to Mark Vaile, the then Minister for Trade, and advised him that Iraq was extremely important to the returns of Australian wheat growers, with the market representing approximately 15 per cent of Australia's wheat export program and being Australia's largest wheat export destination in the 1990/2000 marketing year.

1724 I am satisfied that, as Iraq constituted Australia's largest wheat export destination, that it was a crucial market for AWB in that sense. As AWB received commission on the sales, then it could be seen as highly profitable to AWB.

1725 Subject to those qualifications, I am satisfied that ASIC has made out the allegations in 48(b).

TFASOC – paragraph 48(c)

1726 ASIC alleges that at all material times Flugge knew that the UN had called on Australia, as a member state, to ensure that Australian nationals acted in accordance with the UN Resolutions, including by:

- (a) preventing the direct or indirect payment by Australian nationals of internationally traded currency to the Government of Iraq or its instrumentalities; and
- (b) ensuring that Australian nationals obtained payment from the UN escrow account only on account of OFFP humanitarian goods.

1727 In response to paragraph 48 generally, Flugge admits that in the period 19 December 2001 to 15 March 2002 he was aware that AWB needed to obtain approval from DFAT and the UN in respect of its contracts with the IGB.

1728 Flugge otherwise denies paragraph 48(c).

1729 The period referred to of 19 December 2001 to 15 March 2002 is the period within the limitation period during which ASIC is able to bring proceedings alleging that Flugge

breached his duties. 19 December 2001 is the date six years before the writ was issued. 15 December 2002 is when Flugge ceased to be a director and chairman of AWB.

1730 ASIC alleges that Flugge's knowledge is to be inferred from the matters alleged as to his position and responsibilities at AWB at paragraphs 4 and 6 of the TFASOC, from the matters alleged as to his knowledge of and experience in the grain market in Iraq as in paragraph 5 of the TFASOC, from his participation in the meeting alleged at paragraph 41 of the TFASOC, and from the matters particularised in the particulars alleged (other than paragraphs 6, 9, 11, 15 and 17). ASIC alleges that Flugge's knowledge was cumulative and commenced no later than June 1999.

1731 ASIC submits that Flugge's knowledge of the effect of the UN Resolutions is to be inferred from his regular visits to Iraq, his involvement and interest in the Iraq trade and from correspondence he sent to the Government of Iraq and to the Australian government concerning the Iraq trade and the OFFP in the period between 1996 and 2002.¹¹⁷²

1732 ASIC submits that each of the meetings in Iraq and correspondence referred to below show that Flugge had detailed knowledge of UN procedures and the OFFP. ASIC submits that the meetings also reflect the importance that Flugge and AWB placed on the Iraq market and minimising real costs to the pool by speeding up payment from the UN.

1733 ASIC submits that on 9 and 10 July 1996, Flugge, along with Emons and Greg Harvey, travelled to Iraq. As reported to the Australian government,¹¹⁷³ the main purpose of this visit was to re-establish high-level AWB contacts with the Iraqi government and to attempt to secure sales of Australian wheat, following the agreement by the UN to allow sales of wheat to Iraq under the OFFP.

1734 ASIC submits that as a result of these meetings, AWB and the IGB reached an in-

¹¹⁷² PCS 759.

¹¹⁷³ CB 1/121.

principle agreement for the supply of a minimum of 100,000 tonnes per month of Australian wheat to be shipped to Umm Qasr during the first six months of the operation of the OFFP, with further supply to occur if the resolution was extended. The visit is discussed at paragraph 106.

1735 On 10 November 1997, Flugge wrote the letter to the Iraqi Minister for Trade¹¹⁷⁴ referred to at paragraph 114.

1736 ASIC submits that this letter demonstrates that by 1997 Flugge was aware that AWB's wheat trade with Iraq was subject to UN Resolutions and that payment for wheat shipped to Iraq was controlled by the UN rather than Iraq itself.

1737 ASIC submits that on 2 April 1998 Flugge wrote the letter to the Honourable Tim Fischer, Minister for Trade discussed at paragraph 115.¹¹⁷⁵

1738 ASIC submits that this letter provides further evidence that Flugge had knowledge of the sanctions on Iraq and that these sanctions impacted on AWB's contracts and commercial relationship with Iraq.

1739 ASIC refers to the letter of 10 December 1999, from Flugge to Australian Minister for Trade, Mark Vaile, noting Flugge's recent meeting with Iraqi Minister Saleh and the strength of AWB's trade with Iraq, copied above at paragraph 347.

1740 ASIC submits that this letter further demonstrates Flugge's knowledge of UN sanctions and their long-term effect on Iraq. ASIC submits that properly construed, the letter shows Flugge knew that UN Resolutions prevented Iraq from getting access to hard currency.

1741 ASIC submits that on 20 July 2001, Flugge, Snowball and Matthew Foran (Foran) had a meeting with representatives of the UN (Suzanne Bishopric, Treasurer, and Teklay Afeworki, Senior Finance Officer) and representatives of the Australian Mission to the

¹¹⁷⁴ CB 1/251.

¹¹⁷⁵ CB 1/271.

UN (Moules and Penny Holiday) to discuss procedures for processing payments under the OFFP and AWB's longstanding concerns regarding payment delays. There was discussion of the UN escrow account and the delays in payment. The UN would not give AWB priority, despite being complimentary toward AWB, its product and the way it conducted its business.¹¹⁷⁶ An information paper recording Flugge's visit to Brussels, Washington and New York record detailed discussions concerning the OFFP as follows:

Iraq UN Food for Oil payments

In New York the Chairman met with the United Nations Treasurer to discuss the issue of late payments for sales made to Iraq under the Oil for Food Program and the allocation of bank fees to the vendor.

On the latter issue, the UN claim that this provision had always been a condition of the MOU and that contracts needed to include provision for fees to be paid by the vendor. The UN officials stated that contracts needed to include provision for fees to be paid by the vendor. The UN officials stated that they had on numerous occasions made the Iraqis aware that contracts negotiated with the Iraq Government under phase 8 of the program (November 2000) would need to include this provision.

Discussion was also held on the potential for the UN to diversify the number of banks it would allow to provide letters of credit. The UN recognised the difficulties that were being experienced with the current arrangements (ie all LCs going through BNP) and indicated that this was being reviewed. ...

The Chairman acknowledged that in past months we have seen a significant improvement in payment times but raise the fact that times could still be improved and extended an invitation to work with the UN to continue to improve this process. Unfortunately, the Treasurer didn't offer too much assistance or hope in this area. Her view was that the UN Treasury processed documents as fast as possible but that the timing issue was out of the hands of the UN Treasury and BNP.

It appears that while the UN processes vast quantities of contracts under the program of varying complexity (of which AWB's are relatively simple), they are concerned that if they "prioritise" contract processing to deal with simpler ones first they will be accused of favouring one country/company over another. The Chairman raised with representatives from the Australian Mission to the UN that this perception could be easily overcome by focusing on commodities and/or making simple administrative changes to stream line the processes not based on country or company. The mission agreed and will continue to take this issue up with the UN.

1742 ASIC submits that this record of meeting shows that Flugge had detailed knowledge

¹¹⁷⁶ CB 3/1949.

of the workings and operations of the OFFP and the financial arrangements in place. ASIC submits that it should be inferred from these recorded discussions that Flugge knew that Iraq's finances were closely controlled by the UN through the UN escrow account.

1743 ASIC submits that by mid-January 2002, the dispute between AWB and the IGB over the price of contracts A1111 and A1112 remained unresolved. ASIC says that on or about 16 January 2002 a letter was sent by Flugge to Minister Saleh of Iraq,¹¹⁷⁷ in which Flugge states, 'I am writing to express my concern over Iraq's failure to send final confirmation for the recent one million tonne wheat purchase.'

1744 ASIC says that a draft of this letter was prepared by Hogan and sent to Burley, Flugge's personal assistant, for Flugge's signature, as AWB was very keen to get final agreement from Iraq.¹¹⁷⁸ ASIC says that prior to the final version being sent, Hogan and Flugge discussed a draft of the letter. ASIC says that Hogan amended the letter following his discussions with Flugge.¹¹⁷⁹ When giving evidence, Burley could not recall the letter, but said it was very common for people to send draft letters to Burley for Flugge's attention and the email from Emons asking Burley¹¹⁸⁰ to fax the letter to Flugge for his signature accorded with her recollection of what occurred in practice at AWB.¹¹⁸¹

1745 ASIC contends that this letter shows the importance that Flugge and AWB placed on securing sales to Iraq and Flugge's knowledge of the contract and payment process under the OFFP.

1746 ASIC submits that on 8 February 2002, Flugge had a meeting with UN officials and DFAT representatives in New York to discuss AWB's wheat trade with Iraq, including

¹¹⁷⁷ CB 3/2183.

¹¹⁷⁸ CB 3/2185, 2187.

¹¹⁷⁹ CB 3/2189, 2191.

¹¹⁸⁰ CB 3/2185.

¹¹⁸¹ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T1994, L20-5.

the proposed changes to the OFFP procedures to minimise delays in payments (delay in payments being an ongoing issue with AWB's trade with Iraq), and the threat to AWB's interests in the Iraqi market posed by possible military action. ASIC says that Flugge emphasised AWB's satisfaction with the conduct of its wheat trade with Iraq, its biggest export market, and that trading under the OFFP was complex but worthwhile, and that Flugge well understood the risks involved including possible military action with compensation for distressed cargo at sea raised.¹¹⁸²

1747 ASIC says that the record of the meeting between Flugge and the UN Treasury and the UN's office of the Iraq Program taken by the DFAT officer Stephens present shows that Flugge was informed as to AWB's trade with Iraq under the OFFP.¹¹⁸³

1748 ASIC submits that there is also evidence elsewhere setting out Flugge's visits to Iraq in June 1999, October 1999 and meeting with Nicholas of Austrade in March 2000 in Washington to discuss allegations of possible irregularities in AWB's trade with Iraq. ASIC submits that Stephens recalls that Flugge would visit the UN every 10 months or so to talk to the UN Treasury about processes and payments to AWB under the OFFP.¹¹⁸⁴ The evidence concerning these visits and meetings show that Flugge had direct discussions with Iraq, Austrade and the UN about the Iraq trade and the conditions under which trade with Iraq could take place.

1749 ASIC submits that from the combined force of this detailed documentary evidence, the Court should infer that Flugge knew or had the means of knowing that:

- (a) trade with Iraq was subject to UN Resolutions and required the approval of both DFAT and the UN; and
- (b) the effect of the relevant sanctions was that payments in internationally traded

¹¹⁸² CB 4/2219 is a DFAT email which describes the purpose of the meeting is for Flugge to talk to the UN Treasury about processes and payments for OFFP wheat shipments. CB 4/2221-2224 is a DFAT report of the meeting.

¹¹⁸³ CB 4/2221-2224.

¹¹⁸⁴ Paul Stephens affidavit [9], exhibit P 51.

currency to Iraq were forbidden, and that monies could only be obtained from the UN escrow account for humanitarian goods supplied under the OFFP.

1750 ASIC submits that the Court should more confidently and readily draw this inference because Flugge has elected not to give evidence as to state of knowledge of the UN Resolutions, despite being able to provide relevant evidence on this issue and on the meetings and correspondence set out above.¹¹⁸⁵

1751 Flugge submits that if ASIC cannot show that, at the relevant time, Flugge actually knew, or alternatively shut his eyes to, impropriety in relation to the inland transport payment, then its case fails.

1752 Flugge submits that his knowledge means:

- (a) knowledge that inland transportation payments were, or may be, in breach of UN sanctions; and
- (b) knowledge that money was received and was being used by the Government of Iraq for things that did not have anything to do with the transportation of wheat.

1753 Flugge submits that there is no evidence that Flugge knew that the UN had not approved the inland transportation payments – to the contrary, Flugge submits that the evidence establishes that the UN and DFAT did in fact approve the relevant contracts and that this was generally understood within AWB. Flugge submits that, accordingly, ASIC's case on (a) fails.

1754 Flugge submits that there is no evidence that Flugge ever saw or was told anything whilst a director of AWB to the effect that the money was being sent to the IGB and spent in Iraq (and it is not clear where it was spent). Flugge says that there is no evidence that during Flugge's tenure the money or parts of it was not spent on inland transport. Flugge submits that, accordingly, ASIC's case on (b) also fails.

¹¹⁸⁵ PCS 777.

- 1755 The evidence referred to by ASIC establishes that Flugge knew of the OFFP and that restrictions on sales of wheat to Iraq were eased in 1996 by the OFFP. Flugge travelled to Iraq to re-establish contact with the IGB on behalf of the AWB after the OFFP was introduced.
- 1756 I am satisfied that the Washington meeting in March 2000 would have informed Flugge that under the OFFP there were restrictions involved in making payments, as the complaint was about irregular payments being made by AWB under the OFFP.
- 1757 In July 2001, Flugge was in New York and discussed the escrow account with UN officials. I infer that Flugge knew that AWB obtained payment for wheat sales to Iraq under the OFFP from the UN escrow account into which the proceeds of oil exports from Iraq were to be paid. The evidence of the memorandum by Stephens established that Flugge regularly visited New York and discussed with UN officials about processes and payments to AWB under the OFFP.
- 1758 For these reasons and the evidence referred to by ASIC, I am satisfied that Flugge became aware of UN sanctions against the payment of internationally traded currencies to Iraq or its instrumentalities prior to the introduction of the OFFP, as alleged in paragraph 48(c)(i).
- 1759 I am satisfied that Flugge knew that under the OFFP, DFAT and UN approval was needed for AWB to export wheat to Iraq under the OFFP, as he admits the same. The evidence establishes he discussed with UN officials the payment procedures and processes under the OFFP.
- 1760 As discussed below, the evidence establishes that Flugge and the rest of the AWB board were informed by the managing director Lindberg in mid-2000, that the payments of the inland transportation fees by AWB to the IGB were approved by the UN. As discussed above, evidence was led from two directors who were present when Lindberg gave that advice that they believed what Lindberg said. As discussed above, Flugge told several people that he also believed what Lindberg informed the board of AWB.

1761 As discussed above, Flugge stated to Dawson and Wells, and also in his telephone conference with O'Connell and later in the conference with Zwier, Quennell and Cooper and Thomson, that he was of the view that the UN had approved the payment of the inland trucking fees to the IGB.

1762 I am not satisfied that ASIC has established that at all material times Flugge knew that under the OFFP that the UN could not approve the payment by AWB of inland transportation fees to the IGB.

1763 Accordingly, in those circumstances I am not satisfied that ASIC has established that Flugge knew the matter alleged in paragraph 48(c)(i).

1764 As indicated above, I have not found that the UN resolutions limited the use of moneys from the Escrow Account strictly for humanitarian goods. Putting that issue to one side, for the reasons given in relation to paragraph 48(c)(i), ASIC has not satisfied me that at all material times that Flugge knew that under the OFFP that the UN could not approve the use of the UN escrow account for the payment of the inland transportation fee by AWB to the IGB.

1765 Accordingly, in those circumstances, ASIC has not satisfied me that at all material times Flugge knew the matters alleged in paragraph 48(c)(ii).

TFASOC – paragraph 48(d)

1766 ASIC alleges that, at all material times, Flugge knew that AWB's sales of wheat to Iraq under the OFFP were subject to scrutiny and authorisation by the UN.

1767 Flugge admits the matters alleged in paragraph 48(d).

TFASOC – paragraph 48(e)

1768 ASIC alleges that, at all material times, Flugge knew that the IGB imposed the IGB fees on AWB and that those fees were included in the contract prices in AWB's contracts for the sale of wheat to the IGB.

1769 Flugge admits that, in the period 19 December 2001 to 15 March 2002, he was aware

that AWB contracts with the IGB included a component in respect of inland transportation.

1770 ASIC includes in the IGB fees the after sales service fee. Flugge otherwise denies the allegations in paragraph 48(e) and thus that he knew the contract prices included the after sales service fee.

1771 ASIC alleges that Flugge's knowledge is to be inferred from the matters alleged as to his knowledge of and experience in the grain market in Iraq at paragraph 5(d) and (e) of the TFASOC, from the matters alleged in paragraphs 35 to 43 of the TFASOC and the particulars thereto and from the matters particularised in particulars alleged (other than paragraphs 9, 11 and 15). ASIC alleges that Flugge's knowledge was cumulative and commenced no later than June 1999.

1772 I am satisfied that ASIC has established that the IGB imposed the IGB fees as alleged.

1773 There is no direct evidence that Flugge knew of the after sales service fee.

1774 Particular 21 refers to the conversation between Flugge and Dawson on 5 May 2003. In that conversation, Flugge referred to the fact that the contracts 'include a component of land freight, for which AWB was paid under the OFFP and from which AWB made payments to Iraqi representatives to organise freight.' There was no reference to an after sales service fee in that conversation.

1775 As indicated above, I am not satisfied that ASIC has established that Goode sent to Flugge the email and trip report of 7 February 2001 as alleged in paragraph 43.

1776 I am satisfied that ASIC has established that Flugge knew the IGB had imposed a fee purportedly for the inland transportation of wheat. I am not satisfied that Flugge knew that AWB had imposed a fee for after sale service. As noted above at paragraph 1727, Flugge has admitted that the relevant contracts included a component in respect of inland transportation.

1777 Accordingly, I am satisfied that at all material times Flugge knew that the IGB

imposed a fee described or known as an inland transportation fees on AWB and that those fees were included in the contract prices in AWB's contracts for the sale of wheat to the IGB, otherwise I am not satisfied that ASIC has made out the allegations in paragraph 48(e). I am not satisfied that Flugge knew that the fee was not a genuine fee for transport services for the distribution of wheat within Iraq.

TFASOC – paragraph 48(f)

1778 AWB alleges that at all material times Flugge knew that the UN had made enquiries about allegations that AWB had made irregular payments at the request of the IGB.

1779 ASIC alleges that Flugge's knowledge is to be inferred from the matters alleged at paragraph 41 above and the particulars thereto and from the matters particularised in paragraph 9A of the particulars alleged.

1780 Paragraph 9A alleges that on or about 4 or 5 April 2000, Flugge read and signed a letter to the Iraqi Minister of Trade, Mohammed Saleh, which relevantly stated:

While in Baghdad I will ask AWB to discuss the recent communication from United Nations concerning trucking fees. As you are aware both the Canadian and American Governments have raised this issue with the United Nations. It is our intention to remain committed to the terms of trade agreed between IGB and AWB. The Australian government equally supports this commitment to our trade.

1781 ASIC alleges that the letter was written in whole or in part by Emons. ASIC alleges that the signed letter was collected by Emons from Flugge's secretary, and carried to Iraq by AWB General Manager, Laskie.

1782 Flugge denies the allegation.

1783 On 5 April 2000, Emons sent an email to Abdul-Rahman that said that AWB's Chairman had asked Emons to discuss with Abdul-Rahman when Emons was in Baghdad the issue of the position of the UN on the trucking fee and also future phases of the OFFP.¹¹⁸⁶

- 1784 The fact that Flugge asked about the position of the UN on the trucking fee is not inconsistent with Flugge's later statements that the UN had approved of the trucking fee. Also, the request to Emons is consistent with Flugge seeking further information about the propriety of the fees following the Washington meeting and Flugge having some concerns about the propriety of the trucking fees.
- 1785 In support of the allegation that Flugge knew of UN inquiries, ASIC refers to a draft letter to Minister Saleh purporting to be from Flugge. The draft is referred to above at paragraph 1780.¹¹⁸⁷
- 1786 ASIC submits that a signed copy of the letter in substantially the same form was handed to Minister Mehdi Saleh during the AWB delegation's subsequent visit to Iraq. Emons was asked whether the letter was given to Flugge for signature. He said that he certainly knew that the letter was given to the minister. He said it was given at his meeting with the minister. He said it was signed. He was asked whether it was in the form of the draft and he said that it was in that form as he recalled.¹¹⁸⁸
- 1787 Emons did not know who was the author of the draft but said that the author would have been a combination of members of the Middle East desk and some of Laskie's staff.¹¹⁸⁹ Emons was asked whether he knew whether the letter was given to Flugge for signature and replied that he certainly knew a signed letter was handed over to Mohammed Saleh. Emons could not recall if the signed letter was in the form of the draft.¹¹⁹⁰
- 1788 ASIC submits that while the letter was prepared by others, Flugge personally read over all correspondence prepared for his signature, and his electronic signature could

¹¹⁸⁷ CB 2/979.

¹¹⁸⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1743, L9-17.

¹¹⁸⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1743, L5-8.

¹¹⁹⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1743.

not be affixed without his approval.

1789 ASIC submits that Emons met with the Iraqi Minister of Trade in mid-April 2000. This meeting is referred to above at paragraph 373.¹¹⁹¹

1790 Emons said that he recalled some discussion on the subject matter of the draft letter with Saleh but could not recall reporting back to Flugge about the discussion.¹¹⁹²

1791 Flugge submits that the evidence of the discussion with him and the conveyance of the letter to Saleh is unreliable and should be rejected.¹¹⁹³ Emons accepted in cross-examination that draft letter was inconsistent with the form of other correspondence sent by Flugge to Minister Saleh. These inconsistencies include the:

- (a) different salutations;
- (b) different form of address; and
- (c) different closings.

1792 Emons also accepted that standard practice was for such a letter to be put on letterhead, and a copy of it to be kept once it had been signed by either the managing director or chairman.¹¹⁹⁴

1793 In view of the inconsistencies in the draft letter with Flugge's normal form of addressing the minister and the fact that I am not prepared to accept Emons' evidence unless otherwise corroborated, I am not satisfied that Flugge read or signed a letter in the form of the draft letter.

1794 I have canvassed Flugge's submission on his knowledge as alleged in paragraph 48(i) above at paragraph 1541 and following.

¹¹⁹¹ CB 2/999.

¹¹⁹² Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1743.

¹¹⁹³ Flugge submissions [208].

¹¹⁹⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1945, L26-7.

- 1795 I have also addressed ASIC's submissions at paragraphs 1523 and following.
- 1796 For the reasons discussed in relation to the Washington meeting at paragraphs 1415 above, I am satisfied that the UN had made such enquiries.
- 1797 As to the knowledge of Flugge, as discussed above in paragraphs 1415 and following, I am satisfied that Flugge knew of that fact in the Washington meeting in March 2000.
- 1798 As indicated above at paragraph 1607 and following, I have found that Nicholas told the Washington meeting, that included Flugge, that the UN was concerned about suspected irregularities in payments to Iraq for trucking/discharge made at the request of the IGB.
- 1799 I am able to infer that Flugge would have been most concerned to listen to any complaint by the UN about the conduct of AWB. There is no suggestion in any of the written records of the meeting that Flugge was not participating in the conversation with Nicholas.
- 1800 Accordingly, I am satisfied that ASIC has made out the allegations in paragraph 48(f).
- 1801 There is no direct evidence of what Flugge's thoughts were at the Washington meeting. As a consequence of finding that Flugge knew that the UN had made enquiries about the allegations that AWB had made irregular payments to Iraq for trucking/discharge made at the request of the IGB, I infer that Flugge would have perceived and understood that his belief that the UN had approved the payment of the inland transportation fees by AWB to the IGB may not have been correct (as the UN were treating the complaint as worth investigating) and perceived and understood the fact that the UN were therefore unlikely to have authorized irregular payments being made by AWB at the IGB's behest.
- 1802 Flugge's case was that the only complaint of the UN conveyed at the Washington meeting was that AWB had not disclosed the full terms of its contracts with the AWB. As discussed above, I reject that submission.

1803 I am more readily able to draw the inference that I have as to Flugge's state of mind as Flugge did not give evidence to refute the evidence that he heard the UN complaint related to the inappropriate payment of trucking/discharge by AWB to the IGB.

1804 Accordingly, as discussed below, Flugge had a duty as chairman and a director of AWB to investigate the complaint.

TFASOC – paragraph 48(g)

1805 ASIC alleges that at all material times Flugge knew that IGB fees were not identified or referred to in AWB's contracts for the sale of wheat to the IGB that were submitted to the Department of Foreign Affairs and Trade and the OIP for approval of payment from the UN escrow account.

1806 Flugge denies the allegation.

1807 Flugge submits that ASIC's case turns on proving actual knowledge of the matters, being all of them, in paragraph 48. Flugge submits that ASIC has not proved Flugge knew that the IGB fees, as defined, were not disclosed in AWB's contracts with the IGB.

1808 Flugge also referred to the evidence that initially the inclusion of the inland transportation in AWB contracts was plain.

1809 Flugge submits that when taken to Contract No. A4654, Johnston (the UN Customs officer whose department vetted the contracts for the OFP committee) agreed that the discharge cost was 'identified clearly as US\$12.00' and that this was 'to be paid by the sellers to the nominated maritime agents in Iraq.'¹¹⁹⁵

1810 Flugge says that Johnston further confirmed that the terms of shipment and discharge costs were clearly spelt out in Contract No. A4655.¹¹⁹⁶

¹¹⁹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1782, L19-22.

¹¹⁹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1783, L1-2.

- 1811 Flugge submits that the evidence shows that the inland transport component of the IGB contracts was disclosed at least in the initial contracts provided to the UN OIP whose role was to review and approve those contracts.
- 1812 Bowker agreed that it would be reasonable for an officer of AWB to conclude that upon receiving a permission to export form, that the trucking clause and the contract had been approved by both the United Nations OFFP, OIP and DFAT.¹¹⁹⁷ Moreover, Bowker said that the provision in contracts for distribution costs implied that payment to Iraq for trucking fees was acceptable to the UN Office for the Iraq Program and to DFAT.¹¹⁹⁸
- 1813 As discussed earlier at paragraph 349 and following, on 20 January 2000, three contracts with IGB for the sale of 300,000 tonnes of wheat were entered into as part of Phase VII sales. The contracts contemplated a discharge fee of US\$15.00. Eventually short-form contracts were signed in February 2000 for each of the contracts. The short-form contracts did not include any reference to the discharge cost that was to be paid to the nominated Maritime Agents in Iraq. The short-form contracts submitted to the UN and DFAT did not identify or refer to the IGB fees that were payable.
- 1814 ASIC has satisfied me that from January 2000, IGB fees were not identified or referred to in AWB's contracts for the sale of wheat to the IGB that were submitted to DFAT and the OIP for approval of payment from the UN escrow account.
- 1815 As to Flugge's knowledge of this fact, ASIC gives the following particulars. ASIC alleges that Flugge's knowledge is to be inferred from the matters alleged as to his knowledge of and experience in the grain market in Iraq at paragraph 5(d) and (e) of the claim, from the matters alleged in paragraph 35 to 43 and the particulars thereto and the matters particularised in the particulars alleged (other than paragraphs 9, 11 and 15). ASIC alleges that Flugge's knowledge is cumulative and commenced no later

¹¹⁹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T899, L3-8.

¹¹⁹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T911, L1-5.

than July 1999.

1816 An examination of those particulars shows that ASIC does not rely on any direct evidence that Flugge read the relevant contracts or was expressly informed by somebody that the contracts did not include any reference to IGB fees, but seeks to establish Flugge's knowledge by inference, presumably on the basis that he must have inferred that the contracts did not include any reference to IGB fees as the contracts were approved by DFAT and the UN. This inference appears to be based on the allegation that Flugge knew that contracts that provided for the payment of an inland transportation fee would not have been approved by DFAT and the UN. If it is, ASIC has not established that allegation.

1817 In my view, none of the matters referred to leads me to be satisfied that Flugge did have knowledge of the fact alleged.

1818 I am not satisfied that ASIC has made out the allegations in paragraph 48(g).

TFASOC – paragraph 48(h)

1819 ASIC alleges that at all material times Flugge knew that AWB had and was continuing to make payments of the IGB fees in connection with its trade with the IGB.

1820 Flugge admits that in respect of the period 19 December 2001 to 15 March 2002 he was aware that AWB contracts with the IGB included a component in respect of inland transportation. Flugge otherwise denies the allegation in paragraph 48(h).

1821 I am satisfied that ASIC has established the underlying fact alleged.

1822 As to Flugge's knowledge, ASIC gives the same particulars to that given for paragraph 48(g) save that the knowledge is alleged to be cumulative and commenced no later than December 1999.

1823 Flugge submits that the definition of the IGB fees includes that after sales service fee and there is no evidence that Flugge knew of the after sales service fee.

1824 I have already found in addressing paragraph 48(e) that at all material times Flugge

knew that the IGB imposed the inland transportation fee on AWB and that those fees were included in the contract prices in AWB's contracts for the sale of wheat to the IGB. I infer, therefore, that at all relevant times Flugge knew that AWB was paying an inland transport fee to Iraq in connection with its trade of wheat with Iraq.

1825 I am not satisfied, however, that Flugge was aware that AWB was paying a further fee described as the after sales service fee. Further, as discussed at 560 and following, Flugge told Wells of DFAT that AWB paid the inland transportation fees.

1826 Accordingly I am satisfied that ASIC has established that Flugge knew at all material times that AWB had made and was continuing to make payments of the inland transportation fees in connection with its trade with the IGB, otherwise I am not satisfied that ASIC has made out the allegations in paragraph 48(h).

TFASOC – paragraph 48(i)

1827 ASIC alleges that at all material times, Flugge knew that the purpose and effect of the payment of the IGB fees and the including of the inland transport obligation in AWB's contracts with the IGB were as alleged at subparagraphs 29(a) and 29(b).

1828 In subparagraphs 29(a) and(b), ASIC alleges that by reason of the matters alleged in paragraphs above, the purpose and effect of the payment of the IGB fees and inclusion of the inland transport obligation in AWB's contracts with the IGB, were:

- (a) to enable the Government of Iraq to obtain payments of internationally traded currency from AWB, disguised as amounts payable to AWB in respect of the IGB fees, which payments the UN had called on its member states to prevent; and
- (b) to enable AWB to inflate the contract prices in OFFP Contracts by amounts equal to the IGB fees paid to or at the direction of the IGB, and thereby to enable AWB to recover from the UN escrow account the amount of the IGB fees paid, such recovery constituting payments the UN had called on its member states to prevent.

1829 Flugge denies the allegation in paragraph 48(i).

1830 ASIC alleges that Flugge's knowledge is to be inferred from the matters alleged as to his knowledge of and experience in the grain market in Iraq at paragraph 5(d) and (e) of the TFASOC, from the matters alleged in paragraphs 35 to 43 of the TFASOC and the particulars thereto and from the matters particularised in the particulars alleged (other than paragraphs 9, 11 and 15). ASIC alleges that Flugge's knowledge was cumulative and commenced no later than July 1999.

1831 I have addressed the allegation in paragraph 29 that by reason of the matters alleged in paragraphs 22 and 28 of the TFASOC, the purpose and effect of the payment of the IGB fees and the inclusion of the inland transport obligation in AWB's contracts with the IGB, were:

- (a) to enable the Government of Iraq to obtain payments of internationally traded currency from AWB, disguised as amounts payable by AWB in respect of the IGB fees, which payments the UN had called on its member states to prevent, as alleged in sub-paragraph 16(a) of the TFASOC; and
- (b) to enable AWB to inflate the contract prices in the OFFP Contracts by amounts equal to the IGB fees paid to or at the direction of the IGB, and thereby to enable AWB to recover from the UN escrow account the amount of the IGB fees paid, such recovery constituting payments that the UN had called on its member states to prevent, as alleged at sub-paragraph 16(b) of the TFASOC.

1832 I was not satisfied that ASIC has established that the purpose alleged was that of AWB.

1833 I am not satisfied that ASIC has established that at all material times Flugge knew that the purpose and effect of the payments of the IGB and inclusion of the inland transport obligation in AWB's contracts with the IGB were as alleged.

1834 As discussed at 1669, Flugge said to Quennell words to the effect:

- (a) I thought it was approved by UN – always upfront – money went for inland

transport.

- (b) I have no idea where money actually went – some money would have been spent on inland transport.
- (c) IGB had no money – need for infrastructure to be built – needed source of income to do that – Extensive bunker building programme IGB were involved in. Even Umm Qasr itself port improvements.

1835 This suggests that Flugge may have at some stage have thought that not all money may have been spent on inland transport. This falls well short, however, for him knowing of the purpose and effect of the payments was as pleaded.

1836 In substance, ASIC alleges that Flugge knew that the payment of the inland transportation fees were improper for the reasons pleaded in paragraphs 48(a) to (h). For the reasons given earlier, ASIC has not satisfied me that Flugge knew the matters that would have disclosed to him the purpose and effect of the payment of the IGB fees and the inclusion of the inland transport obligations in AWB's contracts as alleged.

Discussion between Flugge and Michael Long in September 2002

1837 As part of its argument that Flugge knew that AWB was engaged in wrongdoing, ASIC refers to a note Long made of a telephone conversation with Flugge in September 2002.

1838 The telephone conversation is briefly referred to in an email from Long to Geary concerning an arbitration between Ronly and a shipowner. The email of 16 September 2002, addresses a letter that AWB seeks to send to Ronly.¹¹⁹⁹ The email is set out at paragraph 328.¹²⁰⁰

¹¹⁹⁹ CB 4/2681.

¹²⁰⁰ CB 4/2681.

- 1839 ASIC has submitted that I should infer Flugge had a telephone conversation with Long in which Flugge sought to distance himself in relation to the Ronly matter.¹²⁰¹
- 1840 ASIC submits that AWB sought to affect payment of the inland transportation fees through Ronly in order to 'disguise the fee.' ASIC submits that the AWB arrangements with Ronly were entered into out of a concern within AWB as to 'whether payments which they were making for inland trucking in Iraq were in breach of UN sanctions against Iraq' or as Long described them in his 16 September 2002 email¹²⁰² 'alleged problems with the UN/IGB.'¹²⁰³
- 1841 ASIC submits on the issue of Flugge's knowledge that the evidence plainly supports a finding that from as early as June 1999, and in any event by April 2000, Flugge knew that the arrangements between AWB and IGB included the payment by AWB of a US\$12.00 per tonne fee, that the fee was imposed by decree of the President of Iraq, that the fee was included in the contract price, that the fee was to be paid ultimately to an Iraqi entity, that because payments in US dollars were not possible as a result of sanctions, a method had to be found to make the payments and that Ronly had offered to be a conduit for the payments.
- 1842 ASIC alleges that Flugge knew that Ronly was being used to avoid the sanctions as evidence that Flugge knew or had the means of knowing key facts regarding the IGB fees wrongdoing.
- 1843 ASIC relies in support of this proposition on the evidence from Officer, the 2002 'Amarantos' correspondence¹²⁰⁴ and the Quennell notes, from which it can be concluded that Flugge was aware in 2000 that AWB had engaged Ronly to act as a conduit for payments to Alia because AWB was concerned 'at whether payments which they were making for inland trucking in Iraq were in breach of UN sanctions

¹²⁰¹ ASIC FS, [109(x)].

¹²⁰² CB 4/2581.

¹²⁰³ ASIC FS, [420].

¹²⁰⁴ That is correspondence about the Amarantos Shipping Co arbitration about ship hitting the berth at Wallaroo.

against Iraq.’

1844 ASIC says that correspondence from Ronly in 2002 shows that Flugge was aware of the arrangements between AWB and Ronly. ASIC says that when issues later arose in relation to the agreement between AWB and Ronly in the context of a claim by Ronly concerning the vessel *Amarantos*, Flugge told Long that he wanted to ‘distance himself’ from the matter (as recorded in Long’s email of 16 September 2002.

1845 By 16 September 2002, Flugge was no longer a director of AWB. A sensible view of the email, is that Flugge no longer wishes to be involved with a dispute involving Ronly as he is no longer a director. I am not satisfied that the inference arises that Flugge knew that Ronly was being used for the payment of the inland transportation fees when he was a director as the substance of the issue raised by Ronly was about AWB’s liability to a charterer loading wheat in Western Australia.

1846 Flugge says little weight should be given to the evidence in the email as Long was not called by ASIC and a *Jones v Dunkel* inference ought to apply.

1847 Flugge contends that there is no basis for concluding that Flugge was aware of the arrangement with Ronly while he was a director.

1848 Flugge submits that the email is not a safe basis for making any finding of knowledge as alleged in paragraph [48]. I agree. Flugge could have been referring merely to the dispute between Ronly and AWB.

1849 I am not satisfied to draw the inferences that ASIC seeks to draw.

1850 I am not satisfied that ASIC has made out the allegations in paragraph 48(i).

TFASOC – paragraph 48(j)

1851 ASIC alleges that at all material times, Flugge knew the fact that revelation of any conduct by AWB that resulted in:

- (a) the direct or indirect payment of internationally traded currency to the Government of Iraq or its instrumentalities; or

(b) the receipt by AWB of payment from the UN escrow account other than on account of OFFP humanitarian goods

would cause or would be likely to cause, substantial and enduring harm to AWB as previously pleaded.

1852 ASIC alleges that Flugge's knowledge is to be inferred from the matters alleged in subparagraphs 48(c) to (j) above and the particulars thereto. ASIC alleges that Flugge's knowledge is cumulative and commenced no later than Jun 1999.

1853 Flugge denies the allegation in paragraph 48(i) subject to the qualifications mentioned earlier.

1854 The plea of ASIC does not focus on the payment of the inland transportation fees by AWB. As found above, ASIC has not satisfied me that Flugge knew that the payment of inland transportation fees by AWB were contrary to the OFFP and UN sanctions. Subject to that qualification, I am satisfied that Flugge knew that conduct of AWB contrary to the OFFP and UN sanctions would cause and was likely to cause harm to the reputation of AWB. Otherwise I find that ASIC has not satisfied me that Flugge had the knowledge alleged.

1855 Accordingly, I am not satisfied that ASIC has made out the allegations in paragraph 48(j).

Summary on Flugge's knowledge

1856 In ASIC's final submissions, ASIC alleges that Flugge knew that AWB was engaging in the IGB fees wrongdoing and accordingly engaged in conduct that the UN Resolutions had called on member states to prevent, and that the public revelation of the IGB fees wrongdoing would be likely to cause substantial and enduring harm to AWB. Flugge joins issue on this allegation and contends that ASIC has not shown that he knew that AWB was engaged in wrongdoing.

1857 For the reasons given above, I am not satisfied that ASIC has established that Flugge knew that AWB was engaged in wrong doing in AWB paying the inland

transportation fees.

1858 ASIC contends that the principles of *Jones v Dunkel* are applicable in civil penalty proceedings such as these. ASIC does not expressly rely on *Jones v Dunkel* in making their submission on the findings that they seek on Flugge's knowledge. Nevertheless, if inferences are open that Flugge was in fact aware that AWB was engaging in conduct that the UN had called on member states to prevent, then according to *Jones v Dunkel*, I would be more readily able to draw such an inference in view of the fact that Flugge chose not to give evidence to rebut such an inference.

1859 However, I do not consider that any inference has arisen that would suggest that Flugge did in fact know or believe that the UN had not approved of the payment of the inland transport fees. The evidence before me supports the conclusion that the payment of the inland transport fees was widely known in AWB but not identified or characterised as being contrary to conduct that the UN had called on member states to prevent.

TFASOC – paragraph 49

1860 Duties of Flugge he relevant legal principlesIn paragraph 49, ASIC alleges that by reason of his positions as a director and chairman of AWB, the matters alleged in paragraphs 4 to 8 of the TFASOC, the circumstances pertaining to AWB alleged in paragraphs 9 to 46 of the TFASOC, and Flugge's knowledge alleged at paragraph 48 of the TFASOC, at all times from June 1999 to March 2002, Flugge had duties to:

- (a) take reasonable steps to ensure that when AWB was selling and exporting wheat to Iraq and obtaining payments from the UN escrow account, AWB was not engaging in conduct that the UN Resolutions had called on member states to prevent and in particular conduct that would, or would likely to, result in:
 - (i) the direct or indirect payment of internationally traded currency to the Government of Iraq or its instrumentalities; or
 - (ii) the receipt by AWB of payment from the UN escrow account other than

on account of OFFP humanitarian goods;

- (b) take reasonable steps to prevent AWB from entering into or carrying out contracts for the sale of wheat with the IGB where the contract price included an amount in respect of the IGB fees or where the contract enabled AWB to obtain funds from the UN escrow account in respect of the IGB fees;
- (c) take reasonable steps to ascertain whether or not AWB had informed the UN of and whether the UN had approved, the payment or proposed payment by AWB of the IGB fees and the obtaining of funds by AWB from the UN escrow account in respect of the IGB fees;
- (d) take reasonable steps to:
 - (i) make enquiries of AWB's senior management, including the managing director, about each of the matters alleged in subparagraphs 48 (a) to (i) above;¹²⁰⁵
 - (ii) ensure that he, and the AWB Board and/or the Group Corporate Risk Committee and/or the audit committee, were properly informed of those matters;
 - (iii) ensure that he, and the AWB Board and/or the Group Corporate Risk Committee and/or the audit committee, took appropriate action to ensure that the steps described in paragraph 49 (b) were carried out.

1861 As to paragraph 49, Flugge pleads that:

- (a) in view of the Act, s 1317K, and the commencement of these proceedings on 19 December 2007, the Court may not make a declaration, or pecuniary penalty or disqualification order, in relation to any conduct occurring prior to 19 December 2001;

¹²⁰⁵ I have dealt with these allegations in paragraph 1642 and following.

- (b) further says that, in view of the matters pleaded at (a) above, the allegations in paragraph 49(a) that he owed duties prior to 19 December 2001 are not sustainable;
- (c) further says that, in view of the matters pleaded at (a) and (b) above, he does not plead to the allegations in paragraph 49(a) that he owed duties prior to 19 December 2001; and
- (d) denies the allegation that he owed the duties pleaded in the period from 19 December 2001 and 15 March 2002 and repeats paragraphs 6 and 48 of his FAD.

1862 Flugge says that in view of s 1317K of the Act and the commencement of these proceedings on 19 December 2007, the Court may not make a declaration or pecuniary penalty or disqualification order, in relation to any conduct occurring prior to 19 December 2001. Flugge says that the allegation that he owed duties prior to 19 December 2001 are not sustainable.

1863 Flugge does not plead to the allegation that he owed duties prior to 19 December 2001 and denies the allegation that he owed the duties pleaded in the period from 19 December 2001 and 15 March 2002. Flugge says that his responsibilities as a director and chairman of AWB were that:

- (a) as chairman of the board, Flugge had responsibilities to:
 - (i) manage effective discussion at meetings of the board including consulting with the CEO and other members of the board about matters they wished to raise;
 - (ii) ensure discussions of the board led to clear decisions which are appropriately recorded and communicated;
 - (iii) take reasonable steps to engender cohesion, harmony and unity of the board;
 - (iv) take reasonable steps to ensure that relevant financial and non-financial

performance indicating information [was] made available to the board;

- (b) as a director of AWB he had responsibilities to:
 - (i) become familiar with the fundamentals of the business in which AWB was engaged;
 - (ii) be kept informed about the activities of AWB; and
 - (iii) maintain familiarity with the financial position of AWB;
- (c) Flugge was a member of the board which collectively had responsibilities to:
 - (i) oversee the overall strategic direction of AWB;
 - (ii) guide and monitor the management of AWB; and
 - (iii) oversee the implementation of corporate governance policies and procedures.¹²⁰⁶

The relevant legal principles

1864 In equity, a director owed fiduciary duties to the corporation. The duties were not owed in the abstract. A director would not normally be held liable for breaching his duties unless the corporation suffered some harm or detriment by the breach of duty by the director. Can a director be liable for a breach of his statutory duty if the company does not suffer any damage as a consequence? It appears so.

1865 In *Vrisakis v ASIC*,¹²⁰⁷ Ipp J (with whom Malcolm CJ agreed) held that the statutory duty of care and diligence would be contravened if a director had not exercised a reasonable degree of care and diligence in the exercise of his powers or the exercise of his duties, even if there was no actual damage to the corporation. Ipp J held that could only be so if it was reasonably foreseeable that the relevant conduct might harm the

¹²⁰⁶ FAD [6].

¹²⁰⁷ (1993) 9 WAR 395, 449–50.

interests of the company. Ipp J held that in determining whether the relevant duty had been breached the foreseeable risk of harm must be balanced against the potential benefits which could reasonably be expected to accrue to the company from that conduct.¹²⁰⁸

1866 Section 180(1) imposes an objective standard in determining whether a director has exercised reasonable care and diligence that is assessed in the circumstances confronting the director in the corporation.

1867 Section 180(1) fixes two objective standards by which the standard of care and diligence is determined by the element in paragraph (a) 'the corporations circumstances', and the element in paragraph (b) the office and the responsibilities within the corporation that the officer or director in question occupied had.¹²⁰⁹

1868 In imposing these objective standards, it will be assumed that a director would comply with the requirements of the law with respect to directors and especially with the requirements of the Corporations Law. Also 'what constitutes the proper performance of the duties of a director of a particular company will be dictated by a host of circumstances, including no doubt the type of company, the size and nature of its enterprise, the provisions of its articles of association, the composition of its board and the distribution of work between the board and other officers.'¹²¹⁰

1869 Directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company and is under a continuing obligation to keep informed about the activities of the corporation.¹²¹¹

¹²⁰⁸ This decision was cited with approval by Brereton J in *ASIC v Maxwell* (2006) 59 ACSR 373, 397 [99]-398 [102].

¹²⁰⁹ See *Shafroon v ASIC* (2012) 247 CLR 465, 476 [18] (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ).

¹²¹⁰ See *Commonwealth Bank of Australia v Friedrich* (1992) 5 ACSR 115 (Tadgell J); *ASIC v Adler* (2002) 168 FLR 253 (Santow J); *ASIC v Maxwell* (2006) 59 ACSR 373 (Brereton J).

¹²¹¹ See *ASIC v Adler* (2002) 168 FLR 253, 346-349 [372].

1870 Directors are not required to exhibit a greater degree of skill in the performance of their duties than may reasonably be expected for persons of commensurate knowledge and experience in the relevant circumstances. While directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company; directors are entitled to rely upon others save where they know or by the exercise of reasonable diligence should know of facts that would deny reliance.¹²¹²

1871 The 'corporation's circumstances' in section 180(1)(a) will include the competence of a company's management, the competence of the company's advisers and the distribution of responsibilities within the company including as between the directors and as between the directors and officers.¹²¹³

1872 As to the duty to inquire, in *Daniels v Anderson*,¹²¹⁴ the New South Wales Court of Appeal held that if nothing has come to the knowledge of a director to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. The Court quoted *Rankin v Cooper*, in which it was said, that 'if, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and want of that care makes them responsible.'¹²¹⁵ They held that a director is not entitled to shut his or her eyes to what is going on around them.¹²¹⁶

1873 The majority cited with approval the observations of Pollock J in *Francis v United Jersey Bank* as follows:¹²¹⁷

¹²¹² See *ASIC v Maxwell* (2006) 59 ACSR 373, 397-398 [99]-[102] (Brereton J).

¹²¹³ See *ASIC v Macdonald (No 11)*, (2009) 230 FLR 1, 53 (Gzelle J) (citations omitted).

¹²¹⁴ (1995) 37 NSWLR 438.

¹²¹⁵ (1907) 149 F 1010, 1013.

¹²¹⁶ *Daniels v Anderson* (1995) 37 NSWLR 438, 501-502 (Clarke J and Sheller JA).

¹²¹⁷ 432 A2d 814 (NJ 1981), 821-823 (citations omitted).

As a general rule, a director should acquire at least a rudimentary understanding of the business of the corporation. Accordingly, a director should become familiar with the fundamentals of the business in which the corporation is engaged. Because directors are bound to exercise ordinary care, they cannot set up as a defence lack of the knowledge needed to exercise the requisite degree of care. If one 'feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act.'

Directors are under a continuing obligation to *keep informed* about the activities of the corporation. Otherwise, they may not be able to participate in the overall management of corporate affairs... Directors may not *shut their eyes* to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect. As it was, the majority upheld the trial judge's decision that Mr Hooke and the non-executive directors had not been negligent.

1874 Accordingly, if facts have come to the attention of a director's that has awoken his suspicion that something is amiss or the suspicion of a prudent has been awakened or would have awakened the suspicion of a prudent director, then the director has a duty to inquire into the matter. Further, the director is not excused from making his own inquiries by relying on the judgment of others.

1875 What is the position of non-executive directors? In *ASIC v Rich*,¹²¹⁸ Austin J held that non-executive directors are not subject to the same (higher) standard as executive directors under s 180(1).¹²¹⁹

1876 Directors are normally entitled to rely without verification on the judgment, information and advice of the officers of the corporation who have been so entrusted.¹²²⁰ But this principle must be considered along with the duty to inquire when suspicion is awakened or suspicion would be awakened in a prudent director.¹²²¹

¹²¹⁸ (2009) 236 FLR 1.

¹²¹⁹ *ASIC v Rich* 129-130 [7196].

¹²²⁰ See *AWA Ltd v Daniels* (1992) 7 ACSR 759 (Rogers CJ in Comm Div); *Vrisakis v ASIC* (1993) 9 WAR 395, 404-406.,; *ASIC v Loiterton* [2004] NSWSC 172, [19]; and *Re City Equitable Fire Insurance Co* [1925] Ch 407 (Romer J).

¹²²¹ See *Daniels v Anderson* (1995) 37 NSWLR 438,502-503; *ASIC v Maxwell* (2006) 59 ACSR 373, 397 [101];

1877 In considering the duties imposed on Flugge as a consequence of the Washington meeting in the context of the circumstances surrounding the imposition of the inland transportation fees, it will become relevant to consider the degree to which Flugge was entitled to rely on the actions of the executives who were with him.

1878 In *ASIC v Rich*,¹²²² Austin J considered whether a non-executive chairman may have additional responsibilities going beyond procedural duties of chairing board meetings. In *AWA Ltd v Daniels*,¹²²³ Rogers J considered that a chairman may be responsible to a greater extent than any other director for the performance of the board. That issue does not arise in this case. Flugge may have assumed greater duties through his involvement in what otherwise would be executive duties. In any event, the duty to inquire is raised when suspicions are awakened or would be awakened in a prudent director. Thus, such a duty could arise whether the director was carrying out his duties or discovered the suspicious fact otherwise.

Flugge's submissions on the duties owed by Flugge

1879 I consider the legal principles relevant to s 181 of the Corporations Act below at paragraph 1965 and following.

Flugge's duties

1880 Flugge contends that as pleaded, ASIC must establish that Flugge knew each of the facts pleaded in paragraph 48. As it is, I have found that Flugge knew the matters pleaded in 48(d) and (f). I have found that Flugge knew the matters pleaded in 48(a), (b) and (h) subject to some qualifications. I am not satisfied that Flugge knew the matters pleaded in 48(c), (e), (g), (i) and (j).

and *ASIC v Healey* (2011) 196 FCR 291, 330 [168], 331-332 [170]-[174]. See also generally *Re HIH Insurance; ASIC v Adler* (2002) 41 ACSR 72, 166-169 [372] (Santow J). The decision in *AWA Ltd v Daniels* was followed by this Court in *Australian Securities Commission v Gallagher* (1993) 11 WAR 105; see also *Commonwealth Bank of Australia v Friedrich* (1992) 5 ACSR 115; and *Rema Industries & Services Pty Ltd v Coad* (1992) 7 ACSR 251.

¹²²² (2003) 174 FLR 128, 141-149.

¹²²³ (1992) 7 ACSR 759, 867-868.

- 1881 Flugge submits that paragraph 48 is plain in its terms. Flugge says that it demands that ASIC establish each of the matters set out in paragraph 48. Flugge says that for ASIC to suggest that it need not establish Flugge knew each of those matters, is without foundation. This, Flugge says, is a consequence of the manner in which paragraph 48 is pleaded. Flugge contends that when it comes to assessing paragraph 51, it proceeds on the basis that each of the facts in paragraph 48 is not established. Flugge says that if each of those facts is not established, the alternate case then demands that Flugge had means of knowledge of each of the facts identified in paragraph 48.
- 1882 As discussed earlier, ASIC, on the other hand, contends that it does not have to prove that Flugge knew all the facts pleaded in paragraph 48. ASIC says that plainly it will need to establish the Flugge had at least a substantial part of the knowledge (or, in the alternative, means of knowledge) pleaded in paragraph 48 in order to establish that Flugge had the duties pleaded in paragraph 49.
- 1883 ASIC contends that the pieces of knowledge pleaded against Flugge are not elements of a contravention. ASIC submits that if ASIC should fail to make out some aspect of the knowledge pleaded in paragraph 48, it does not follow that the Court cannot find that Flugge had sufficient knowledge to found the duties as set out in paragraph 49.
- 1884 ASIC submits that whether the knowledge established against Flugge is sufficient to found the duties in paragraph 49 is ultimately a matter for the Court to consider in all the circumstances of the case.
- 1885 In substance, I accept ASIC's submission. I find that ASIC does not have to make out that Flugge knew all the matters pleaded in paragraph 48 to establish that Flugge owed each of the duties alleged. Rather, I find that ASIC must establish that Flugge knew sufficient of the facts alleged that would enliven one or more of the particular duties alleged in paragraph 49. It will be necessary to examine each alleged duty to ascertain whether ASIC has established knowledge of sufficient facts to enliven the duty alleged.

1886 Flugge also relies on the evidence of Kriewaldt (who gave expert evidence on the practices of a director on behalf of Flugge) to rebut any suggestion that Flugge had duty to inquire into the complaint of the UN made at the Washington meeting. Kriewaldt relevantly observed:¹²²⁴

245. The reasonable chairman would have heard the assurances of management that there were no irregularities in the Iraqi contracts and that Mr. McConville, whom he knew to be the AWB Manager Government Relations, had assured Mr. Nicholas that the matter:

‘would be taken seriously and that a full response would be forthcoming for the UN.’

246. To the reasonable chairman, this would be an example of management not responding appropriately at first but that the relevant manager was now seized of the matter and it would be handled appropriately.

247. The reasonable chairman would not take the unsubstantiated allegation of an unnamed third party competitor (which one would infer was a losing bidder in the sales to Iraq) as a signal to do more himself or at the board level.

248. It is a common occurrence for boards to hear from one’s own management complaints of unethical (or, occasionally, illegal) behaviour by competitors when one is asking management about sales numbers or where a large, important contract has been lost on tender – or where one’s company’s product specified to be used has been substituted with another company’s product and so on.

249. Occasionally one might hear similar stories about one’s own company from acquaintances or even from fellow directors who heard it at their board. In these circumstances, the reasonable director might (if the source were credible) convey the substance to the Chief executive officer for appropriate action to be taken.

250. Here, that appropriate action was going to be taken: the reasonable chairman has heard management’s assurance that there are no irregularities and the appropriate senior officer has it in hand to deal fully with the enquiry from OIP by supplying the documents as requested.

1887 Flugge submits that ASIC accepts that the Canadian Wheat Board was a major competitor. Here, in the case of the Washington meeting, on the evidence available to the Court, Flugge was informed by AWB officers, speaking in his presence, that there were no irregularities and an appropriate executive officer was to deal with the inquiry raised by the OIP. Kriewaldt’s views as to the Washington meeting were not

subject to specific cross-examination.

1888 In a similar vein, Bowker gave evidence in relation to how he viewed the matter when he first learnt of the complaint made by another country. Bowker said, when explaining his reaction to the cable from Moules raising the complaint made by a third party, that a thing which 'shaped my initial response was the very vagueness, the vague nature of the allegations that were being made. This was a case where a competitor of the AWB, who was unnamed, was relaying a supposed conversation with Iraqi authorities about the way in which business was being done with AWB and with another country, and the allegations themselves were simply an assertion without any evidence in their support.'¹²²⁵

1889 Bowker had available to him more information than Flugge. He had the information contained in the cables from Moules, and, after assurances from AWB officers, concluded that there was no issue or impropriety. Accordingly, in the face of assurances from executive officers about there being no irregularities and that attention would be given to it, it is a stretch to conclude:

- (a) Flugge was informed by the discussions at the meeting of the matters in paragraph 48, particularly 48(i); or
- (b) that such matters would have put Flugge under an obligation to inquire further as alleged by ASIC, or demonstrate that he had shut his eyes to corporate misconduct.

1890 I turn to the question, did Flugge know sufficient of the facts alleged to give rise to the duties alleged in paragraph 49? I accept that in answering this question, the test is an objective one of whether a reasonable person in Flugge's position would have had the duty alleged, if he had the knowledge of Flugge.

1891 I am not satisfied that Flugge knew sufficient of the facts alleged to give rise to the duties alleged in paragraph 49(a) and 49(b). In my opinion, each of those duties is

¹²²⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T858, L23-31.

premised on the allegation being made good that Flugge knew of the IGB fees and that they were being paid by AWB out of the UN escrow account contrary to the UN Resolutions. As it is ASIC, has not satisfied me that Flugge knew that the payment of the inland transportation fees was contrary to the OFFP and contrary to the UN Resolutions.

1892 The allegations in 49(c) and (d) appear to be premised on the fact that Flugge may not have known all the facts alleged in paragraph 48.

1893 I am satisfied, for the reasons that follow, that Flugge knew sufficient facts, particularly following the Washington meeting, to enliven his duty to take steps to ascertain or to inquire into why the UN considered the payment of inland transportation fees by AWB to Iraq were considered inappropriate by the UN. I accept the submission of ASIC that the inquiry by ASIC would have raised the issue of whether the UN had knowingly approved the payment of the inland transportation fees by AWB in circumstances where they were investigating whether AWB was making inappropriate payments as alleged by a third country.

1894 For the reasons given below, I am satisfied that Flugge knew sufficient facts to enliven the duties alleged in paragraphs 49(c) and (d).

1895 ASIC submits that in relation to Flugge, the evidence plainly supports a finding that from as early as June 1999, and in any event by April 2000, Flugge knew that the arrangements between AWB and IGB included the payment by AWB of a US\$12.00 per tonne fee, that the fee was imposed by decree of the President of Iraq, that the fee was included in the contract price, that the fee was to be paid ultimately to an Iraqi entity, that because payments in US dollars were not possible as a result of the sanctions, a method had to be found to make the payments and that Ronly had offered to be a conduit for the payments.

1896 I have found that Flugge knew from the meeting he held in Washington in March 2000 that the UN had made enquiries about allegations that AWB had made irregular payments at the request of the IGB.

- 1897 At the time that Flugge learnt of the complaint, Flugge knew that AWB was paying the IGB inland transportation fees and that these moneys were being obtained by AWB from the UN escrow account.
- 1898 I am not satisfied that this time, however, that Flugge knew that the payments of the inland transportation fees by AWB to the IGB were contrary to the OFFP.
- 1899 I am satisfied that Flugge knew that the complaint related to the payment by AWB to the IGB of the inland transportation fees.
- 1900 I am satisfied that Flugge knew at the time of the complaint, from the meeting that he attended in Iraq at the IGB with Hogan and Rogers in October 1999, that the inland transportation fee was imposed by the President of Iraq and was US\$12.00 per tonne. I am also satisfied that Flugge knew from this meeting that AWB were having difficulties in finding an acceptable method of paying the inland transportation fee.
- 1901 I am satisfied that Flugge knew that the complaint raised at the Washington meeting had been conveyed by the UN to an Australian government representative at the UN and that Flugge would have inferred that the complaint was one that the UN was unable to resolve itself.
- 1902 In my opinion, Flugge's knowledge following that meeting would have enlivened in him, a duty to make reasonable inquiries as to whether or not the payment of inland transportation fees by AWB to the IGB were irregular or not and whether or not the UN had in fact approved of their payment with full knowledge of the actual arrangements that had been entered into between AWB and the IGB in relation to the payment of the inland transportation fees, as would a reasonable director in the position.
- 1903 Turning to s 180(1) of the Act, in my opinion, Flugge, in exercising his powers and discharging his duties with the degree of care and skill that a reasonable person would exercise if they were a director of AWB in AWB's circumstances and occupied the office held by Flugge and had the same responsibilities within the corporation as

Flugge, would have had a duty to make the inquiries I have referred to.

1904 I should add a further word about Flugge's defence to this allegation. As discussed above, Flugge sought to argue that the UN concern discussed at the Washington meeting was whether AWB had a parallel contract and what was encompassed by the provision in the AWB sale of wheat contract that incorporated AWB's standard terms and conditions.

1905 Flugge did not seek to argue that if a complaint was that the payment by AWB of the inland transportation fees was irregular, that Flugge was not obliged to make any inquiries about the matter, or that his duty to do so was satisfied in some way by what he was told or found out following the meeting.

Flugge's defence on limitation period

1906 As indicated above, Flugge says that in view of s 1317K of the Act and the commencement of these proceedings on 19 December 2007, the Court may not make a declaration or pecuniary penalty or disqualification order, in relation to any conduct occurring prior to 19 December 2001. Flugge says that the allegation that he owed duties prior to 19 December 2001 are not sustainable.

1907 For the reasons explored above, I do find that a director in the position of Flugge exercising reasonable diligence would have made inquiries to ascertain why it was contended that the inland transportation fees were said to be irregular and why the UN would be making the inquiry if they had approved their payment. I find that such an obligation was imposed on Flugge from at the latest March 2000 and continued through to when he lost his position as a director. In my opinion, the failure of Flugge to make any inquiries from March 2000 until 19 December 2001 (when the limitation period no longer pertains) does not in any way excuse him for not making the inquiries after 19 December 2001. The breach of his duty was continuing and did not cease merely because he failed to make the inquiries he should have before 19 December 2001.

1908 There is little authority on dealing with a continuing breach and the duty to inquire.

1909 In *Bennett v Minister of Community Welfare*,¹²²⁶ McHugh J drew a distinction between a duty that ceases when broken and a duty that continues to apply even though broken. He said as follows:¹²²⁷

The notion that the Director had no duty to obtain independent advice for the appellant after Christmas 1976 rests on the assumption that the Director's duty to obtain independent legal advice for the appellant was broken once and for all at the expiration of a reasonable period after 23 April 1973 or, at all events, came to an end on the termination of the guardianship on 7 March 1975. However, the terms of the duty which the Director owed to the appellant demonstrate that it was a duty which continued until 22 May 1980. It was a general duty to take such steps as were necessary to obtain independent legal advice for the appellant so as to avoid the loss which would arise if the appellant did not pursue any rights which he had in respect of his injury. No doubt the failure to carry out the duty within a reasonable period constituted a breach. But it is impossible to accept that the rights and liabilities of the appellant and the Director were fixed once and for all upon the expiration of that period even though it expired during the period of the guardianship. *The distinction between a duty which is broken once and for all on a particular day and a duty which is a continuing one despite its breach is never easy to draw. But here the particular duty to obtain independent legal advice arose out of the more general duty of the Director to care for the welfare of the appellant. Moreover, it arose out of the guardianship and out of circumstances which occurred during the course of the guardianship. That being so, the better view is that it was a continuing duty to avoid economic loss to the appellant as the result of his injury occurring during the guardianship rather than a duty to obtain advice within a reasonable period or by 7 March 1975. Once the Director became charged with the duty, it continued to bind him until it was performed or discharged. It did not end on the day when the appellant was discharged from the Director's custody and care. The duty, having arisen during the period of the Director's guardianship, continued while it could be fulfilled. Consequently, the duty of the Director was still operative as at 22 May 1980. His failure to fulfil it before that date was a cause of the loss which the appellant suffered on that date, notwithstanding that the appellant, of his own motion, sought legal advice in 1976.*

1910 In my opinion, directors can be liable for continuing to fail to make proper inquiries, if their s 180 duty of care and diligence required them to make those inquiries. If the inquiries related to a single isolated transaction with no continuing consequences, then s 180 may not require the director to make the inquiries after the transaction has been completed, because the horse has bolted, so to speak. If, however, the inquiries relate to an ongoing relationship, transaction, activity, problem etc., I think the duty in s 180 would continually require the director to make those inquiries until he/she

¹²²⁶ (1992) 176 CLR 408.

¹²²⁷ *Bennett v Minister of Community Welfare*, 430–431 [emphasis added].

did in fact make them or until he/she ceases to be a director (whichever occurs first).

1911 Applying the comments of McHugh J and the above reasoning to the case of Flugge, I find that there was a continuing duty to make inquiries, and by not making those inquiries, Flugge was in continuing breach of that duty. The duty to make inquiries comes from the general duty of care and diligence owed to the company, and the duty arose out of Flugge's directorship, and remained during his directorship. These facts support the continuing nature of the duty.

TFASOC – paragraph 50

Flugge's alleged contraventions

1912 ASIC pleads that at all times from:

- I. June 1999 to 18 December 2001; and
- II from 19 December 2001 to 15 March 2002, inclusive:
 - (a) Flugge took no or no reasonable steps to ensure that when selling and exporting wheat to Iraq and obtaining payments from the UN escrow account, AWB did not engage in conduct that was, in substance, conduct that the UN Resolutions had called on member states to prevent under the OFFP;
 - (b) Flugge took no or no reasonable steps to prevent AWB from entering into or carrying out wheat sale contracts to Iraq where those contracts included an amount in respect of the IGB fees and enabled AWB to obtain funds from the UN escrow account in respect of the IGB fees;
 - (c) Flugge took no or no reasonable steps to ascertain whether or not AWB had informed the UN of, and whether the UN had approved, the payment of proposed payment by AWB of the IGB fees and the obtaining of funds by AWB from the UN escrow account in respect of the IGB fees;
 - (d) Flugge took no, or no reasonable steps, to:

- (i) make enquiries of AWB's senior management, including the managing director, about each of the matters alleged in sub-paragraphs 48(a) to 48(i) as alleged above;
- (ii) ensure that he, and the AWB Board and/or the Group Corporate Risk Committee and/or the audit committee, were properly informed of those matters;
- (iii) ensure that he, and the AWB Board and/or the Group Corporate Risk Committee and/or the audit committee, took appropriate action to ensure that the steps described in subparagraph (b) above, were carried out.

1913 Flugge denies the assertions in paragraph 50 of the TFASOC.

1914 I find that the duty to exercise reasonable diligence under s 180(1) of the Act did in the circumstances impose a duty on Flugge to make inquiries as alleged by ASIC.

1915 It is alleged that Flugge in exercising his powers and discharging his duties should have made the necessary inquiries to ascertain whether there was any basis to the UN concerns that had been raised at the Washington meeting.

1916 I am not satisfied that Flugge made any, or any reasonable, enquiries as to whether or not the payment of the inland transportation fee were irregular as suggested at the Washington meeting, why it was suggested that they were irregular, and why would the UN make inquiries about irregular payments of the inland transportation fees if the UN had approved the payment of inland transportation fees.

1917 There was no evidence that he made any enquiries after the meeting about the concerns of the UN. Flugge did not give evidence to rebut the inference that no enquiries were made. If Flugge had made inquiries, as he ought, I would have expected Flugge to ensure that the payment of the inland transportation fees were stopped. As they continued, I am more readily able to infer that Flugge did not make enquiries as he was duty bound to make.

1918 I should add that the fact that in mid-2000, Flugge as a member of the board was informed by Lindberg that the United Nations had approved the payment of the inland transportation fees, did not relieve him from the obligation to make inquiries. The fact that the complaint was being pursued by the UN should have alerted him to question whether the UN had knowingly approved what AWB was doing.

TFASOC – paragraph 50A

1919 In paragraph 50A, ASIC pleads that by Flugge's omissions as alleged in paragraph 50(II) in the period between 19 December 2001 and 15 March 2002 inclusive, Flugge breached each of the corresponding duties alleged in paragraph 49.

1920 The particulars to 50A, include the allegation that a reasonably person in Flugge's position with the duties alleged at paragraph 49(c) above would have:

E made enquiries of AWB's senior management including the managing director, as to whether AWB had informed the UN about, and whether the UN had approved, the IGB fees;

F called for production by AWB's senior management of correspondence or other documentary evidence that AWB had informed the UN about, and that the UN had approved the IGB fees;

G if the steps referred to at (E) and (F) were not effective in informing him regarding the matters referred to in 49(c) – written to the Australian government – including DFAT and the Australian Trade Commission – enquiring as to whether AWB had informed the UN and whether the UN had approved the IGB fees.

H Further or alternatively, taken any other step reasonably within his power to ensure that he ascertained the matters referred to in 49(c).

1921 Further the particulars to paragraph 50A, allege that a reasonable person in Flugge's position with the duties alleged at subparagraph 49(d) would have:

- I informed the AWB Board and/or the AWB Group Corporate Risk Committee and/or the AWB audit committee of the matters known to him as alleged in paragraph 48;
- J made enquiries of AWB's senior management, including the managing director, about each of the matters alleged in paragraph 48;
- K if the steps referred to at (I) and (J) were not effective to fully inform him, the AWB Board and/or the AWB Group Corporate Risk Committee and/or the AWB audit committee of the matters alleged in paragraph 48 – taken any other steps reasonably within his power to ensure that he and they were so informed.

1922 Flugge denies paragraph 50A.

1923 For reasons canvassed above, I am satisfied that Flugge breached his duties as alleged in paragraph 49(c) and 49 (d)(i).

1924 I am satisfied that a reasonable person in the position of Flugge would have made enquiries of AWB's senior management including the managing director, as to whether AWB had informed the UN about, and whether the UN had approved, the IGB fees; called for production by AWB's senior management of correspondence or other documentary evidence that AWB had informed the UN about, and that the UN had approved the IGB fees, or alternatively, taken any other step reasonably within his power to ensure that he ascertained the matters referred to in 49(c).

TFASOC – paragraph 51

1925 In paragraph 51, ASIC pleads alternatively, that if Flugge did not have knowledge of each of the matters alleged in paragraph 48, then:

- (a) Flugge had the means of knowledge of each of those matters; and
- (b) by reason of Flugge's position as a director and chairman of AWB, the matters alleged in paragraphs 4 to 8 and the circumstances pertaining to AWB alleged

in paragraphs 9 to 46, at all times from June 1999 to March 2002, Flugge had duties to:

- (i) inform himself of each of the matters alleged in paragraph 48; and
- (ii) thereafter do each of the things alleged in paragraph 49.

1926 ASIC gives particulars of Flugge's means of knowledge alleged in paragraph 51(a) as ASIC refers to and repeats the particulars to paragraph 48 above as the means of Flugge's knowledge.

1927 Flugge denies paragraph 51 and says further that he did not, by reason of the matters alleged in paragraph 48, have means of knowledge of those matters.

1928 During argument, counsel for Flugge submitted that they had been struggling with the means of knowledge plea. Mr Dharmananda submitted that the plea alleges that Flugge had the means of knowledge but doesn't identify the source of the obligation as to why Flugge ought to have informed himself of the matters alleged.¹²²⁸ Mr Dharmananda said that it was not apparent from the pleading how the case worked, if it did work.

1929 I do not accept this submission. In my opinion, the plea makes clear that ASIC contends that the duty of Flugge arises by reason of Flugge's position as chairman and a director and the facts alleged in the paragraphs of the TFASOC referred to.

1930 Flugge submitted that that was one of the reasons why ASIC ought to provide its closing address or make its closing address before the defendants did. Flugge submitted that he needed to understand in the light of the evidence that has emerged, exactly how this plea was to be advanced. Flugge submitted that it was not apparent.

1931 Despite Flugge's submissions, ASIC in its final written submission submitted:

Alternatively, ASIC alleges that Flugge, if he did not know the facts, had the means of knowing them and a duty to inform himself. By reason of his positions at AWB and the relevant circumstances, Flugge breached his duties

¹²²⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (7 December 2015) T2631.

under sections 180 and 181 of the Act by not informing himself of the relevant facts and thereafter not taking the reasonable steps required of him as alleged in paragraphs 49 (a) –(e).

1932 Further, in addressing the February 2001 trip report, ASIC submitted that:

Third, if Flugge did not read the report, he had the opportunity to do so. Flugge was ultimately responsible for what information he received—if, having personally discussed and endorsed the payment of the inland transportation fees through Ronly, Flugge then chose to disregard further information received by him on that issue (or put in place measures to ensure such information did not reach him), that is a matter which the Court should take into account in determining whether—on the alternative ‘means of knowledge’ case—Flugge was wilfully blind (s 181) as opposed to simply negligent (s 180).

1933 ASIC appears to suggest that the plea in paragraph 52 raises an allegation of wilful blindness. Wilful blindness does not appear to be pleaded, however.

1934 ASIC submits that:

Once he learned of the IGB fees wrongdoing, Flugge had a duty to object to it so that the practice stopped once and for all. Even if he didn’t know of the IGB fees wrongdoing or parts of it, Flugge could not simply shut his eyes to the misconduct. He had a duty to look, investigate and take steps to stop it. Flugge was repeatedly put on notice that AWB might be doing something improper in connection with AWB’s trade with Iraq.

1935 ASIC also submits that:¹²²⁹

As was stated eloquently by Pollock J in *Francis v United Jersey Bank*¹²³⁰ and endorsed by the NSW Court of Appeal in *Daniels v Anderson*:¹²³¹

Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect.

Whatever he actually knew, Flugge was privy to more than enough meetings, discussions and communications that he must have had his proverbial eyes closed not to have known, or have been highly suspicious, that AWB was engaging in conduct that the UN Resolutions had called on member states to prevent. A reasonable Chairman in his position and in AWB’s circumstances would have enquired into those matters and taken steps to ensure that the

¹²²⁹ PCS, 303.

¹²³⁰ 432 A 2d 814 (NJ 1981).

¹²³¹ (1995) 37 NSWLR 438, 503.

conduct was brought to light and did not continue.

- 1936 Flugge submits that the paragraph 51(b) alleges that, 'at all times from June 1999 to March 2000 Flugge had duties to inform himself of each of the matters alleged in paragraph 48 using the means of knowledge alleged' in paragraph 51(a) and to 'thereafter do each of the things alleged in paragraph 49 above.'
- 1937 Flugge submits that the means of knowledge plea is circular and irregular. Flugge submits that the particulars to paragraph 48 refer to all matters it is alleged Flugge knew, in turn by reference to matters pleaded at various other paragraphs such as paragraph 48(a).
- 1938 Flugge submits that ASIC's plea in paragraph 51(a), as particularised, is that Flugge had the means of knowledge of the matters pleaded in paragraph 48 because he knew of those matters.
- 1939 Flugge submits that further, ASIC's plea in paragraph 51(b)(i), that Flugge owed a duty to inform himself of the matters pleaded in paragraph 48, using the means of knowledge alleged in paragraph 51(a), is that Flugge owed a duty to inform himself of matters that he allegedly knew.
- 1940 Flugge submits that as the premise of paragraph 51 is that Flugge did not know of the matters pleaded in paragraph 48, the plea in paragraph 51(b) of Flugge's alleged duty to inform himself is circular and meaningless.
- 1941 I do not agree. In my opinion, the plea in paragraph 51 in substance is that Flugge had the means of knowledge of each of the matters alleged in paragraph 48 and therefore he had a duty to stop the conduct as alleged in paragraph 49. ASIC are alleging in paragraph 52 that Flugge failed to inform himself of the matters alleged in paragraph 48 (even though he had the means of knowledge) and as a result he failed to stop the conduct as alleged in paragraph 49.
- 1942 ASIC are submitting that Flugge cannot avoid his duty to stop the improper conduct because he did not actually know the matters alleged in paragraph 48 as he had a duty

to inquire of those matters in the circumstances alleged (which included, for example, attending the meeting with the IGB in Iraq to discuss the payment of the inland transportation fees and attending the Washington meeting) and if he had inquired he would have informed himself of the matters alleged in paragraph 48 and then he would have been duty bound to stop the improper conduct as alleged in paragraph 49.

1943 In my opinion, the authorities discussed above do establish that Flugge cannot avoid his duties to prevent the improper conduct AWB was engaged in by contending he was ignorant of the matters when, by reason of his position as a director and chairman and in the circumstances alleged, he was duty bound to inquire and the inquiry would have revealed the improper conduct.

1944 In my view, the particulars refer to the means by which it is inferred that Flugge had the knowledge alleged. If the inference was not made out, the particulars nevertheless provide the source of the information that would have disclosed the wrong doing if Flugge had made the inquiries that, by reason of his position and the in the circumstances alleged, he was duty bound to make.

1945 Accordingly, I am satisfied that by reason of his position as a director and the chairman and in the circumstances alleged in paragraph 51, that Flugge had the duties to:

- (a) to inform himself of each of the matters alleged in paragraph 48 above, that he did not already know using the means of knowledge alleged at paragraph 51(a);
- (b) thereafter to do each of those things alleged in paragraph 49 above.

1946 I am satisfied that Flugge had the duties alleged from at the latest within a reasonable time of the Washington meeting in March 2000 to March 2002 when Flugge ceased to hold office as a director. In my opinion, for the reasons discussed above, Flugge was clearly 'put on notice that AWB might be doing something improper in connection

with AWB's trade with Iraq' by the Washington meeting.¹²³²

TFASOC – paragraph 52

1947 In paragraph 52, ASIC pleads, at all times from:

- (i) June 1999 to 18 December 2001; and
- (ii) 19 December 2001 to March 2002 inclusive:
 - (a) Flugge failed to inform himself of the matters alleged in paragraph 48 above; and
 - (b) Flugge failed to do each of the things alleged in paragraph 49.

1948 Flugge denies the assertions in paragraph 52.

1949 As discussed above, I have found that the duties of Flugge to inform himself and to stop the improper conduct of AWB commenced at the latest within a reasonable time of the Washington meeting in March 2000 and were continuing duties that did not lapse by the effluxion of time but continued whilst Flugge held the position of a director and chairman with the concomitant duties.

1950 Accordingly, I am satisfied that at all material times from:

- (i) about March 2000 to 18 December 2001; and
- (ii) 19 December 2001 to March 2002 inclusive;
 - (a) Flugge failed to inform himself of the matters alleged in paragraph 48; and
 - (b) Flugge failed to do each of the things alleged in paragraph 49.

1951 If Flugge had carried out his duties I am satisfied that Flugge would have informed

himself as follows.

- 1952 Flugge would have found the true nature of the trucking payments and that AWB was flouting, on a large scale, UN resolutions which if disclosed would severely damage AWB's good name and reputation
- 1953 Flugge would have ascertained that AWB was paying a trucking fees that Canada had also been asked to pay but had refused to pay as Canada were advised by the OIP that to make such payments Canada would be in breach of UN sanctions to pay US dollars to Iraq or one of its instrumentalities.
- 1954 Most importantly, Flugge would have ascertained:
- (a) that at no stage had AWB or anybody on its behalf sought confirmation from the UN of what AWB had been informed by the IGB, that is, that the UN had approved the payment of the inland trucking fees to, or for the benefit of Iraq; and
 - (b) that AWB had not informed the UN or DFAT of what it was doing and had not sought the UN's approval for the payment of inland trucking fees to or for the benefit of Iraq; that AWB had not sought any legal advice from its own lawyers (or any others) on the propriety of what it was doing.
- 1955 Flugge would also have informed himself that:
- (a) the agreement between AWB and IGB for the supply of wheat provided to DFAT and the UN contained a term that falsely suggested that AWB had an obligation to deliver wheat it sold to Iraq to silos in all Governates of Iraq. In fact, the arrangement between AWB and IGB was that AWB had no such obligation. The contract provided to the UN was a sham;
 - (b) the contracts with this purported term in it were forwarded to the UN for approval without the UN being informed there was no such obligation on AWB. The contracts were designed to mislead the UN;

- (c) the contracts with the IGB obliged AWB to pay a fixed sum per tonne of wheat supplied to a Jordanian company. Initially, the payment was to be made to a company in Iraq but that arrangement was changed as US sanctions prohibited the transfer of US dollars to Iraq;
- (d) initially, AWB paid the fees through shipping companies and then through Ronly to disguise the source of the funds being paid to the Jordanian company;
- (e) that there was no contractual arrangement between AWB and the Jordanian company to truck wheat or do anything. The Jordanian company was merely nominated as the agent of the IGB;
- (f) AWB did not have in place any procedure to ensure that the moneys it paid to the Jordanian trucking company were being spent on trucking wheat;
- (g) AWB had not sought advice from its in-house lawyers or any lawyers about whether or not the contracts contravened UN sanctions;
- (h) AWB falsely represented to the UN that wheat was being sold to Iraq for the price stated in the contracts whereas a portion of the price was not for wheat but for the payment of US dollars to the Jordanian company; and
- (i) senior management had not told the board the true state of affairs.

1956 I am satisfied that Flugge, acting with the reasonable degree of care and diligence required of him in his position as a director and chairman and in the circumstances alleged in paragraph 51, would have discovered the true state of affairs. I am satisfied that if Flugge had done so he should have brought these matters to the attention of the board and if he had done so, the conduct in breach of UN sanctions would have been stopped.

TFASOC – paragraph 52A

1957 ASIC pleads in paragraph 52A that by Flugge's omissions of failing to inform him and failing to do each of the things alleged in paragraph 52(ii), in the period between 19

December 2001 and 15 March 2002 inclusive, Flugge breached his duties alleged in paragraph 51.

1958 Flugge denies paragraph 52A.

1959 For the reasons given above, I am satisfied that Flugge breached his duties alleged in paragraph 51 as alleged during the period alleged.

TFASOC – paragraph 53

1960 ASIC pleads in paragraph 53, that by engaging in the conduct alleged in paragraph 50A, alternatively paragraph 52A, in the period 19 December 2001 to 15 March 2002 inclusive, Flugge:

- (a) failed to exercise his powers and discharge his duties with the degree of care and skill that a reasonable person would exercise if they:
 - (i) were an officer of a corporation in AWB's circumstances; and
 - (ii) occupied the office held by Flugge and had the same responsibilities as Flugge; and
- (b) breached the duty he had under s 180(1) of the Act.

1961 As to paragraph 53, Flugge:

- (a) states that, in view of the Act, s 1317K, and the commencement of these proceedings on 19 December 2007, the Court may not make a declaration, or pecuniary penalty or disqualification order, in relation to any conduct occurring prior to 19 December 2001;
- (b) says that, that in view of the matters pleaded at (a) above, the allegations in paragraph 53, by incorporation of paragraphs 50A and 52A, that he breached duties in the period between 19 December 2001 and 15 March 2002 by his conduct prior to 19 December 2001 are not sustainable.
- (c) says that, in view of the matters pleaded at (a) and (b) above, he does not plead

to the allegations in paragraph 53, by incorporation of paragraphs 50A and 52A, that he breached duties in the period between 19 December 2001 and 15 March 2002 by his conduct prior to 19 December 2001;

- (d) denies the allegation that he breached the duties pleaded in the period from 19 December 2001 and 15 March 2002 by his conduct during that period.

1962 I am satisfied that by engaging in the conduct alleged in paragraph 50A, and paragraph 52A above, in the period 19 December 2001 to 15 March 2002, Flugge:

- (a) failed to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (i) were an officer of a corporation in AWB's circumstances; and
 - (ii) occupied the office held by Flugge and had the same responsibilities as Flugge had;
- (b) breached the duty alleged in paragraph 7 of the TFASOC and thereby contravened s 180 of the Act.

TFASOC – paragraph 54

1963 In paragraph 54, ASIC pleads further or alternatively by engaging in the said conduct Flugge:

- (a) failed to exercise his powers and discharge his duties in good faith and in the best interests of AWB and for a proper purpose; and
- (b) breached the duty under s 181 of the Act.

1964 As to paragraph 54, Flugge:

- (a) says that, in view of the Act, s 1317K, and the commencement of these proceedings on 19 December 2007, the Court may not make a declaration, or pecuniary penalty or disqualification order, in relation to any conduct occurring prior to 19 December 2001;

- (b) says that, in view of the Act, s 1317K, and the commencement of these proceedings on 19 December 2007, the Court may not make a declaration, or pecuniary penalty or disqualification order, in relation to any conduct occurring on 19 December 2001;
- (c) says that, in view of the matters pleaded at (a) above, the allegations in paragraph 54, by incorporation of paragraphs 50A and 52A, that he breached duties in the period between 19 December 2001 and 15 March 2002 by his conduct prior to 19 December 2001 are not sustainable;
- (d) denies the allegation that he breached the duties pleaded in the period from 19 December 2001 and 15 March 2002 by his conduct during that period.

1965 ASIC submits that s 181 encompasses the basic common law duty of a director that he or she must act bona fide in what he or she believes is in the best interests of the company as a whole.¹²³³ ASIC also contends that there is an objective element to the duty under s 181 as well, such that where no reasonable director could consider a decision to be in the best interests of the company, the section may be infringed by the taking of that decision.

1966 In *Marchesi v Barnes*,¹²³⁴ Gowans J considered the meaning of the obligation on a director to 'act honestly' in the discharge of his duties of his office as found in s 124(1) of the *Companies Act 1961* (Vic). Section 124(1) provided that:

A director shall at all times act honestly and use reasonable diligence in the discharge of his duties of his office.

1967 Two directors had been charged that they did not act honestly in the discharge of their duties. The prosecution alleged that they had voted at a directors' meeting to issue shares to another company (which they held shares in) for the purpose of removing control of the existing shareholders of the company.

¹²³³ *Re S&D International Pty Ltd (No 4)* (2010) 79 ACSR 595, 657[283].

¹²³⁴ [1970] VR 434.

1968 The defendants argued that for a director to join in an allotment of shares for the purpose of altering control was consistent with an absence of dishonesty and thus the charge could not be made out.

1969 Gowans J said:¹²³⁵

Involved in all this is the conception of 'acting honestly in the discharge of the duties of the office of a director.' The Full Court in *Byrne v Baker* has attributed the source of the language used in s 124(1) (formerly s. 107(1)) to the judgment of Romer J in *Re City Equitable Fire Insurance Co Ltd*, a judgment which in turn refers to the language of Lindley, MR in *Lagunas Nitrate Co v Lagunas Syndicate*, 'act honestly for the benefit of the company they represent.' This is the language it has become customary to use in respect of a director's duty in the exercise of his powers or position. 'They must exercise their discretion bona fide in what they consider - not what a Court may consider - is in the interest of the company, and not for any collateral purpose.' (per Lord Greene, M.R., in *Smith v Fawcett*.) The company in this passage means the company as a whole. This background to the language of the section appears to justify the conclusion, first, that the section is not concerned with the conduct of a director in relation to creditors or other persons dealing with or concerned with the company or anybody else but the company itself; secondly, that it is concerned with the performance of his fiduciary duty to the company; and, thirdly, that to 'act honestly' refers to acting bona fide in the interests of the company in the performance of the functions attaching to the office of director. A breach of the obligation to act bona fide in the interests of the company involves a consciousness that what is being done is not in the interests of the company, and deliberate conduct in disregard of that knowledge. This constitutes the element of mens rea in the criminal offence created by the statute. If the term 'fraud' is applicable in this situation, it is only so in the sense of a 'fraud on the power.' In effect, the common law obligation in respect of acting honestly, as with the common law obligation to act with due diligence has been made a statutory duty, and failure to perform it, provided there is the proper mental element, has been made a criminal offence.

1970 After considering the particulars of the charge against the defendants, Gowans J said:¹²³⁶

As it is alleged that the defendant was aware that the allotment was not being made in the interests of the company, it is sufficiently alleged that there was conscious and deliberate conduct in disregard of those interests, and, in my opinion, that is sufficient to satisfy the charge of not acting honestly in the discharge of the duties of the office of director.

1971 It is important to keep in mind that Gowans J was considering a criminal charge. In

¹²³⁵ *Marchesi v Barnes*, 437-438 (citations omitted).

¹²³⁶ *Marchesi v Barnes*, 48.

any event, according to Gowans J to 'act honestly' referred to the obligation on a director to act bona fide in what the director considered to be the interest of the company. The test was entirely subjective.

1972 A contrary view, however, was taken by King CJ in *Australian Growth Resources Corp Pty Ltd v Van Reesema*,¹²³⁷ where it was held that the duty to act honestly is breached where a director exercises powers in a subjectively honest way but for a purpose which the Court judges to be an improper one.

1973 Section 181(1) of the *Corporations Act 2001* replaced s 232(2) of the *Corporations Act 1989* (Cth). This section stated that an officer of a corporation 'shall at all times act honestly in the exercise of his or her powers and the discharge of the duties of his or her office.' Ford, Austin and Ramsey's *Principles of Corporation Law* provides an extensive review of the cases that dealt with s 232(2) and the divided views as to whether or not the test to apply was subjective or objective.¹²³⁸ Ford says that given these difficulties with interpretation, s 181 was introduced, which split the duties into two; such that, a director or other officer of a corporation must exercise their powers and discharge their duties (a) in good faith and in the best interests of the corporation, and (b) for a proper purpose.

1974 As to (b), in my opinion, there is little doubt that the test is both subjective and objective. Whether the purpose of director in exercising his powers and discharging his duties was improper depends on the purpose, which the person exercising the power, has. It is the person's purpose that has to be assessed. The assessment of whether that purpose was improper is objective. It is for the Court to determine the substantial purpose of the relevant person.¹²³⁹ An overview of the principles

¹²³⁷ (1988) 13 ACLR 261 ('*Van Reesema*').

¹²³⁸ Lexis Nexis Butterworths, R P Austin, I M Ramsay, *Ford, Austin & Ramsay's Principles of Corporations Law*, vol 1 (at Service 126) [8.065].

¹²³⁹ *Re Peninsula Kingswood Country Golf Club Ltd* [2014] VSC 437, [78]–[96]; and on appeal *Falkingham v Peninsula Kingswood Country Club Ltd* [2015] VSCA 16.

applicable to determining whether directors have acted for an improper purpose were examined by Ipp J (Malcolm CJ and Seaman J agreeing) in *Permanent Building Society (in liq) v Wheeler*.¹²⁴⁰

1975 Ipp J said:¹²⁴¹

It must be shown that the substantial purpose of the directors was improper or collateral to their duties as directors of the company. The issue is not whether a management decision was good or bad; it is whether the director acted in breach of their fiduciary duties.

Honest or altruistic behaviour by directors will not prevent a finding of improper conduct or their part if that conduct was carried out for an improper or collateral purpose. Whether acts were performed in good faith and in the interests of the company is to be objectively determined, although statements by directors about their subjective intentions or beliefs will be relevant to that inquiry.

1976 As to s 181(1)(a), Ford argues, and I accept, that there is a subjective and an objective test involved. Ford said that the existence of an objective test was recognised in *Hutton v West Cork Railway Co*, where Bowen LJ said:¹²⁴²

Bona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational.

1977 In *Bell Group Ltd (in liq) v Westpac Banking Corporation*,¹²⁴³ Owen J held that the duty to act in the best interest of the company has both subjective and objective elements. He said that it is the directors who determine what are in the best interests of the company and not the courts but the courts may find a breach of duty if the decision of the directors is one that, according to the Court, no reasonable board member would judge to be in the interests of the company.

1978 On appeal,¹²⁴⁴ Lee AJA held that a bona fide belief that a director's conduct is

¹²⁴⁰ (1994) 11 WAR 187, 218 ('*Permanent v Wheeler*').

¹²⁴¹ *Permanent v Wheeler*.

¹²⁴² (1993) 23 Ch D 654, 671 ('*Hutton v West Cork*').

¹²⁴³ (2008) 39 WAR 1, 583-584 [4619].

¹²⁴⁴ *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 ('*Westpac v Bell Group*').

undertaken in the best interests of the company 'will not prevent a finding of breach of the duty where the conduct is plainly unreasonable or irrational or fails to have any regard to obligations the company must meet: *Grimaldi v Chameleon Mining NL (no 2)*.'¹²⁴⁵ Carr AJA said the test was subjective but conceded that was in the absence of irrationality.¹²⁴⁶ Drummond AJA said the test was subjective.¹²⁴⁷ It must be borne in mind that the Court was addressing the common law duties of the directors. Accordingly, the Full Court of Western Australia, accepted, by majority, that s 181(1)(a) involves both a subjective and objective test.

1979 In *Mernda Developments Pty Ltd (in liq) v Alamanda Property Investments No 2 Pty Ltd (in liq)*,¹²⁴⁸ the Court of Appeal of this Court was considering whether a shadow director had breached his duty under s 181(1)(b). The appellants submitted that the appropriate test to be applied was that formulated by Pennycuick J in *Charterbridge Corporation Ltd v Lloyds Bank Ltd*,¹²⁴⁹ where his Lordship said the proper test was:¹²⁵⁰

whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.

1980 The Court of Appeal held that:

While there has been some debate about the application of an objective test, and whether it is appropriate to consider whether in fact the directors considered the interests of the company, it is now generally accepted that an objective test ought to be applied.¹²⁵¹

1981 Flugge submits that the statement by the Court of Appeal that 'it is now generally

¹²⁴⁵ *Westpac v Bell*, 169 [923].

¹²⁴⁶ *Westpac v Bell Group*, 533-534 [2772].

¹²⁴⁷ *Westpac v Bell Group*, 353 [1988].

¹²⁴⁸ (2011) 86 ACSR 277 ('*Mernda v Alamanda*').

¹²⁴⁹ [1970] Ch 62, 74 ('*Charterbridge v Lloyds*').

¹²⁵⁰ *Charterbridge v Lloyds*.

¹²⁵¹ *Mernda v Alamanda* (2011) 86 ACSR 277, 286 [33].

accepted that an objective test ought to be applied' ought to be rejected. Flügge submits that the correct position was correctly summarised by Black J of the Supreme Court of New South Wales in *Re Colorado Products Pty Ltd (in prov liq)*,¹²⁵² where his Honour said:¹²⁵³

Section 181(1) of the Corporations Act requires a director or other officer of a corporation to exercise his or her powers and discharge his or her duties in good faith in the best interests of the corporation, and for a proper purpose. In *Chew v R*, Malcolm CJ summarised the requirements of that duty as being that directors (1) must exercise their powers in the interests of the company, and must not misuse or abuse their power; (2) must avoid conflict between their personal interests and those of the company; (3) must not take advantage of their position to make secret profits; and (4) must not misappropriate the company's assets for themselves.

The case law is divided as to whether a contravention of s 181(1)(a) of the Corporations Act requires that it be established that a director engaged deliberately in conduct which he or she knew was not in the company's best interests: for example, *Forge v Australian Securities and Investments Commission* McColl JA (with whom Handley and Santow JJA agreed); *Holyoake Industries* at [150], varied on appeal on another point in *V-Flow*. In *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)*, the Court of Appeal of the Supreme Court of Western Australia unanimously held that the corresponding general law duty to act in good faith in the company's best interests was subjective and would be complied with if directors honestly believed they acted in the company's best interests: ... The alternative view is that a contravention of that limb of s 181 can be established if the law objectively considers that what the director did was improper, even if the director subjectively believed that he or she was acting in the company's best interests: see, for example, *Australian Growth Resources Corporation Pty Ltd v Van Reesema* per King CJ; *Mernda Developments Pty Ltd (in liq) v Alamanda Property Investments No 2 Pty Ltd*. The difference in those approaches does not seem to me to be material for the purposes of this case. The section may be contravened if a director promotes his or her personal interest in a situation where there is a conflict or real or substantial possibility of a conflict between those interests and the company's interests: *Adler; Parker*.

A contravention of s 181(1)(b) may also be established if a director does not exercise his or her powers for the purpose for which they were conferred or exercised them for an improper purpose, and the bulk of authority indicates that question is to be determined objectively: *Permanent Building Society (in liq) v Wheeler* per Ipp J (with whom Malcolm CJ and Seaman J agreed); *Adler; Parker*. In *Westpac Banking Corporation*, the majority held that whether a director acts for an improper purpose, for the purposes of the corresponding general law duty, is determined objectively involving an assessment by the Court of what was reasonable in the circumstances: per Lee AJA, and per Drummond AJA.

¹²⁵² (2014) 101 ACSR 233 ('*Re Colorado Products*').

¹²⁵³ *Re Colorado Products*, [419]-[421] (citations omitted).

By contrast, Carr AJA held that the test whether directors had acted for an improper purpose was primarily subjective, although a decision would be voidable if directors acted in good faith for a purpose that was beyond their powers or for a collateral purpose.

1982 Flugge also relies on further authorities.

1983 In *Forge v ASIC*,¹²⁵⁴ McColl JA of the Court of Appeal of the Supreme Court of New South Wales (with whom Handley and Santow JJA agreed) referred to the difference in approach to the meaning of to 'act honestly' in *Marchesi v Barnes* and by King CJ in *Van Reesema*. Her Honour found it unnecessary to decide the issue as assuming that the *Marchesi v Barnes* test applied the primary judge had concluded that the appellants were subjectively dishonest.

1984 In *ASIC v Maxwell*,¹²⁵⁵ Brereton J of the Supreme Court of New South Wales referred to the different approach to the meaning of to 'act honestly' in *Marchesi v Barnes* and by King CJ in *Van Reesema*. Brereton said:¹²⁵⁶

While the words 'act honestly' have not been retained in the current section, the historical origin of the duty, as explained by Gowans J which led his Honour to equate 'acting honestly' with acting bona fide in the interests of the company' are equally applicable to the current section. In this context, absence of good faith requires much more than negligence. In my opinion, s 181 is contravened only where a director engages deliberately in conduct, knowing that it is not in the interests of the company.

1985 In *ASIC v Macdonald* Gzell J of the Supreme Court of New South Wales considered the meaning to be given s 181 referring to *Marchesi v Barnes*, *Forge v ASIC*, *ASIC v Maxwell*, noting that Brereton J adopted the *Marchesi v Barnes* approach.¹²⁵⁷ He noted that contrary approach in *ASIC v Sydney Investment House Equities Pty Ltd*,¹²⁵⁸ Gzell J held that the *Marchesi v Barnes* approach is the correct approach.

¹²⁵⁴ (2004) 213 ALR 574.

¹²⁵⁵ (2006) 59 ACSR 373 ('*ASIC v Maxwell*').

¹²⁵⁶ *ASIC v Maxwell*, 401-3.

¹²⁵⁷ (2009) 71 ACSR 368.

¹²⁵⁸ (2008) 69 ACSR 1.

1986 Gzell J referred to Malcolm J's statement of the principles for the operation of s 181(1) in *Chew v The Queen*, where he said:¹²⁵⁹

It follows that the duty of honesty or good faith has a number of aspects under the general law. First, the directors must exercise their powers in the interests of the company, they must not misuse or abuse their powers. Secondly, they must avoid conflict between their personal interests and those of the company. Thirdly, they should not take advantage of their position to make secret profits. Fourthly, they should not misappropriate the company's assets for themselves.

1987 Gzell J said that in *ASIC v Maxwell*,¹²⁶⁰ Brereton J added that the duty was imposed not to secure compliance with various requirements of the Act but, as it was at general law, to prevent abuses of directors' powers for their own or collateral purposes.

1988 In *Australian Motor Finance Ltd (rec and mgrs apptd) v Angeleri (No 3)*, Tracey J said:¹²⁶¹

There is an unresolved debate as to whether it is necessary to establish subjective dishonesty on the part of a director before a contravention of s 181 can be proved: see, for example, *Marchesi v Barnes* (per Gowans J); *Australian Growth Resources Corp Pty Ltd v Van Reesema* (per King CJ). The weight of authority favours the stricter view that it must be shown that a director engaged deliberately in conduct which he or she knows is not in the best interests of the company or for a proper purpose: see the authorities collected by McColl JA in *Forge v Australian Securities and Investments Commission*.

1989 In *Macralink Pty Ltd v Saris*,¹²⁶² and in *Re Environinvest Ltd (recs and mgrs apptd) (in liq)*,¹²⁶³ Ferguson J (as her Honour then was) followed *Mernda v Alamanda* and adopted an objective test for applying s 181. In *Mills Oakley Lawyers Pty Ltd v Huon Property Holdings Pty Ltd*,¹²⁶⁴ Hargrave J held that in assessing whether a director had breached the duties under ss 181 and 182 of the Act an objective test must be applied, citing *Mernda v Alamanda*.

¹²⁵⁹ (1991) 4 WAR 21, 49.

¹²⁶⁰ (2006) 59 ACSR 373, 400 [106].

¹²⁶¹ [2010] FCA 1431, [51].

¹²⁶² [2011] VSC 665.

¹²⁶³ [2012] VSC 151, [13].

¹²⁶⁴ [2012] VSC 39, [70].

- 1990 I do not accept that the Court of Appeal's decision should be rejected by reason of the decision of Black J in *Re Colorado Products* and the other authorities that I have referred to that adopt the *Marchesi v Barnes* approach to the application of s 181. In any event, I am not at liberty to do so. I am bound to follow *Mernda v Alamanda* as have Ferguson and Hargrave JJ as referred to above.
- 1991 I propose to adopt both an objective and a subjective test to s 181(1)(a), as held apposite by Owen J in *Bell Group v Westpac* and approved by the Court of Appeal in *Mernda v Alamanda*.
- 1992 As to the subjective test, I am satisfied that Flugge knew, as he admits, that AWB was paying the IGB inland transportation fees. The evidence establishes, however, that Flugge said on several occasions that he believed that the UN had approved the payment of the inland transportation fees to the IGB. As discussed above, this was the recorded view of many AWB officers and is what the board of AWB were formally advised by the managing director Lindberg.
- 1993 I am not satisfied on the evidence that Flugge was not speaking honestly when he expressed that view.
- 1994 ASIC says that its case against Flugge, in summary, is that as Chairman of AWB at all relevant times Flugge breached duties owed to AWB under ss 180 and 181 of the Act by his conduct in not taking reasonable steps to stop AWB from engaging in any misconduct in connection with the OFFP, including the IGB fees wrongdoing, in circumstances where he knew that wrongdoing was taking place and that it would cause substantial harm to AWB if it were ever revealed. To the extent that his acts and omission in breach of those duties occurred between 19 December 2001 and 15 March 2002, ASIC seeks declarations and other orders in respect of that conduct.¹²⁶⁵
- 1995 ASIC has not satisfied me that Flugge knew that wrongdoing was taking place and that it would cause substantial harm to AWB if ever revealed as alleged in this

¹²⁶⁵ PCS, [32].

passage. Further, I find that ASIC has not established that Flugge engaged deliberately in conduct, knowing that it was not in the interests of the company.¹²⁶⁶

1996 Turning to the objective test. In the case at hand, the relevant conduct of Flugge consists of failing to make adequate inquiries or inform himself of matters that would have informed him of the matters alleged in paragraph 48. ASIC also submits that the evidence establishes that:

Flugge had a duty to try and prevent the IGB fees wrongdoing and disclose relevant matters to the AWB board;

Flugge's conduct in not taking steps to prevent the IGB fees wrongdoing, and his failure to bring these material matters to the AWB Board's attention meant he did not exercise his powers and discharge his duties with the degree of care and diligence that a reasonable Chairman in his position and in AWB's circumstances would have exercised in contravention of s.180;

Flugge's conduct in allowing the IGB fees wrongdoing to continue in circumstances where he authorised, encouraged or was knowingly involved in the wrongdoing meant he did not exercise his powers honestly or bona fide and therefore did not exercise his powers or discharge his duties in good faith in the best interests of AWB in contravention of s.181;

Alternatively, because Flugge was present at a number of material meetings and discussions, and received a number of communications, a reasonable director in Flugge's position would have been put on notice that inquiry should be made about the terms and conditions of AWB's trade with Iraq and whether AWB was engaging in any conduct that the UN Resolutions had called on member states to prevent.

Flugge's failure to inform himself and thereafter to take steps to prevent the IGB fees wrongdoing and bring material matters to the Board's attention meant he did not exercise his powers and discharge his duties in good faith in the best interests of AWB and/or he did not exercise his powers or discharge his duties with the degree of care and diligence that a reasonable Chairman in his position and in AWB's circumstances would have exercised in contravention of sections 180 and 181.¹²⁶⁷

1997 ASIC alleges that Flugge allowed the IGB fees wrong doing to continue in circumstances where he authorised, encouraged or was knowingly involved in wrongdoing. I am not satisfied that ASIC has established that Flugge authorised,

¹²⁶⁶ ASIC v Maxwell 401-3.

¹²⁶⁷ PCS, [907].

encouraged or was knowingly involved in the alleged wrong doing.

- 1998 ASIC also alleges that Flugge's failure to inform himself lead to him not taking steps to prevent the wrongdoing.
- 1999 I have found that Flugge breached his duty under s 180 by failing to exercise due diligence in failing to make inquiries or inform himself. I have also found through the means of knowledge plea that he failed to take steps to prevent the wrongdoing.
- 2000 I have not found, and ASIC has not established that Flugge made a decision not make an inquiry or inform himself or made a decision not to take steps to prevent the wrongdoing. My finding is that he failed to do something that he ought to have done.
- 2001 In failing to make inquiries or inform himself or failing to prevent the wrongdoing, Flugge was not exercising his powers and discharging his duties. The finding is that he failed to exercise his powers and discharge his duties with due diligence.
- 2002 In my opinion, s 181(1) addresses how a director or an officer of a corporation should exercise his powers and discharges his duties in particular circumstances where he seeks to do so. In my opinion, it is not apposite to apply the provision to a situation where the director or officer has not sought to exercise his powers or discharge his duties. If Flugge had made a decision to not make inquiries or inform himself, or had made a decision not to prevent the wrong doing, the provision would have come into play. It would be possible to apply an objective test of whether an honest and reasonable director could have made such a decision in the circumstances. Similarly, if Flugge decided or elected not to do anything, the section could be tested against that decision or election.
- 2003 How do I apply the objective test to a situation where Flugge did not exercise his powers or seek to discharge his duties, or decide or elect to do nothing, but was negligent in failing to exercise his powers and discharge his duties?
- 2004 In my opinion, the application of the test suggested by Owen J in *Westpac v Bell Group* or that by Bowen LJ in *Hutton v West Cork* is not sensibly open in the circumstances of

Flugge's breach of s 180.

2005 Flugge submits that the second limb of s 181(1), relating to the exercise of the director's powers or duties for a proper purpose, reflects case law as to the requirement of proper purposes. Flugge submits that in particular, directors' powers may be exercised only for the purpose for which they were conferred and not for any collateral or improper purpose and this is to be determined by reference to the substantial purpose of the exercise of the power and on an objective basis. Flugge refers to *Permanent Wheeler*;¹²⁶⁸ *ASIC v Adler*.¹²⁶⁹ Flugge submits that the section may be contravened if a director promotes his or her own personal interest in a situation where there is a conflict real or substantial possibility of a conflict between those interests and the company's interests.

2006 Flugge submits that none of the evidence at the trial established that Flugge:

- (a) know of illegality or illicit activity or breach of UN sanctions; and/or
- (b) gained anything. In fact, Flugge lost a great deal by reason of the Cole Inquiry.

2007 I have found that Flugge breached his duties under s 180 in not making inquiries, in not informing himself and in not preventing the improper conduct of AWB, but I find that his failure to inquire, failure to inform himself and failure to prevent AWB's improper conduct was not done for an improper purpose. ASIC has not established that he had any purpose in mind in not making any inquiry, not informing himself, or not preventing the improper conduct of AWB. ASIC has not sought to establish that the lack of purpose was an improper purpose.

2008 Whether a person's purpose was improper depends on the purpose, which the person exercising the power, had. It is the person's purpose that has to be assessed. The assessment of whether that purpose was improper is objective but the purpose is the

¹²⁶⁸ [1994] 11 WAR 187, 218.

¹²⁶⁹ (2002) 168 FLR 253, 414 [738]-[739].

substantial purpose of the relevant person.¹²⁷⁰ I am not satisfied that ASIC has established that Flugge had any purpose in not exercising his powers and discharging his duties.

2009 Accordingly, I am not satisfied that ASIC has established that Flugge:

- (a) failed to exercise his powers and discharge his duties in good faith and in the best interests of AWB and for a proper purpose; and
- (b) breached the duty under s 181 of the Act.

TFASOC – paragraph 55

Relief

2010 ASIC alleges that Flugge is liable to be the subject of a declaration in respect of each of the contraventions alleged in paragraphs 53 and 54 of the TFASC, pursuant to s 1317E(1)(a) of the Act.

2011 As to paragraph 55, Flugge:

- (a) states that, in view of s 1817K of the Act, and the commencement of these proceedings on 19 December 2007, the Court may not make a declaration in relation to any conduct occurring prior to 19 December 2001;
- (b) in view of the matters pleaded in (a) above, denies the allegation in paragraph 55, by incorporation of paragraphs 53 and 54, that he is liable to be the subject of a declaration for his conduct prior to 19 December 2001; and
- (c) denies the allegation that he is liable to be the subject of a declaration sought, or any declaration, for his conduct in the period from 19 December 2001 and 15 March 2002.

¹²⁷⁰ *Re Peninsula Kingswood Country Golf Club Ltd* [2014] VSC 437,[78]-[96]; and on appeal *Falkingham v Peninsula Kingswood Country Club Ltd* [2015] VSCA 16.

TFASOC – paragraph 56

2012 ASIC alleges that further, the contraventions and each of them:

- (a) materially prejudiced the interests of AWB; or
- (b) were serious

within the meaning of s 1317G(1) of the Act.

2013 ASIC further alleges that it refers to and repeats the particulars subjoined in paragraph 47 of the TFASOC.

2014 In relation to subparagraph 56(b), ASIC also refers to and repeats the responsibilities of Flugge as alleged at paragraph 6 of the TFASOC, the importance of the Iraq market as alleged at paragraph 19 of the TFASOC, and the importance of the single desk as alleged at paragraph 45 of the TFASOC.

TFASOC – paragraph 55

2015 ASIC pleads that Flugge is liable to be the subject of a declaration in respect of the contraventions alleged in paragraphs 53 and 54 of the TFASC, pursuant to s 1317E(1)(a) of the Act.

2016 Flugge pleads in response that:

- (a) in view of s 1317K of the Act, and the commencement of these proceedings on 19 December 2007, the Court may not make a declaration in relation to any conduct occurring prior to 19 December 2001;
- (b) in view of the matters pleaded at (a) above, denies the allegation in paragraph 55, by incorporation of paragraphs 53 and 54, that he is liable to be the subject of a declaration for his conduct prior to 19 December 2001; and
- (c) denies the allegation that he is liable to be the subject of a declaration sought, or any declaration, for his conduct in the period from 19 December 2001 and 15 March 2002.

TFASOC – paragraph 56

2017 ASIC pleads that further that the contraventions and each of them:

- (a) materially prejudiced the interests of AWB; and
- (b) was serious

within the meaning of s 1317G(1) of the Act.

2018 As to paragraph 56, Flugge:

- (a) states that, in view of s 1317K of the Act, and the commencement of these proceedings on 19 December 2007, the Court may not make a declaration in relation to any conduct occurring prior to 19 December 2001;
- (b) further states that, in view of the matters pleaded at (a) above, the allegations in paragraph 56, by incorporation of paragraphs 53, 54 and 55, that he contravened the Act by his conduct prior to 19 December 2001, and that those contraventions had the effects, or were of the character, pleaded in paragraph 56(a) and (b) are not sustainable;
- (c) further states that, in view of the matters pleaded at (a) and (b) above, he does not plead to the allegations in paragraph 56, by incorporation of paragraphs 53, 54 and 55, that he contravened the Act by his conduct prior to 19 December 2001, and that those contraventions had the effects, or were of the character, pleaded in paragraph 56(a) and (b); and
- (d) if, which is denied, he did contravene the Act, as pleaded, in the period from 19 December 2001 and 15 March 2002 by his conduct during that period, he denies that any such contraventions had the effects, or were of the character, pleaded in paragraph 56(a) and (b).

TFASOC – paragraph 57

2019 ASIC pleads that in the premises, Flugge is liable to pay a pecuniary penalty pursuant to s 1317G(1) of the Act in respect of the contravention.

2020 As to paragraph 57, Flugge:

- (a) states that in view of s 1317K of the Act, and the commencement of these proceedings on 19 December 2007, the Court may not make a pecuniary penalty order by reason of any conduct occurring prior to 19 December 2001;
- (b) in view of the matters pleaded at (a) above, denies the allegation that he is liable to pay a pecuniary penalty by reason of his conduct prior to 19 December 2001, and
- (c) denies the allegation that he is liable to pay a pecuniary penalty for his conduct in the period from 19 December 2001 and 15 March 2002.

TFASOC – paragraph 58

2021 Further, ASIC seeks an order pursuant to s 206C(1) of the Act to disqualify Flugge from managing a corporation for such period as the Court considers appropriate.

2022 As to paragraph 58, Flugge:

- (a) states that, in view of s 1317K of the Act, and the commencement of these proceedings on 19 December 2007, the Court may not make a disqualification order by reason of any conduct occurring prior to 19 December 2001;
- (b) in view of the matters pleaded at (a) above, denies the allegation that he is liable to an order disqualifying him from managing a corporation by reason of his conduct prior to 19 December 2001; and
- (c) denies the allegation that he is liable to an order disqualifying him from managing a corporation for his conduct in the period from 19 December 2001 and 15 March 2002.

2023 The claims of ASIC:

- A A declaration pursuant to s 1317E of the Act that Flugge has contravened s 180 of that Act in respect of the matters alleged in paragraph 53 of the TFASOC.

- B A declaration pursuant to s 1317E of the Act that Flugge has contravened s 181 of that Act in respect of the matters alleged in paragraph 54 of the TFASOC.
- C An order pursuant to s 1317G of the Act that Flugge pay to the Commonwealth a pecuniary penalty in relation to each civil penalty contravention in such amount as the Court thinks fit.
- D An order pursuant to s 206C(1) of the Act to disqualify Flugge from managing a corporation for such period as the Court considers appropriate.
- E Costs
- F Such further or other relief as the Court thinks fit.

Findings on relief

- 2024 As I have found that Flugge did breach his statutory duty under s 180 of the Act, I consider it appropriate to hear further submissions on the parties on the relief to which ASIC is entitled.
- 2025 Accordingly, I will hear the parties on relief and costs.

The case against Geary – factual background

Introduction

- 2026 The case against Geary involves Geary's knowledge of and involvement in paying IGB fees to Iraq, the Iron Filings Claim and the Tigris Debt payment.
- 2027 In substance the Tigris claim arises as follows. Iraq owed moneys for the supply of wheat to a BHP subsidiary, called Tigris. Ownership of the subsidiary was transferred to some investors. The investors sought the assistance of AWB in recovering the debt owed to Tigris. AWB agreed to help for a fee. The means adopted by AWB was to increase the price of wheat that AWB sold to the IGB by an amount sufficient to recover the debt and use the moneys released from the escrow account to pay for the wheat and pay the Tigris the debt.
- 2028 In substance the Iron Filings Claim arises as follows. The IGB claimed that certain shipments of wheat supplied by AWB to the IGB were contaminated with iron filings. AWB agreed to compensate the IGB for the cost of removing the iron filings at an

agreed amount. AWB increased the price of wheat sold to the IGB sufficiently to recover the damages that AWB had agreed to pay the IGB. These moneys were recovered from the escrow account and then paid by AWB to IGB as compensation for the Iron Filings Claim.

2029 I will now turn to the evidence concerning the Tigris and Iron Filings Claim. I have already dealt with some of the evidence led against Geary in relation to the paying of IGB fees to Iraq.

2030 The following statement of facts are essentially taken from ASIC's closing submissions. In many instances, ASIC contends that Geary received and read an email based on documentary evidence that the email was sent to him. In many cases, Geary denies that he received or alternatively read the email. I deal with these contentions when I examine the pleadings and particulars alleged against Geary. In the following description of events, where I state that Geary received an email, unless the context discloses from other evidence that he received and read the email, I leave open at this stage whether or not Geary did receive and read the email, although I accept that the documentary evidence establishes it was sent to him. I discuss emails sent to Geary more fully when discussing ASIC's allegations below.

The Tigris and Iron Filings wrongdoing

Overview

2031 In 1995, BHP agreed to make a donation of a US\$5 million shipload of wheat to Iraq.¹²⁷¹ That delivery of wheat was prior to the OFFP. In September 2000, BHP assigned to Tigris BHP's rights, 'if any', to its Iraqi assets and liabilities. The assignment included the following:¹²⁷²

Grain Board receivable

3.1 Tigris will pursue the recovery, in cash or in kind. Of amounts owing to BHPP by the Government of Iraq in relation to BHPP's earlier

¹²⁷¹ CB 4/2679.

¹²⁷² CB 2/1314-1315.

assistance with the purchase of wheat. BHPP will provide all reasonable information and reasonable assistance to Tigris in the pursuit of the claim. BHPP makes no representations and gives no warranties as to the validity of this claim.

- 3.2 Tigris will pay to BHPP 25% (twenty-five per cent) of all cash or cash equivalent recovered, net of expenses incurred after the Effective Date, on an as-received basis.
- 3.3 Tigris may compromise, exchange for assets or otherwise settle the debt at its sole discretion, subject only to permitting BHPP to participate in any non-cash asset acquired in the terms mutatis mutandis as set forth in Clause 2 hereof.
- 3.4 BHPP shall provide the Grain Board Receivable Assignment Letter, annexed hereto as Schedule C.
- 3.5 Tigris will not do or allow anything to be done that could lead to publicity regarding the Grain Board Receivable.

2032 The 'Grain Board receivable' the subject of that clause is referred to below as the Tigris Debt. In 2001, AWB agreed to assist Tigris to recover the Tigris Debt. In return, Tigris offered to pay (and ultimately did pay) AWB a commission of US\$500,000.00.

2033 In July 2002, AWB received a complaint and a demand for compensation from the IGB arising from wheat shipments that were allegedly contaminated with iron filings (the Iron Filings Claim). An agreement was thereafter reached whereby AWB would pay the IGB US\$6.00 per tonne as an addition to the IGB fees in settlement of the Iron Filings Claim (the Iron Filings Compensation).

2034 AWB received advice from DFAT to the effect that compensation for the Iron Filings Claim could only be paid by reducing the price of wheat in future shipments to Iraq or by paying the money back into the UN escrow account. The advice was not followed, because the IGB insisted on payment through the IGB fees.

2035 Negotiations took place in mid to late 2002 between AWB and the IGB to resolve two issues:

- (a) the recovery of the Tigris Debt on behalf of Tigris; and
- (b) the proposed payment of the Iron Filings Compensation through the IGB fees.

- 2036 As a result of these negotiations, AWB proposed to the IGB and subsequently agreed to inflate or 'load up' the contract prices in contracts A1670 and A1680 by approximately US\$8.00 per tonne, by which means the amount of the Tigris Debt would be recovered from the UN escrow account over the course of the two contracts. At the same time, AWB agreed to increase the amount of the IGB fees that it paid to Alia in connection with contracts A1670 and A1680 by approximately US\$2.00 per tonne, by which means the Iron Filings Compensation would be paid to the IGB over the course of the two contracts.
- 2037 ASIC contends that the contracts submitted to the OIP for approval did not disclose the true agreement between AWB and the IGB.
- 2038 The true agreement involved AWB agreeing to pay Alia €51.30 per tonne in respect of the IGB fees and recovering an additional €8.40 per tonne that would ultimately be paid to Tigris in settlement of the Tigris Debt, and that both of these additional amounts would be recovered out of the UN escrow account. The agreement also involved AWB paying the IGB US\$2.00 per metric tonne compensation for the Iron Filings Claim.
- 2039 Throughout late 2002 to March 2003, AWB sought legal advice on its conduct in relation to the Iron Filings Compensation and the Tigris transaction. Following the invasion of Iraq, contracts A1670 and A1680 were renegotiated, however the component on account of the Tigris Debt was not disclosed and so continued to be collected from the UN escrow account. Ultimately, AWB recovered the amount of the Tigris Debt from the UN escrow account and paid the amount of that debt (less AWB's commission) to Tigris. Due to the US-led invasion of Iraq, an amount in respect of the Iron Filings Compensation was not paid (although from provision made in AWB's accounts prior to the invasion, it had been AWB's intention to pay it).¹²⁷³
- 2040 ASIC submits that the purpose and effect of:

¹²⁷³ See paragraph 2270 below.

- (a) the Iron Filings Claim; and
- (b) the agreement to pay compensation for that claim;
- (c) AWB's agreement to load up contracts A1670 and A1680 by €8.40 per tonne;
- (d) AWB's receipt of an amount representing the Tigris Debt from the UN escrow account;

was to facilitate new and different means of engaging in variations on the IGB fees wrongdoing. ASIC says that as to the compensation agreed to be paid for the Iron Filings Claim, the ultimate effect would have been as before: payment to Iraq of internationally traded currency by AWB. ASIC argues that in the case of the Tigris Debt, the effect was (again) for AWB to recover money from the UN escrow account for a purpose altogether unrelated to the supply of humanitarian goods under the OFFP (in this case, repayment of an alleged non-OFFP debt).

2041 ASIC submits that AWB's receipt of the amount representing the Tigris Debt and its payment (less commission) had to be justified to the outside world. To this end, AWB and Tigris executed an agreement which provided that the Tigris Debt was being paid in recognition of assistance provided by Tigris to AWB in obtaining contracts for the sale of wheat to Iraq (the Tigris agreement). The consideration for this assistance was said initially to be US\$7.875 million. Tigris ultimately received from AWB US\$7,087,202.24, after taking into account a 'success fee' of US\$500,000.00 retained by AWB, and interest.¹²⁷⁴

2042 ASIC submits that the Tigris transactions and the Iron Filings Claim are important not only because they constituted further instances of misconduct by AWB under the OFFP (to which Geary was party), but also because they plainly illustrate the ways in which AWB was prepared to manipulate or circumvent the OFFP in order to seek to benefit itself and the IGB. In particular:

¹²⁷⁴ CB 7/4681 (invoice dated 1 December 2004).

- (a) The negotiation of the Iron Filings Claim between AWB and IGB, and the ultimate agreement to pay the Iron Filings Compensation as an increase in the 'inland transportation' fees, demonstrate that it was well understood by both entities that 'inland transportation' payments were simply a means by which hard currency could be funnelled to the IGB. The Iron Filings Claim was a commercial claim agreed to be settled by payment to the IGB. The agreement to pay the compensation to the putative trucking company (Alia) as an addition to the 'inland transportation' fees made no sense at all unless it was understood that Alia simply passed such fees onto the IGB.
- (b) The Tigris Transactions demonstrate that the covert inflation of OFFP contracts was already known by AWB and the IGB as a means by which funds could be obtained from the UN escrow account other than for OFFP humanitarian goods. It was known because AWB and the IGB had for some time been doing precisely the same thing in order to recover the IGB fees from escrow. In the case of the Tigris Debt, the only difference was that the payments AWB made were not to the IGB itself, but to a company claiming to be a creditor of the IGB in order to settle an alleged pre-OFFP debt that was wholly unrelated to the OFFP.¹²⁷⁵

2043 ASIC submits that other than AWB personnel, two persons involved in some of the Tigris events were:

- (a) Davidson Kelly – he worked for BHP Petroleum until 2001. He was also the president of Tigris.
- (b) Stott – he left AWB and commenced working for BHP in 1996. He there reported to Davidson Kelly. Stott returned to AWB in July 2000.

¹²⁷⁵ Some documents strongly suggest that at least part of the 'debt' was to be passed on by Tigris to 'influential people': CB 1/33, 44.

The documentary evidence led by ASIC against Geary

2044 The documentary evidence led against Geary was voluminous. ASIC sought to break it up into groups relating to the alleged IGB fees, the Tigris transaction and the Iron filings transaction. I have found it convenient to list the evidence chronologically. The case against, Geary has been pleaded with great particularity. When I come to the allegations, I will follow the pleadings.

2045 On 2 May 2000, Stott (by then back at AWB) emailed Davidson Kelly of Tigris, noting that the debt of around US\$8 million owed by the IGB to BHP would become due in January 2001.¹²⁷⁶

2046 By letter and agreement dated 13 September 2000, BHP Petroleum assigned all its Iraqi assets and liabilities to Tigris, including the Tigris Debt (described in the letter as the 'Grain Board Receivable').¹²⁷⁷

2047 On 15 September 2000, Davidson Kelly emailed Stott seeking his views on a draft letter to AWB from Tigris.¹²⁷⁸

AWB engaged by Tigris to assist with recovery

2048 On 28 September 2000, Davidson Kelly formally wrote to Stott requesting AWB's assistance in recovery of the Tigris Debt.¹²⁷⁹ The letter also contained changes from the draft forwarded to Stott on 15 September 2000, indicating that Stott had discussions with Davidson Kelly as to its final form. The letter provided:

The Australian Wheat Board was helpful in assisting BHP Petroleum procure and deliver a cargo of 20,833 metric tonnes of Australian Wheat to Iraq in January 1996, prior to the adoption of the United Nations' Oil for Food Programme. The cost of the shipment was US\$5 million.

The cargo was delivered on the basis that BHP Petroleum would be reimbursed in due course for the cargo, not later than 5 years from the date of shipment, with interest running at 10% per annum compound. The debt falls due on 26

¹²⁷⁶ CB 2/1003.

¹²⁷⁷ CB 2/1311.

¹²⁷⁸ CB 2/1319.

¹²⁷⁹ CB 2/1333.

January 2001, and the amount due to BHP Petroleum at that date, including interest, will stand at US\$8,052,550.

BHP has appointed The Tigris Petroleum Corporation Limited as its agent to achieve the recovery of the outstanding obligation, and I should be very grateful if AWB Limited could assist us in achieving that result. A copy of the original Bill of Lading and the Export Invoice is attached for your information, together with a copy of the Assignment of the Obligation from BHP Petroleum to the Tigris Petroleum Corporation.

2049 On 20 February 2001, Hogan emailed Moona at the IGB:¹²⁸⁰

You may recall that during my recent visit to Baghdad, I inquired about the status of the MV Ikan Sepat on behalf of Tigris Petroleum.

You advised that this issue was currently being discussed by the Central Bank of Iraq and the Ministry of Petroleum.

Can you advise on any developments?

2050 On 4 May 2001, Hogan wrote to Abdul-Rahman concerning his intended visit to Baghdad proposing 'Tigris Petroleum' as one of a number of issues for discussion.¹²⁸¹

2051 On 10 May 2001, Davidson Kelly, on Tigris letterhead, wrote to Stott concerning Stott's advice on discussions which had taken place that week in Baghdad.¹²⁸² Davidson Kelly noted Iraq had acknowledged its obligation to Tigris, and had requested Tigris make a proposal for settlement to be transmitted through AWB. Davidson Kelly proposed that Tigris would accept simple rather than compound interest and thus the net amount due as at 26 January 2001 would be US\$7.5 million. He proposed 10 per cent simple interest on unpaid balances, and that the debt would be paid on two rests at 1 June 2001 and 1 December 2001. There was no discussion of the mechanism for payment.

2052 On 16 May 2001, Stott wrote to Abdul-Rahman noting recent discussions concerning repayment to Tigris for the grain shipped, and forwarded Davidson Kelly's letter.

¹²⁸⁰ CB 3/1569.

¹²⁸¹ CB 3/1615.

¹²⁸² CB 3/1619.

Stott asked it be passed to ‘the appropriate authorities’ for their consideration.¹²⁸³

2053 On 21 May 2002, Davidson Kelly emailed Stott,¹²⁸⁴ noting that Tigris had not given up on recovering the Tigris Debt and attaching copies of recent correspondence to BHP and the Vice President Ramadan of Iraq (the letter to BHP is misdated as 21 May 2001).¹²⁸⁵ Davidson Kelly’s letter to the Vice President referred to various previous correspondence, including a letter of 30 January 2002 from Davidson Kelly to Abdul-Rahman, in which Davidson Kelly referred to a suggestion that repayment could be linked to future deliveries of grain by AWB to Iraq.¹²⁸⁶

Iron Filings Claim made

2054 In July 2002, AWB received a complaint and a demand for compensation from the IGB arising from wheat shipments allegedly contaminated with iron filings. An agreement was soon struck in Iraq whereby AWB would pay the IGB US\$6.00 per tonne through the mechanism of the IGB fees in settlement of the Iron Filings Claim.

2055 On 25 July 2002, the IGB sent an email to Hogan asserting that there was iron powder in wheat shipments and reserving its right to compensation.¹²⁸⁷

2056 In relation to the Iron Filings Claim, Whitwell gave evidence that two vessels had been rejected by the Iraqis at Umm Qasr and that in response to that claim, AWB sent a delegation to Iraq which resulted in a settlement of the claim and the vessels started discharging.¹²⁸⁸

2057 On 26 July 2002, Long wrote to the IGB in response to its email dated 25 July 2002,

¹²⁸³ CB 3/1621.

¹²⁸⁴ CB 4/2359.

¹²⁸⁵ CB 4/2361, 2363.

¹²⁸⁶ CB 4/2364.

¹²⁸⁷ CB 4/2535.

¹²⁸⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1548, L28 – T1549, L4.

denying the 'iron powder' contamination allegation.¹²⁸⁹

2058 On or about 26 July 2002, Geary attended a meeting of the ELG in which a briefing note on Iraq was discussed. The briefing note referred to necessary actions in dealing with the Iraq market, including finalisation of a comprehensive crisis management plan to ensure AWB was best positioned in the event of any outbreak of hostilities and the development of a broad strategic approach towards Iraq, including trade and marketing, international governmental relations, Federal government relations, investment, risk management, grower and public relations.¹²⁹⁰

2059 On 2 August 2002, Geary (and others) received the email from Johnson entitled 'National Pool Iraq Update' referred to at paragraph 432.¹²⁹¹ The email commented that '[t]his is another sign of the fact they are not in need of grain at the moment, and they are using it as a reason to signal to Australia the change in status.' Thus ASIC contends that it was apparent from the outset that the 'iron filings' contamination, and the subsequent demand for compensation, was likely a ruse to obtain additional funds.

2060 As discussed above, on 2 August 2002, Geary was copied into an email from Long that referred to AWB sending a delegation to Iraq to discuss the Iron Filings Claim with the IGB.¹²⁹²

2061 On 5 August 2002, an internal AWB email noted the financial implications relating to the alleged contaminations.¹²⁹³ On the same date, AWB reserved its rights to claim against the shipowners in relation to the alleged contaminations (MV North

¹²⁸⁹ CB 4/2539.

¹²⁹⁰ Geary, sch A [32].

¹²⁹¹ CB 4/2553.

¹²⁹² CB 4/2555.

¹²⁹³ CB 4/2557.

Duchess¹²⁹⁴ and MV Tuo Hai¹²⁹⁵).

2062 On 6 August 2002, the IGB advised AWB by email that its claim in relation to the three contaminated shipments could be settled by the payment of US\$7.00 per metric tonne for four shipments.¹²⁹⁶

2063 On 7 August 2002, Geary (and others) were sent an email from Johnson entitled 'National Pool Iraq Update 7.8.02', which advised that a further vessel had been reported as contaminated with iron powder contamination and that the three vessels contaminated with iron filings could be unloaded if AWB paid the IGB US\$7.00 per tonne to sieve the grain.¹²⁹⁷ Johnson also said in his email:

Coincidentally this is about the same amount that they made an error on when converting US to Euro when the contract was booked. This can be negotiated next week, when the delegation arrives. Even at US\$7 it will be cheaper than diverting and reselling this grain elsewhere.¹²⁹⁸

2064 On 7 August 2002, Geary (and others) were sent an email from Stott entitled 'Visit to Baghdad', which forwarded an email of the same date from Davidson Kelly asking whether the forthcoming AWB delegation to Iraq would be prepared to carry with them a letter from Tigris to the Trade Minister of Iraq in relation to the repayment of the Tigris Debt.¹²⁹⁹

2065 On 7 August 2002, Stott advised Davidson Kelly of the imminent arrival of the AWB delegation and that they would take with them the letter from Tigris.¹³⁰⁰

2066 On 9 August 2002, Davidson Kelly faxed to Long a copy of the letter from Tigris to the

¹²⁹⁴ CB 4/2561.

¹²⁹⁵ CB 4/2563.

¹²⁹⁶ CB 4/2565.

¹²⁹⁷ CB 4/2567, 4/2569.

¹²⁹⁸ Geary, sch [35].

¹²⁹⁹ CB 4/2571.

¹³⁰⁰ CB 4/2573.

Trade Minister of Iraq. A copy of the letter was also emailed to AWB and forwarded to Edmonds-Wilson for inclusion in the brief for the delegation.¹³⁰¹

2067 In mid-August 2002, Lindberg led an AWB delegation (also including Flugge, as consultant, and Cracknell) to Iraq to discuss the Iron Filings Claim with the IGB and the Iraqi government. By that date, Flugge had ceased to be a director and chairman of AWB. An executive Iraq brief¹³⁰² prepared for the AWB delegation referred to the Iron Filings Claim and that 'AWB also pays a fee, covered under sales contract, to the Ministry of Transport covering inland transport fees and discharge costs.'

2068 ASIC submits that it should be inferred that members of the AWB delegation received this executive Iraq brief, consistent with usual practice¹³⁰³ and read the statement to the fees being paid to the Ministry of Transport. ASIC says that there is no evidence of any reaction or response to that statement.

2069 On 12 August 2002, Mitchell Morison sent an email to Geary, which stated:¹³⁰⁴

Iraq – Chris Whitwell has managed the process well. IGB looking for \$7/mt discount on vessels. AL./MT/TF/BC team going into Iraq this week

2070 On 12 August 2002, Peter McBride (McBride) sent an email to Geary, in which McBride stated that:¹³⁰⁵

The issue surrounding Iraq generated an influx of media calls over the weekend. The story keeps getting oxygen from the political parties. The coverage has shifted from the contamination issue to Iraq's threat that it may look at all future wheat sales due to the Government's support of the US stance on military action against Iraq.

2071 On 12 August 2002, Anna Rasalingam (Rasalingam) sent an email to Geary's assistant

¹³⁰¹ CB 4/2581–2585.

¹³⁰² CB 4/2603.

¹³⁰³ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1549, L20 – T1550, L3; T1613, L6–13.

¹³⁰⁴ CB 4/2587; Geary, FP [13].

¹³⁰⁵ CB 4/2593; Geary, FP [14].

Sophie Moraitis (Moraitis) which attached a report covering International Sales & Marketing's input for the CEO Report covering the month of July. The report stated:¹³⁰⁶

MV Tuo Hai (15kmt), MV North Duchess (26kmt) MV Tai An Hai (42kmt) have all been shifted from berth to anchor due to alleged presence of iron powder. In addition to these vessels, IGB have claimed iron powder was also present on the MV Mani P (51kmt). This vessel completed discharge on 5 July 2002.

IGB have requested a USD7 pmt discount in light of their quality claim, and indicated they are prepared to complete discharge of all remaining vessels if payment was forthcoming.

- 2072 On 15 August 2002, Richardson sent an email to Geary which forwarded an email from Nalla Sagna of AWB in Geneva, regarding the IGB's claim that some shipments of wheat were contaminated with iron powder.¹³⁰⁷
- 2073 On 16 August 2002, the AWB delegation arrived in Iraq. There was no evidence of a trip report being prepared following the August trip to Iraq.
- 2074 On 19 August 2002, Whitwell noted in an email that agreement had been reached with the Iraqis to discharge the 'iron filing' vessels.¹³⁰⁸ In another email, AWB recorded that it had negotiated a US\$6.00 per metric tonne 'discount' in light of the claim.¹³⁰⁹
- 2075 ASIC contends that the evidence suggests that the agreement reached was that AWB would pay US\$6.00 per metric tonne as a rebate or refund. As shown below, the option of discounting future shipments was later raised by DFAT but rejected by AWB.
- 2076 On 21 August 2002, Whitwell in an email referred to the agreement reached with Iraq, which he described as 'USD6 pmt on the 4 iron filing vsls and assurances from IGB

¹³⁰⁶ CB 4/2543; Geary, FP [15].

¹³⁰⁷ Geary, FP [16].

¹³⁰⁸ CB 4/2607.

¹³⁰⁹ CB 4/2609.

going forward to execute the contract smoothly.’¹³¹⁰

2077 On 21 August 2002, Peter McBride sent Geary (and others) an email from Peter McBride entitled ‘Daily Media Brief – 21 August’ which noted that a media conference was held on Lindberg’s return from Iraq, and the signing by AWB of a contract for the supply of 2 million tonnes of wheat.¹³¹¹

2078 On 22 August 2002, the IGB emailed Hogan requesting that he ‘confirm settlement of the contaminated quantities with iron powder that will be cleaned and screened in our silos by USD 6 (six) per mt for total cargo to each vessel.’¹³¹²

2079 On 22 August 2002, Hogan forwarded the IGB’s email to Edmonds-Wilson and Whitwell.¹³¹³ Hogan’s forwarding email notes

We need to think how we ‘legally’ pay Iraq.

2080 ASIC contends that it is clear that what was being contemplated was a payment to Iraq – not a discount on current or future shipments.

2081 On 22 August 2002, Lindberg, Hockey and Stewart had a meeting with Minister Downer and his staff informing them of the quality claims on the four vessels and the settlement agreement between AWB and Iraq. AWB noted their concerns about the genuineness of the quality complaints. Minister Downer advised that, on his information, the concerns had been genuine. The Prime Minister also attended the meeting briefly. Lindberg told Downer and the Prime Minister that AWB had ‘accepted a price reduction for the shipments’.¹³¹⁴

¹³¹⁰ CB 4/2613.

¹³¹¹ CB 4/2611.

¹³¹² CB 4/2619.

¹³¹³ CB 4/2619.

¹³¹⁴ CB 4/2617.

2082 The long-form contract for each of contracts A1111 and A1112,¹³¹⁵ the contracts under which the contaminated wheat was shipped, provided at paragraph 9F:

Amounts related to the settlement of claims relevant to shortages, damages and any other discrepancies for each shipment (according to the confirmation of the Secretary General's designee which should be sent to the Secretary General within 24 hours) must be remitted to Iraqi account.

Paragraph 9 of each contract defined the 'Iraqi account' as the account held with BNP New York branch against which a letter of credit is to be issued in payment of the contract – i.e. the UN escrow account.

2083 ASIC says that thus the contracts provided that any settlement of claims had to be paid into the escrow account. These were contracts the UN had approved.

2084 On 23 August 2002, Edmonds-Wilson sent Geary (and others) an email entitled 'Middle East Report - Week ending 23 August 2002'.¹³¹⁶ The email stated:

Successful negotiation of the 4 claimed 'iron powder' contaminated vessels that had previously stopped discharging. 1 x vessel completed, 1 x vessel undergoing fumigation and 2 x vessels are at berth discharging.

and that the total tonnage of wheat to be shipped to Iraq during the calendar year was 2.179 tonnes.¹³¹⁷

2085 The two-paged CEO Report for August 2002 concerning IS&M,¹³¹⁸ which ASIC alleges Geary saw, noted as follows:¹³¹⁹

Significant Issues:

Iraq

- Iron powder vessels -.all four original vessels have completed loading and sailed, however Iraq Grains Board (IGB) have claimed contamination on

¹³¹⁵ CB 3/2195, 2199.

¹³¹⁶ CB 4/2621.

¹³¹⁷ Geary, sch A [36].

¹³¹⁸ CB 4/2631.

¹³¹⁹ CB 4/2632.

two more vessels (currently at berth). These vessels will be discharged, however USD6 pmt will be payable.

2086 On 26 August 2002, Whitwell emailed Abdul-Rahman about the Iron Filings Claim.¹³²⁰

Whitwell wrote:

We would like to confirm again our agreement to the settlement of contaminated quantities as agreed by our delegation from the 15-18/8/2002. To that end we would ask for your proposal with regard to a settlement process that would abide by relevant United Nations guidelines with respect to the Oil for Food program.

An option might be to offset this amount against monies outstanding to Tigris Petroleum and we would appreciate your view on this.

2087 Prior to sending the email to Abdul-Rahman, Whitwell sent a draft of his email to Long, Hogan and Edmonds-Wilson. Long replied, suggesting that the Tigris offset option be included for the Iraqis' consideration.¹³²¹

2088 On 6 September 2002, Abdul-Rahman emailed Hogan:¹³²²

You are kindly requested to send representative from yr side and representative from (Tigris Petroleum Cooperation Pty Limited) in order to discuss settlement of outstanding matter.

2089 On 7 September 2002, the IGB advised AWB of the results of its testing and requesting that AWB 'confirm settlement ... by USD(6) six per MT'.¹³²³ It repeated its request on 9 September 2002.¹³²⁴

2090 On 9 September 2002, AWB (Long) wrote to the IGB confirming AWB's agreement to the settlement amount of US\$6.00 per metric tonne.¹³²⁵

2091 On 10 September 2002, Rasalingam sent an email to Geary's assistant, Moraitis, which

¹³²⁰ CB 4/2627.

¹³²¹ CB 4/2625.

¹³²² CB 4/2641.

¹³²³ CB 4/2643.

¹³²⁴ CB 4/2645.

¹³²⁵ Fax: CB 4/2647; Email: CB 4/2649.

attached the report covering International Sales & Marketing's input for the CEO Report covering the month of August referred to above at paragraph 2085.

2092 On 11 September 2002, Long sent an email to Davidson Kelly that was copied to Geary and others including Stott entitled 'Tigris/BHP/AWB/IGB.' The email stated:¹³²⁶

We may have an angle to assist you with debt recovery, ie the IGB has suggested we may send representatives from AWB and Tigris to Baghdad to discuss the matter.

Before we progress, would you please send to me all relevant documentation from BHP authorising AWB to negotiate/settle with Tigris/yourself on their behalf in part/full payment for the Iraqi debt to BHP.

The documentation will be scrutinised by our legal department and the authority for me to negotiate with you/IGB will need to be signed off by the Executive of the AWB.

2093 On 12 September 2002, a meeting of the Corporate Risk Review Committee (CRRC) was held. Geary was noted as being on the distribution list. It was reported in the section on International Sales and Marketing:¹³²⁷

Iraq

Iron powder vessels – all four original vessels have completed unloading and sailed, however Iraq Grains Board (IGB) have claimed contamination on two more vessels (currently at berth). These vessels will be discharged, however USD6 pmt will be payable.

2094 On 12 September 2002, Jane Steggall sent an email to Moraitis, attaching a Managing Director's Report. The Report stated that the vessels in respect of which iron powder was allegedly found would be discharged, and that US\$6.00 per metric tonne would be payable.¹³²⁸

2095 ASIC submits that it is plain from the report that members of the CRRC had a level of familiarity with the Iraq market and the processes of payment through the UN. ASIC contends that it was also plain from the report that settlement of the Iron Filings Claim

¹³²⁶ CB 4/2651; Geary, sch A [37].

¹³²⁷ CB 4/2653 at CB 4/2658; Geary, FP [18].

¹³²⁸ Geary, FP [19].

involved a payment by AWB of US\$6.00 per metric tonne.

2096 On 16 September 2002, Long sent to the CRRC members and others a memorandum which he also copied to Geary.¹³²⁹ Long wrote:

During 1995/1996 BHP agreed to provide USD 5m worth of Australian wheat to the IGB as a gesture of good faith in view of BHP's desire to enter the Iraqi oil market.

AWB shipped the wheat on board MV Ikan Sempat in Jan. 1996 and were paid by BHP Petroleum.

IGB have acknowledged the outstanding debt owed to BHP who subsequently assigned their rights to Tigris Petroleum. The current debt including interest stands at some USD 8.8m.

AWB has always acknowledged that it would assist in this debt recovery process. This issue has been raised by AWB personnel with the Minister of Trade, HE Mohamed Medhi Saleh on a few occasions since the debt became due on 26 January 2001. The Minister has always acknowledged this debt.

AWB has agreed to pay IGB USD 6 per tonne on approximately 300 000mt under Contract Number A1111/A1112 as settlement for the 'iron filings' quality issues amounting to some USD1.8m. AWB raised the possibility of settlement of this quality claim by AWB paying Tigris as settlement of the Iraqi debt to Tigris. *UN Regulations prohibit direct payment of funds to Iraq whilst Iraq is under UN sanctions.* The IGB has recently invited representatives from AWB and Tigris to visit Baghdad to discuss this issue.

Furthermore, AWB today received a communication from the Iraq Charges de Affaires (attached) quoting the Iraqi Foreign Minister stating 'as regards to the statements by Australian Foreign Minister claiming that Australia owes Iraq USD 500m, this is not true as the amount pending is only around USD8.8m in favour of Australia/Tigris Petroleum Corporation Pty Ltd representing value of a quantity of wheat shipped in 1996 plus interest until 30th Jan 2002.'

...

Actions, Approvals

1. ISM request AWB Legal to review the file attached and to advise CRRC if ISM is authorised to negotiate with IGB/Tigris the settlement of the Iraqi debt to Tigris. Specifically it would involve AWB I paying monies to Tigris Petroleum subject to all the correct paperwork being received from both IGB and Tigris. Advice to go to CRRC for meeting Thursday 19 Sept 2002.

2. ME Desk/Government Relations to devise the most appropriate strategy for liaising with the Australian Government in relation to the latest

¹³²⁹

CB 4/2679, 2680, Geary, sch A [39] [emphasis added by ASIC].

advice from Charge de Affaires. This will need to be done quickly if we are to gain political mileage from it.

3. ME Desk to prepare a letter to HE Medhi Saleh from Andrew Lindberg alerting him to our concern over the recent correspondence and seeking his reconfirmation of the Australian debt.

2097 ASIC submits that it was thus made clear to all AWB senior management, if it was not clear beforehand, that 'UN Regulations prohibit direct payment of funds to Iraq whilst Iraq is under UN sanctions.'¹³³⁰

2098 On 17 September 2002, Long forwarded to Geary an email from Foran to Long regarding a debt allegedly owed by Iraq to Australia for sales of wheat from 1987 to 1990.¹³³¹ The forwarded email notes that:

The monies owing to Tigris Petroleum for wheat sales are unrelated to the outstanding monies owed by Iraq from credit default as a result of the Gulf conflict.

This transaction relates to a decision by Tigris to fund a shipment of wheat to Iraq in '96 to assist the company in business development opportunities in Iraq.

2099 Geary responded on the same date asking for the matter to be raised at the ELG.¹³³² The fact that Geary asked that the matter be raised with the ELG supports that finding that he was of the view that AWB should observe legalities, as he later demonstrated when dealing with the Iron Filings claim, as discussed below.

2100 On 17 September, Moraitis forwarded the above email from Long, with a message from Geary which relevantly stated:¹³³³

Re note from Michael Long on Iraqi debt, I agree with what you are saying. I have asked Michael to prepare a briefing note for the ELG. Will not be this week as we will wait for you to get back.

CES knows most about the background as he negotiated the deal from AWB

¹³³⁰ CB 4/2679.

¹³³¹ CB 4/2691-2692; Geary, FP [20].

¹³³² CB 4/2693.

¹³³³ CB 4/2693.

side, then left to join BHP at around the time it was executed.

- 2101 The email was sent from Moraitis' email account. ASIC contends that Geary's sending (or causing of Moraitis to send) the email is to be inferred from the content of the email, the fact that Moraitis worked for Geary, and the fact that the email is signed 'Peter'.¹³³⁴
- 2102 On 18 September 2002, Whitwell wrote to the IGB confirming AWB's agreement to 'the settlement amount of USD6 pmt to cover removal of "iron powder" from the vessel MV "Andros" under contact A1111.'¹³³⁵
- 2103 On 21 September 2002, the IGB wrote to AWB noting further contamination in the M/V Andros, and that 'discharge of this cargo will be effected as per our agreement of settlement of USD (6) pmt.'¹³³⁶
- 2104 On 25 September 2002, Geary attended a meeting of the board of AWBI. At that meeting, a Corporate Risk Report for the period ending 9 September 2002 was discussed.¹³³⁷ The Report stated that the vessels in respect of which iron powder was allegedly found would be discharged, and that US\$6.00 per metric tonne would be payable.
- 2105 The matters discussed at the meeting and Geary's attendance at the meeting are recorded in minutes dated 18 November 2002.¹³³⁸
- 2106 An Iraq ELG Brief dated 1 October 2002 noted the Tigris Debt and the proposal to IGB that the rebates for iron filings contamination be offset against the Tigris Debt:¹³³⁹

Iraq Debt

¹³³⁴ Geary, FP [21].

¹³³⁵ CB 4/2701.

¹³³⁶ CB 4/2711.

¹³³⁷ AWB.0291.0246.

¹³³⁸ Geary, FP [22].

¹³³⁹ CB 5/2831.

... In addition, IGB owe Tigris Petroleum USD 8 million for Cargo of Wheat sent to Iraq in 1996.

...

- We have proposed the current rebates for iron powder should be offset against Tigris Petroleum. We have received a positive response from IGB. ISM requires ELG direction in regard to this matter.

2107 ASIC contends that Geary's receipt of the document is to be inferred from his membership of the ELG and from the fact that ELG direction was being sought.¹³⁴⁰

2108 On 6 November 2002, Whitwell sent an email to Davidson Kelly (copied to Hogan and Long) entitled 'Re: your email'. Long forwarded the email to a distribution list called 'Executive', with the subject line 'Tigris/BHP/IGB.'¹³⁴¹ ASIC submits that it is to be inferred that Geary was included in this distribution list, as at this time he was Group General Manager Trading and a direct report to Lindberg.

2109 Whitwell's forwarded email summarised AWB's discussions with Abdul-Rahman about the Iron Filings Claim. In particular, Whitwell suggested three proposals for the IGB to make the payment. The three proposals were referred by Abdul-Rahman to the Minister. The email stated:¹³⁴²

Had a first meeting with Dr Yousif [Abdul-Rahman] where we put you [sic] approximate figures forward – however we emphasised that any agreement on the final actual figures had to be reached between Tigris representatives and appropriate persons in the govt – we were only facilitating possible repayment.

...

We suggested the following proposal

1. offsetting vessel claims (iron filings) against Tigris (BHP) debt –
2. Balance of debt to be recovered against new business (load up contract). – approx. USD7.5 million (if using compound)
3. No further vessel claims would be used as offset – but would need to be redirected through UN account.

¹³⁴⁰ Geary, FP [23].

¹³⁴¹ CB 5/2871.

¹³⁴² CB 5/2869.

Yousif referred the issue to the Minister who we met that evening.

The minister wants to keep the two issues (vessel claims and Tigris debt) separate. He stated that the simple interest amount on the Tigris debt had received approval for repayment and that he felt through loading up the next Phase provided this opportunity.

Given that the next phase is due for discussion in Dec it was agreed that it was important that Tigris have arranged figures and agreed them prior to then. Sabah told us of your plans to be there this month.

We discussed with Sabah the possible difficulties in incorporating the entire debt into one 500 K contract. Suggested some alternate pressure could be bought to bear on the Govt by yourselves to increase the tonnage of next phase to make things easier. He said he would discuss this with you.

2110 ASIC alleges that Geary knew that AWB proposed to 'load-up' contracts with the IGB to recover the supposed debt, after offsetting the iron filings compensation claim. ASIC says that the quoted paragraph numbered 3 makes clear that Geary knew that any quality claim payments due by AWB to the IGB should be paid into the UN escrow account.

2111 The report of this trip also recorded a meeting on 28 October 2002 with Minister Saleh. It noted:¹³⁴³

Simple Interest amount to be recovered by Tigris through loading up the next Phase 13 wheat business. This has received Cabinet approval.

Vessel rejection claims as per original agreement to be paid through inland transport system against next contract - phase 13 ...

AWB to advise re payment mechanism of rebate and to brief Tigris re Iraqi position on their debt. Tigris to have arranged figures and agreed prior to AWB visit to Iraq in December.

2112 ASIC submits that the second quoted paragraph makes plain that the 'transport system' was a mechanism for passing moneys to Iraq and that this must have been apparent to Geary.

2113 The report recorded a meeting with Sabah Jumah (Jumah), Tigris Petroleum's representative in Iraq, on 29 October 2002 after their meeting with IGB and the

¹³⁴³ CB 5/2866.

Minister:¹³⁴⁴

Sabah was DG of Iraqi Oil Board? Has connections with the Ministry of Oil and is a consultant with Tigris petroleum. Is well connected with Iraqi elite. AWB briefed him as to the Iraqi position vis a vis the Tigris debt and again clarified that our role was as facilitator only and that Tigris had to agree amount with Iraqis prior to our next meeting in Iraq. He advised Tigris rep would be in Iraq shortly to finalise.

We discussed possible difficulties in raising the price that significantly to incorporate the entire debt into one 500 K contract. Suggested some alternate pressure could be brought to bear on the Iraqi Govt to increase the tonnage of next contract to make things easier to pass through UN. He said he would look into it.

2114 ASIC alleges that Geary knew by then that AWB sought to disguise and hide the loading-up of the contract from the UN.

Tigris and AWB agree on debt recovery commission

2115 On 15 October 2002, Davidson Kelly emailed Long suggesting that a fee of US\$500,000.00 be paid to AWB for assisting with 'the recovery of the loan', and noting Davidson Kelly's expectation that repayment of the loan would be 'based upon deliveries of grain' by AWB.¹³⁴⁵ This was acknowledged by Long on 16 October 2002, who proposed that AWB's fee be paid in full out of the first shipment.¹³⁴⁶

2116 ASIC contends that there was a discussion, presumably around this time, between Hogan and Long about 'clipping the ticket' which Hogan explained as charging Tigris a fee to collect the Tigris Debt.¹³⁴⁷

Loading up of contracts and requests for payment through Alia

2117 On 31 October 2002, Hogan prepared Iraq trip notes and emailed them to Whitwell in relation to a meeting with the IGB on 28 October 2002. At that meeting there was

¹³⁴⁴ CB 5/2906; Geary, sch A [42].

¹³⁴⁵ CB 5/2845.

¹³⁴⁶ CB 5/2847.

¹³⁴⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1011, L7-16.

discussion about how to pay the Iron Filings Compensation and how to retrieve the Tigris Debt.¹³⁴⁸

2118 The email states:

Suggested following proposal

Offsetting vessel claims (iron filings) against Tigris (BHP) debt - approx. USD2 million.

Balance of debt to be recovered against new business (load up contract) - approx USD7.5 million (if using compound)

No further vessel claims would be used as offset - but would need to be redirected through UN account.

IGB - confused abt amount and offer made by Tigris - Jan 2001, where Tigris would accept simple interest amount.

AWB advised we were not involved [sic] in the actual amount, but only the mechanism.

IGB - referred any decisions to Minister.

Meetintg [sic] with Minister - 28th October 2002

Simple interest amount to be recovered through loading up the next Phase 13 wheat business.

Vessel rejection claims as per original agreement to be paid through inland transport payment system against next contract -Phase 13 **(this contract, if executed will not commence loading until April 2003 - inland payment will be due end of April 2003 - so we will be holding those funds until such time - good insurance against redirection of vessels in war situation).**

2119 The trip report of the meeting with the IGB on 28 October 2002 also noted that AWB was to 'get a copy of the letter sent by Tigris in Jan this year [2001].'¹³⁴⁹

2120 On 6 November 2002, Whitwell sent an email to Davidson Kelly entitled 'Re: your email.'¹³⁵⁰ The email was a briefing to Davidson Kelly on the results of a recent meeting with Abdul-Rahman. The material effect of which was that:

¹³⁴⁸ CB 5/2863 [emphasis in original].

¹³⁴⁹ CB 5/2903.

¹³⁵⁰ CB 5/2869.

- (a) AWB proposed to the IGB the 'loading up' of contracts as a way of recovering part of the Tigris Debt;
- (b) the Iraqi Minister for Trade had advised that the repayment of the Tigris Debt had received cabinet approval, and 'loading up' of the next phase OFFP contracts provided an opportunity to effect repayment;
- (c) Hogan and Whitwell had discussed with Jumah 'possible difficulties in incorporating the entire debt into one 500K contract' and that they had suggested that increasing the tonnage of forthcoming contracts would 'make things easier'; and
- (d) AWB proposed to offset the Iron Filings Claim against the Tigris Debt but that the Iraqi Minister for Trade wanted to keep these issues separate.

2121 On 6 November 2002, Long forwarded this email to 'the Executive', including Geary.¹³⁵¹

2122 On 7 November 2002, Geary (and others including Lindberg, Ingleby, Stott, Long and Hogan) were sent an email from Whitwell entitled, 'Recent Trip to Iraq'.¹³⁵² The email referred to the payment to the IGB of the Iron Filings Compensation as 'separate from other debt issues' and included the statement, 'the minister has asked for repayment though inland transport mechanism.'

2123 The email further noted, 'Tigris Debt has cabinet approval for repayment – final amount to be agreed during the next month by Tigris/Iraqis and then mechanism for repayment to be agreed during next visit.'¹³⁵³

2124 ASIC submits that the words 'would need to be directed through UN account' in item 3 of that email makes clear that AWB (including anyone who received this report)

¹³⁵¹ CB 5/2871, Geary, sch A [40].

¹³⁵² CB 5/2901, Geary, sch A [41].

¹³⁵³ Geary, sch A [41].

understood that the proper course was for compensation to be paid back into the UN escrow account.

2125 ASIC contends that as a recipient of Whitwell's email of 7 November 2002, Geary must have known that the Tigris Debt had been approved by the Iraqi cabinet for repayment with the mechanism for repayment to be agreed during the next visit. ASIC submits that Geary must also have known the Minister had asked for payment of the iron filings compensation through the 'inland transport mechanism.'

2126 Geary was on study leave - Executive MBA (Carlton) during the period from 13 October 2002 to 9 November 2002. ASIC contends that there is no evidence that he did not have access to his emails during this period. ASIC says that there is no evidence that he did not review his emails upon his return. ASIC says that if he did not have access, then it ought be reasonably inferred that, like any responsible officer would do in any organisation, he read his emails upon his return from leave rather than deleting or ignoring them.

2127 The report also recorded a meeting on 28 October 2002 with Minister Saleh on the Tigris issue. Hogan and Whitwell's report is noted above at paragraph 2111.¹³⁵⁴

2128 ASIC says that the inclusion of the words 'Vessel rejection claims as per original agreement to be paid through inland transport system against next contract - phase 13...' and 'AWB to advise re payment mechanism of rebate...' in the report makes clear that Minister Saleh, Hogan and Whitwell understood that the 'inland transport system' was a mechanism for passing moneys to Iraq. ASIC says that must also have been apparent to anyone in AWB who read the report.

2129 Relevant excerpts of the report are also referred to above at paragraph 2113.

2130 ASIC submits that the last paragraph quoted at paragraph 2113 shows a recognition by Hogan and Whitwell, which was being explained to all the AWB senior executives to whom the report was sent, that the recovery of the Tigris Debt by loading up the

¹³⁵⁴ CB 5/2904 [emphasis added by ASIC].

price of wheat contracts, was to be hidden from the UN: there was an apprehension the debt recovery would become apparent if the price increase was too great. Spreading the compensation over a larger contract would be 'easier to pass through UN' undetected.

2131 ASIC contends that 'inland transport' connoted the payment of hard currency to Iraq was by this time well known within AWB. ASIC submits that no-one ever asked what was meant by the 'inland transport mechanism' or 'inland transport system'¹³⁵⁵ term which – to the uninitiated – do not have any obvious connection to the settlement of compensation claims. ASIC submits that nor did anyone ever suggest that it was inappropriate, dangerous or risky for AWB load up contracts to deal with the Tigris Debt and the Iron Filings Claim.¹³⁵⁶ ASIC says that it should be inferred that this was because it was well-known that 'loading up' had been occurring for years in respect of IGB fees. ASIC says that no-one asked Hogan whether the UN had approved the inland transport payments, the Tigris or the iron filing rebate payments.¹³⁵⁷

2132 ASIC says that according to Whitwell, the reference to paying through the inland transport payment mechanism meant paying Alia and then Alia paying the Iraqis.¹³⁵⁸

2133 Hogan gave evidence that no-one asked him whether the UN had approved the inland transport payments, the Tigris or the iron filing rebate payments.¹³⁵⁹

2134 By letter dated 17 November 2002, Tigris authorised AWB to negotiate the mechanism for payment of the Tigris Debt on its behalf.¹³⁶⁰ That mechanism was stated to be a 'surcharge per tonne...agreed with the AWB in relation to forthcoming contracts for

¹³⁵⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1022, L27 – T1023, L3.

¹³⁵⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1024, L7-11.

¹³⁵⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1025, L11-18.

¹³⁵⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1559, L25-9; T1562, L8-11.

¹³⁵⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1025, L11-18.

¹³⁶⁰ CB 5/2921, 2923.

the supply of Australian grain.¹³⁶¹

2135 Between 19 and 21 November 2002, Long and Whitwell travelled to Baghdad and visited the IGB, having been invited by IGB to make a further offer of Australian wheat. According to the trip report,¹³⁶² Long asked the IGB on 20 November 2002 whether 'for corporate governance reasons' the repayment of the iron filings rebate could be passed through Tigris or through further equipment to be provided by AWB rather than through Alia. IGB agreed to pass these suggestions onto the Minister.

2136 At a meeting with the Minister of Trade on 21 November 2002, Long asked the Minister to reconsider the mechanism for repaying the rebate claim, and was advised the Minister would discuss the matter with the Ministry of Finance. Whitwell later recorded that it was during this visit that it was agreed with IGB that the Tigris Debt would be recovered by allowing the new contract to be a conduit for a repayment of US\$8,375,000.00 from the IGB to Tigris.¹³⁶³

Advice from DFAT on quality refunds to Iraq

2137 On 25 November 2002, Cuddihy (DFAT) emailed Stephens at the Australian mission to the UN in New York.¹³⁶⁴ The email read as follows:

During the dispute over alleged contamination of some AWB Ltd wheat which arrived in Iraq earlier this year, AWB Ltd accepted that some of the cargoes were tainted with iron fillings. It agreed to accept a lower price for the 'tainted' wheat.

In this context, AWB Ltd has asked me whether there's a mechanism for refunding the money paid by Iraq for the faulty wheat. The only warranty arrangements I am aware of require AWB Ltd to supply replacement wheat, rather than refund monies paid.

Grateful if you could ask OIP what AWB Ltd's options are in this case.

2138 This enquiry was raised by DFAT as a result of Hockey raising with Cuddihy the issue

¹³⁶¹ CB 5/2924.

¹³⁶² CB 5/2949.

¹³⁶³ CB 5/2969.

¹³⁶⁴ CB 5/2929.

of how the agreed iron filings rebate could be paid to Iraq (see email from Hockey to Whitwell of 27 November 2002 discussed below). The handwriting of Paul Stephens (Stephens), who worked in the Australian Mission to the UN from January 2002 to January 2005, is on the document and reads 'return to BNP Iraq account escrow account the only way'.¹³⁶⁵

2139 On 26 November 2002, Stephens replied to Cuddihy's email.¹³⁶⁶ He stated that he had spoken to OIP and Treasury who said AWB had one of two options. He described the options as follows:

1. If there are additional shipments of wheat to go to Iraq under the contract in question, AWB can give a discount to Iraq when it receives its next invoice for those additional shipments.
2. If there are no further shipments under the contract, AWB can transfer funds to the Iraq escrow account operated by BNP Paribas. Any such transfer would have to clearly acknowledge the LC number (and any other relevant details) that would tie the refund explicitly to the AWB contract and would enable Treasury and BNP to ensure that the money is assigned back to the relevant phase and sector.

I hope this is clear. If not, please let me know.

2140 On 27 November 2002, Hockey sent an email to Whitwell, Hogan and Long.¹³⁶⁷ Hockey stated:

In a conversation with DFAT the other day I raised that we were going to have to find out a way of settling the iron filings payment issue, and asked for suggestions.

2141 Hockey then set out verbatim points 1 and 2 of Stephens' email to Cuddihy of 26 November 2002.¹³⁶⁸ ASIC says that it must have been clear to AWB that, Stephens having raised the matter with both OIP and the UN Treasury, the UN and DFAT's

¹³⁶⁵ CB 5/2929.

¹³⁶⁶ CB 5/2931.

¹³⁶⁷ CB 5/2933.

¹³⁶⁸ CB 5/2931.

position was considered, formal and clear.¹³⁶⁹

2142 ASIC says that moreover, the DFAT advice was consistent with what the contracts, and the relevant UN resolutions, required.

2143 Whitwell could not recall anyone within AWB telling him that AWB should adopt one of the two recommendations that DFAT had advised it should take in relation to the payment of the Iron Filings Claim.¹³⁷⁰

2144 On 28 November 2002, Whitwell emailed Abdul-Rahman:¹³⁷¹

Following our meeting with the Minister last week we raised the issue of payment of the recent quality issue.

In particular we asked the Minister to reconsider his position to repay it directly to Alia Transport and instead asked whether it would be possible to offset it against Tigris for reasons already advised.

The Minister said he would discuss the matter again with his Excellency the Minister of finance and revert.

We would respectfully ask whether his Excellency has reached a decision in this regard

Thank you for you kind attention to this matter.

2145 On 2 December 2002, Whitwell sent an email to Geary and others reporting on the most recent trip to Baghdad.¹³⁷² The attached trip report noted that the Tigris Debt would be discussed with the Minister, and that Long asked the Minister to reconsider the mechanism for repaying the Iron Filings Compensation through Tigris.¹³⁷³ The attached report also stated:

Rebate - This was then raised by IGB. ML asked whether for corporate governance reasons the issue of repayment of this debt, which AWB acknowledged, could be passed through Tigris or through further equipment

¹³⁶⁹ Paul Stephens' affidavit [11]-[12] CB 10/8174.

¹³⁷⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1564, L21-3.

¹³⁷¹ CB 5/2939.

¹³⁷² CB 5/2943.

¹³⁷³ CB 5/2944, Geary, sch A [43]; Geary, FP [24].

to be provided rather than through Alia. IGB agreed to pass on these concerns to the Minister and perhaps suggested that it could be one of these 3 routes.

Sale on 'loaded-up' contract confirmed

- 2146 On 4 December 2002, the IGB wrote to AWB confirming the next 1 million MT contract and that the cost of inland transport was not included in the price, but would be mutually agreed on later.¹³⁷⁴ This was confirmed by Whitwell the same day.¹³⁷⁵
- 2147 On 5 December 2002, Whitwell sent an email to Geary and others entitled 'SALE 1 MILLION TONNES TO IRAQ' advising that AWB had sold 1 million tonnes of wheat to Iraq. This email is referred to below at paragraph 2432.¹³⁷⁶
- 2148 On 5 December 2002, Johnson sent Geary an email, which was a reply to the email from Whitwell referred to at paragraph 2147.¹³⁷⁷ Johnson's email refers to the importance of the 1 million tonne to the performance of the National Pool and the possibility of obtaining a very high (US\$180 FOB) return.
- 2149 On 5 December 2002, Davidson Kelly sent Whitwell an email entitled 'Tigris Petroleum', which Whitwell forwarded to Long, Hogan and Edmonds-Wilson, attaching a letter from Tigris to Abdul-Rahman.¹³⁷⁸ In the letter Tigris proposed to recover from Iraq only simple interest on 'the outstanding amount of the loan' and to waive future interest. The letter also referred to a 'mechanism for the repayment of the loan, tied to future shipments of Australian grain.'
- 2150 On 9 December 2002, Whitwell sent Abdul-Rahman an email proposing two options for payment of the Tigris Debt and the Iron Filings Compensation. Both proposals involved calculating the amount to be paid in excess of the already agreed price to

¹³⁷⁴ CB 5/2953.

¹³⁷⁵ CB 5/2955.

¹³⁷⁶ CB 5/2957, Geary, sch [44].

¹³⁷⁷ CB 5/2959; Geary, FP [25].

¹³⁷⁸ CB 5/2961, 2963.

deliver the tonnage CIF Umm Qasr.¹³⁷⁹ The email refers to an email of 28 November 2002 in which AWB again requested that the iron filings rebate be offset against the Tigris Debt.

2151 Option A was to add to the inland transport fee of US\$51.15 per tonne a sum of US\$8.375 per tonne (which over the million tonnes would provide the \$8,375,000.00 due to Tigris), but then deduct from that US\$2.01389 per tonne in respect of the iron filings compensation. This option meant that the moneys due to Iraq would be deducted from the amount to be recovered from the UN escrow account payable to Tigris.

2152 Option B was simply to add to the price and the inland transport fee, US\$8.375 per metric tonne in respect of the Tigris Debt and for the 'quality issue rebate to be settled as previously discussed' – in other words, to pay the IGB through the inland transport mechanism.

2153 On 11 December 2002, Whitwell prepared a memorandum to senior management, including Geary, with the subject 'Iron filing rebate payment and Tigris Petroleum'. ASIC do not submit that it was actually sent to Geary or that Geary received it. That memo said:¹³⁸⁰

Mindful of the possible implications for AWB on a corporate governance basis IS&M have tried to suggest a number of different methods of repayment of the debt in order to avoid a direct payment to a company with links to the Iraqi regime which may be construed to be in contravention of the UN Sanctions.

We have suggested the following during our last two visits.

- Offsetting the debt against the Outstanding debt to 'Tigris petroleum' (approx. USD 8.35 million)
- Reducing the any new contract price by the amount of the rebate on a pmt basis
- Repaying the debt through the provision of aid in some form – Wheat, Health supplies etc.

¹³⁷⁹ CB 5/2965.

¹³⁸⁰ CB 5/2969.

However, unfortunately in discussion with the Minister of Trade he has continually insisted on repayment directly as an addition to the inland transport. Now that the new contract has been concluded ISM need a sign off to organise this payment.

Other Issues

- According to DFAT any repayment of a quality rebate should be either re-paid through UN escrow account or as a contract price reduction.
- Timing – New contract to be shipped in all likelihood from April to August (after any likely US led attack).
- Repayment could be made under the guise of a service agreement between Alia/AWB Actions – Sign off from ELG for ISM to agree and sign the following for the National Pool
- Agree with IGB the process for repayment of debt and repay through next contract.
- AWB/Tigris to sign confidentiality and liability agreement for debt process
- AWB to obtain copy of the IGB/Tigris agreement for debt repayment.

2154 On or about 11 December 2002, AWB entered into contract number A1670 with the IGB for the supply by AWB to the IGB of 500,000 tonnes of wheat.

2155 Contract A1680 contained terms including the following:

- (a) AWB agreed to sell and the IGB agreed to buy 500,000 tonnes of Australian wheat (and 5 per cent more or less at AWB's option);
- (b) the CIF Free in Truck price for the wheat was €280.37 per tonne;
- (c) the wheat was to be discharged Free into Truck to all silos within all governorates of Iraq;
- (d) AWB agreed to ship the wheat during the period 1 January 2003 to 30 June 2003, subject to receipt of appropriate UN approval;
- (e) payment was to be made by a procedure that involved the Central Bank of Iraq requesting the bank holding the UN escrow account to open an irrevocable, non-transferable letter of credit in favour of AWB for payment from the UN escrow account; and

- (f) a copy of the 661 Committee letter stating that AWB was eligible for payment from the UN escrow account was required to effect payment.

2156 The price per tonne of €280.37 agreed in Contract A1680 had been inflated by:

- (a) €51.30 in respect of purported fees; and
- (b) the sum of €8.40 which was calculated to recoup the entirety of the Tigris Debt from the UN escrow account once contracts A1670 and A1680 were paid in full.

2157 On 13 December 2002, Edmonds-Wilson sent an email to Geary and others detailing the new contracts, A1670 & A1680. The first line of the email is set out at paragraph 845.¹³⁸¹

2158 The email referred to the payment of inland transportation fees of €51.30 per tonne and an additional component of €8.40 per tonne incorporated into contracts A1670 and A1680 on account of the Tigris Debt:

	A1670 - 500,000mt APW10.5%
Total Free in Truck	280.37EUR (USD279.53)
Inland transport	51.30EUR (USD51.15)
CIF	229.07EUR (USD228.38)
TIGRIS DEBT *	8.40EUR (USD8.375)*
Exchange Rate	USD1: EURO.9970
Sea Freight	USD 23.00 PMT BUDGET
GROSS FOB (USD)	USD197.01
COSTS **	USD25.00
NETT FOB TO AWB(I)	USD172.01

2159 It also stated that AWB was to deduct US\$500,000.00 for providing the debt collection service to Tigris.

2160 Under the heading 'TIGRIS DEBT', the email stated:¹³⁸²

As part of the contract agreement, AWB will recover the Tigris debt (outstanding since 1996) on behalf of Tigris Petroleum (USD8,375,000/1Million mt). For this service, AWB are deducting USD500,000 (ie: AWB will pay Tigris Petroleum USD7,875,000 on a pro rata basis as vessels are being shipped).

¹³⁸¹ CB 5/2977.

¹³⁸² CB 5/2978. Geary, sch [45].

- 2161 ASIC submits that it should be inferred from the contents of the email that the recipients were aware that the recovery of the Tigris Debt by AWB through the loading up of contracts and receipt from the UN escrow account was an improper attempt to disguise conduct flatly inconsistent with UN resolutions.
- 2162 Edmonds-Wilson made a handwritten note showing that the price of contracts A1670 and A1680 included components for inland transportation fees and Tigris.¹³⁸³
- 2163 Geary was on leave for eye surgery during the period from 11 December 2002 to 17 December 2002.
- 2164 On 18 December 2002, the IGB sent Hogan an email setting out the breakdown (copied below) of costs for Phase XII (A1670) and Phase XIII (A1680) contracts including the inland transport fee, the quality issue rebate and the Tigris Debt.¹³⁸⁴

Grain Board of Iraq

Ref: 2488

DDT: 17/12/2002

Pls be advised that details of prices will be as follow:-

- Cost insurance freight Umm Qaser USD 220 pmt.
- Inland transport USD 51.15 pmt.
- Quality issue rebate 2016133186
Divided by (1) million mt
= USD 2.016133/86
- Inland charges USD 51.15 plus 2.017
- Total USD 53.167 = 53.33 Euro
- Tigris debt tonnes USD 8.375 pmt (USD 8.375.000)
Divide by (1) million
- Final contract price in USD USD 279.53 pmt equal equal to 280.37 Euro.

Pls confirm and send signed confirmation..

B.Regards

Yousif M. Abdul-Rahman
Director General

¹³⁸³ CB 5/2981; Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T633, L26 – T634, L7.

¹³⁸⁴ CB 5/2991.

2165 ASIC submits that in effect, the email indicates that the Tigris and Iron Filings components should be dealt with in accordance with 'Option B' in Whitwell's email of 9 December.

2166 Hogan forwarded the email to Whitwell and Edmonds-Wilson.¹³⁸⁵

2167 On 23 December 2002, Whitwell was sent a copy of an email from Abdul-Rahman to Davidson Kelly entitled 'Loan to supply grain/wheat—January 1996'. Abdul-Rahman wrote:¹³⁸⁶

[We] are pleased to inform you that we have reach an agreement with AWB on the final above subject.

Pls coordinate with them accordingly.

2168 Whitwell copied the email the same day to Geary and the other persons on the 'private & confidential' email of 13 December 2001 (CB 2977).¹³⁸⁷

2169 On 23 December 2002, Whitwell sent Geary (and others) an email entitled 'LOAN TO SUPPLY GRAIN/WHEAT - JANUARY 1996', which forwarded the email from the Director General of the IGB dated 23 December 2002 confirming that the IGB had reached agreement with AWB on the 'above subject.'¹³⁸⁸

2170 On 23 December 2002, Edmonds-Wilson faxed the contracts A1670 and A1680 to Cuddihy and DFAT with a UN 'Notification to ship goods to Iraq' in respect of each contract.¹³⁸⁹ He requested the material be forwarded to the UN for approval. ASIC submits that neither document made any mention of the inflation of the contracts to recover the Tigris Debt, or the manner of payment proposed for the iron filings compensation.

¹³⁸⁵ CB 5/2993.

¹³⁸⁶ CB 5/3011.

¹³⁸⁷ CB 5/3011; Geary, sch A [46].

¹³⁸⁸ CB 5/3011.

¹³⁸⁹ CB 5/3013.

2171 ASIC submits that the evidence establishes that by 23 December 2002:

- (a) the loading up of contracts A1670 and A1680 to recover the Tigris Debt of US\$8.375 million from the UN escrow account by inflating the price of wheat by US\$8.375 per tonne was known to Geary;
- (a) Geary knew that the loading up of the price of wheat was not disclosed to the UN, or DFAT;
- (b) Geary knew that contracts A1670 and A1680 did not disclose that the price included a sum for recovery of the Tigris Debt;
- (c) Geary knew that UN sanctions prohibited direct payments to Iraq;
- (d) Geary knew that Alia and the inland transport mechanism was a conduit by which payments could be made to Iraq without detection by the UN or DFAT, in circumvention of UN sanctions;
- (e) Geary knew this was the means by which Iraq required compensation under the iron filings settlement be paid, notwithstanding the terms of AWB contracts with Iraq as disclosed to the UN;
- (f) Geary, knew that by an exchange of correspondence, AWB and IGB had entered into an agreement, collateral to contracts A1670 and A1680 for the supply by AWB to Iraq of 1 million tonnes of wheat, to pay to Iraq the sum of US\$2.01389 per tonne shipped under these contracts purportedly as compensation for iron filings contamination. This agreement was not referred to in contract A1670 or A1680, or in any other document referred to the UN or DFAT for approval.

2172 On 24 December 2002, Whitwell sent Geary an email regarding various issues relating to Iraq. In relation to contracts A1670 and A1680, Whitwell stated:¹³⁹⁰

We now have the contracts in from the IGB signed and they have gone to DFAT for onward transfer to the UN.

2173 In January and February 2003, Whitwell continued to edit his 11 December 2002 draft

¹³⁹⁰ Geary, FP [26].

memorandum referred to at paragraph 2153 above.

2174 On 14 January 2003, Whitwell emailed Long concerning discussions they had as to the content of the memorandum. Whitwell wrote:¹³⁹¹

I have redrafted the memo to include your suggestions and to highlight the issues etc and to now have one action point. I do think it is important on an issue such as this that IS&M are shown to have explored all the avenues before making this recommendation and highlight the exposure that this may bring the company. I agree that we have to keep a lid on this but feel strongly that we cannot afford to go down the line of repayment and when a problem possibly occurs be told by the ELG 'we were not aware of the possible implications of this method of repayment'. We have also provided a couple of solutions re: timing for the Service Agreement which may work to lessen the exposure level.

What were your reasons for just a file note?

2175 The UN approved contract A1680 on 17 January 2003.¹³⁹² Contract A1670 was approved on 22 January 2003.¹³⁹³

2176 On 21 January 2003, Whitwell sent back signed confirmation to the IGB of the agreement on pricing in relation to the Tigris Debt and the Iron Filings Claim, attaching signed copies of the long-form contracts.¹³⁹⁴

2177 On 22 January 2003, Lyons¹³⁹⁵ spoke with Whitwell discussing the Iron Filings Compensation and the proposed payment through the IGB fees mechanism.¹³⁹⁶ Lyons kept a file note of that meeting with Whitwell dated 22/1/03. The note was 'Iron filings' and read:¹³⁹⁷

¹³⁹¹ CB 5/3077.1.

¹³⁹² CB 5/3095.

¹³⁹³ CB 5/3125.

¹³⁹⁴ CB 5/3107 (fax), CB 5/3109 (initialled copy of IGB email setting out components), CB 5/3111, 3113, 3117, 3119 (contracts), CB 5/3123 (fax confirmation).

¹³⁹⁵ In late 2001 or early 2002, Lyons became the lawyer principally responsible for providing legal services to the IS&M and the Chartering Divisions.

¹³⁹⁶ CB 5/3129.

¹³⁹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1350, L21 - T1351, L18.

Att Chris Whitwell

\$6 per tonne rebate—IRAQ—when shipments held up late last year—iron filings—payment within course existing shipments—BUT Iraq Gov said NO—need to pay through Inland Transport—payment to a Jordan based company—links—you have looked and don't think any prohibition re: 'rebates'.

DFAT—off the cuff discussion.

2178 Lyons sought advice on the matters raised by Whitwell from Brasington of BDW.

Brasington provided advice by email which stated (inter alia) that:¹³⁹⁸

The real answer to the question you raised is that to make a cash rebate would be to provide funds contrary to the embargo resolution, resolution 661 (1990).

Resolution 661 (1990) provides at clause 4:-

"...all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq...except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs."

To make a cash rebate would directly contravene clause 4 above. If so, the Government of the Commonwealth of Australia would be obliged to prevent AWB Limited from making the remittance of funds.

The same difficulty would not arise if price reductions were factored in to current or future sales to the equivalent amount of the rebate.¹³⁹⁹

2179 ASIC submits that the BDW email made it clear that Lyons did not seek advice about payments to a third party (such as Alia) outside Iraq. Rather, the advice was sought about a cash payment ('rebate') to the Government of Iraq or to a commercial, industrial or public utility in Iraq. ASIC says that the BDW email made clear that to make the payment to the IGB would be contrary to the sanctions.

2180 On 23 January 2003, Hockey sent Whitwell an email entitled, 'Iron Filings' noting

¹³⁹⁸ CB 5/3131.

¹³⁹⁹ CB 5/3131.

that:¹⁴⁰⁰

My feeling on the issue is that (i) I don't think we should breach a UN sanction, so Jess's opinion carries all the weight (iii) if its legal, we should get an independent written opinion to that effect and just do it (iv) otherwise I think we are just going to have to advise Iraqis that we have tried everything and the only way we are able to recompense is through Escrow as a repayment and see what their response is.

My concern is there is a significant risk that the OIP will be unhappy if we don't go through their processes (high chance they will discover what has happened - our only possible defence is a written legal opinion to say it's OK), and given we are always dependent upon their goodwill in shuffling phase funds, prioritising etc, we should do everything possible to keep them happy.

From a public relations perspective, the only red lights are breach of sanctions/legalities. 3rd parties with Iraq connections are no worries (as long as its legal).

2181 On 24 January 2003, Lyons sent Whitwell an email entitled 'Iron Filings.'¹⁴⁰¹ The email raised proposals as to possible mechanisms for making payments to the IGB in light of UN sanctions. These proposals were to make the payments in instalments, or that it be made to a company other than the IGB in a jurisdiction other than Iraq, or the renegotiation of the price of future vessels.

2182 Lyons said, *inter alia*:¹⁴⁰²

In summary, this [referring to UN resolution o661] that the Government of the Commonwealth of Australia would be obliged to prevent AWB Limited from making any remittance of funds to the IGB.

This does not mean, however, that a payment might not be able to be made which will comply with the terms of the UN Resolution. As a minimum, if AWB management determines to make the payment, then it should be made in the following circumstances:

- 1 The payment be made in instalments over time and coincide with payments for future shipments of wheat (ie no a lump sum payment);
- 2 The payments preferably be made to a company other than the IGB and in a jurisdiction other than Iraq; and
- 3 The payments be reported as being made as part of a settlement reached

¹⁴⁰⁰ CB 5/3133.

¹⁴⁰¹ CB 5/3135.

¹⁴⁰² CB 5/3135.

between AWB and IGB, the terms of which contemplated that IGB would agree not to take any action against AWB for the alleged contamination of the 8 vessels in 2001 with iron filings AND would agree to enter into the contracts for the purchase of Australian bulk wheat in the future in exchange for a renegotiation of the price of the 8 vessels.

If we ensure that the above requirements are met, then, I consider it will be at least arguable that we are not 'making funds or financial resources available' to the Iraqi Government. Instead we are repaying part of the contract price for the 8 vessels following a re-negotiation of the sale price due to a downgrading of the grain (which potentially contained iron filings).

2183 Lyons re-sent the same email later that day, copying in Cooper, AWB in-house counsel.¹⁴⁰³

2184 On 7 February 2003, Geary received a memorandum from Whitwell addressed to him and Long, and copied to others, entitled 'Iron filing rebate payment and Tigris Petroleum fee.' The memorandum was as follows:¹⁴⁰⁴

¹⁴⁰³ CB 5/3137.

¹⁴⁰⁴ CB 5/3161, 3165.

AWB Limited Memorandum



To: P Geary, M Long

CC: S Scales, D Johnson, D Hogan, O Johnstone, J Cooper, J Lyons, D Hockey, M Thomas

From: C Whitwell

Date: 7 February 2003

Subject: **Iron filing rebate payment and Tigris Petroleum fee**

PRIVATE AND CONFIDENTIAL

This memo is in respect to refunding the Grain Board of Iraq the quality rebate of approx USO 2,016,133 through the inland transport payments for the new contract as requested by the Minister of Trade, Iraq. In addition, for the record IS & M has negotiated (through an uplift in price the recovery of a USO 8.375 million outstanding debt to Tigris by IGB through this contract. AWB will repay this debt back to Tigris less an agreed recovery fee of USO 500 K on a pro rata basis as tonnage is shipped.

Overview

Delegation led by Andrew Lindberg (August 2002) to Baghdad agreed to settle the contamination of the 'Iron Filings' vessels by paying them USD 6 pmt for each vessel total = USO 2,016,133

After being approached by Tigris Petroleum AWB and IGB have agreed to allow the new contract to be the conduit for a repayment of USO 8,375,000 owed to Tigris by IGB for a cargo of wheat shipped in 1996. IGB have agreed to raising the contract price by the debt amount and when payments are made under the Letter of Credit AWB will pay Tigris its debt less AWBs recovery fee.

We have suggested the following during our last two visits.

- Offsetting the debt against the Outstanding debt to 'Tigris petroleum' (approx USO 8.35 million)
- Reducing the any new contract price by the amount of the rebate on a pmt basis
- Repaying the debt through the provision of aid in some form – Wheat, Health supplies etc.

However, in discussion with the Minister of Trade he has continually insisted on repayment directly as an addition to the inland transport and said that this was his understanding of the agreement with Andrew Lindberg – Michael Long was present and confirms that this was discussed. Now that the new contract has been concluded ISM need a sign off to organise this payment when shipments start.

Issues

- Possible implications for AWB on a corporate governance basis ie/ direct payment to a company with links to the Iraqi regime may be construed to be in contravention of the UN Sanctions.

The relevant UN Security Council Resolution is 661 (1990). This resolution provides at clause 4: -

"...All States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons

AWB Limited Memorandum



AWB.8001.0017

or bodies within Iraq.... except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs."

In summary, this means that the Government of the Commonwealth of Australia would be obliged to prevent AWB Limited from making any remittance of funds to the IGB.

AWB Legal opinion in this regard is set out below.

This does not mean, however, that a payment might not be able to be made which will comply with the terms of the UN Resolutions. As a minimum, if AWB management determines to make the payment, then it should be made in the following circumstances:

LPP

1. The payment is made in installments over time and coincides with payments for future shipments of wheat (ie not a lump sum payment);
2. The payments preferably be made to a company other than the IGB and in a jurisdiction other than Iraq; and
3. The payments be recorded as being made as a part of a settlement reached between AWB and IGB, the terms of which contemplated that IGB would agree not to take any action against AWB for the alleged contamination of the 8 vessels in 2002 with iron filings AND would agree to enter into contracts for the purchase of Australian bulk wheat in the future in exchange for a renegotiation of the price on the 8 vessels.

If we ensure that the above requirements are met, then Legal consider it will be at least arguable that we are not 'making funds or financial resources available' to the Iraqi Government'. Instead, we are **repaying** part of the contract price for the 8 vessels following a re-negotiation of the sale price due to a downgrading of the grain (which potentially contained iron filings).

In addition to the above the UN Security Council resolutions also require (resolution 986 (1995) clause 8) that the cost of food exports to Iraq must be met by draw down from the UN "escrow account". Furthermore draw down from the escrow account is only allowable under strict conditions. Those conditions include, at clause 8(a)(iii) that the goods to which payment is referable shall have arrived in Iraq. In this case, the goods have already arrived in Iraq and HAVE been paid for in full. However, the Resolutions are SILENT on the procedure for any repayment of part of the price in circumstances where there has been a quality complaint (and a subsequent renegotiation of price).

This may therefore give us more scope to make the repayment to IGB.

Even if we make payment as outlined above, there is still a risk that the Australian Government and/or the United Nations will take a contrary view on the interpretation of the above mentioned resolutions and declare that AWB has breached the terms of those resolutions by making the payment. This is a commercial and political issue, which AWB's management will need to consider.

- According to an informal discussion with DFAT any repayment of a quality rebate should be either re-paid through UN ESCROW account or as a contract price reduction however they have not had a full legal argument put in front of them or been told officially. In Public affairs opinion as long as the repayment is legal and could not be seen to be breaking UN Sanctions then we should proceed (with the proviso that we have an independent legal opinion to that effect – see above legal opinion).

Public Affairs also expressed concern that this would not be well received by the UN OIP office and that there was a reasonable chance of them finding out. IS & M on the other hand do not want them involved and feel confident that this issue could be handled without the need for the OIP to be consulted. It has been articulated to us and we have circumstantial

AWB Limited Memorandum

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AWB .8001.0018

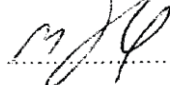
evidence that other participants in the OIP program (Russian and Pakistani companies) have had to sort out quality problems in a similar way and it is unlikely either their national governments or the OIP were consulted

- IS & M feel strongly that a failure to repay the IGB as discussed will lead to serious consequences for AWBs relationship with the IGB. IS & M also believe that failure to refund this agreed debt in this way would have serious implications for the execution of the new contracts. AWBI are aware of all the issues laid out above and in light of the commercial imperative of this situation agree with the recommendation as laid out below. **They do however insist that the Managing director is appraised of the situation.**

Actions

Whilst IS & M have received a number of different opinions from different areas of AWB and an informal opinion from DFAT we still feel this issue is a grey area with no prescriptive answers. Based on the opinions we do have and the commercial circumstances surrounding this issue IS & M recommend and seek approval for the following:

- IS & M is to repay debt as per method outlined in AWBs legal opinion (and requested by the Minister of Trade) directly to Alia Transport in Jordan in instalments. IS & M will also look to obtain written agreement from IGB to the payment in the format agreed by legal however it is not guaranteed.
- Managing director **only** to convey our intentions to the Australian Government at the appropriate time prior to Shipment. The timing of such a disclosure is important and we would recommend that nothing be done until at least Letters of Credit are in place for these contracts. Given that this is unlikely to happen until after a war with Iraq it may allow us a further chance of renegotiation with a new regime.
- IS & M to finalise as soon as possible a written agreement with Tigris with regard to the settlement of their debt.



Recommended

M Long
General Manager International Sales and Marketing.

.....
Approved

P Geary
Group General Manager – Trading

2185 Lyons accepted that the legal opinion contained in this memorandum was taken directly from her email to Whitwell.¹⁴⁰⁵

- 2186 Geary signed the 7 February 2003 memorandum prepared by Whitwell as 'approved.' ASIC says that the evidence thus establishes that Geary read the memorandum, understood its contents and supported the strategy set out in it.¹⁴⁰⁶
- 2187 ASIC alleges that Geary must have known what was obvious on the face of the memorandum: the so-called legal opinion was an attempt to devise a method whereby the payments to Iraq would not be obvious by spreading them thinly over future shipments (paragraph 1), to hide the fact of payment to Iraq by making the payment to an intermediary rather than IGB direct and in a country other than Iraq (paragraph 2), and to falsify the nature of the transaction by recording it as a transaction different from payment of compensation (paragraph 3).
- 2188 ASIC says that no competent officer could fail to see the risk in following this 'advice' and acting contrary to the clear, specific advice given to AWB by DFAT after consultation with the UN in November 2002.
- 2189 ASIC contends that the memorandum recognised the plain corporate governance issues associated with making a direct payment to a company with links to the Iraqi regime.
- 2190 ASIC submits that following. The implications for AWB on a corporate governance basis was that if payment of the Iron Filings Claims was not made in the appropriate way, it would be in contravention of UN sanctions.¹⁴⁰⁷ The only company to whom a payment was to be made was Alia. Geary knew Alia was linked to the Iraqi regime by at least December 2002. Geary also knew that the Australian government, were it aware of the contemplated payments, would be obliged to stop them. Geary also knew that DFAT had, on UN advice, indicated that any iron filings compensation should be paid to the escrow account or deducted from the price in future sales. Nonetheless, Geary decided that AWB should both load-up two contracts to recover

¹⁴⁰⁶ See the emails of 20 to 21 February 2003 referred to below in which Geary confirms that he signed the memorandum (CB 5/3187).

¹⁴⁰⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1570, L5-7 (Whitwell).

\$8.375 million for Tigris (and thus earn a fee of US\$500,000.00) and to pay the iron filings compensation 'as per method outlined in AWB's legal opinion (and requested by the Minister of Trade) directly to Alia Transport in Jordan in instalments.'

2191 ASIC says that AWBI were 'aware of all the issues laid out above' and agreed with the recommendation 'in light of the commercial imperative of this situation.' That imperative was to retain the Iraqi grain trade, which it feared would be lost if the compensation claim was not paid.

2192 ASIC says that the memorandum was forwarded to Geary, who in turn forwarded it with his approval to Lindberg's office.

2193 ASIC submits that the intention of AWB, known to Geary, was to hide from the Australian government these transactions – that is, the inflation of the contract price to recover the Tigris Debt and the repayment of the iron filings compensation via the inland transport mechanism to Alia. ASIC says that AWB did not ever inform the Australian government of either matter.

2194 On 10 February 2003, Geary sent a file note to Lindberg entitled 'Iron Filing Rebate.' The note was as follows:¹⁴⁰⁸

FILE NOTE

To: Andrew Lindberg
From: Peter Geary
Date: 10 February 2003
Subject: Iron Filing Rebate

PRIVATE & CONFIDENTIAL

Andrew

This is a sensitive issue as you can understand.

The first vessel under the new contract is due to be loaded in early April and a lot of things may change in Iraq between then and now. As we get closer to the loading of the first vessel, we will need to advise you so you can OK the payment mechanism with DFAT, ie Minister Downer.

My guess is that DFAT and the UN will have major problems with this and if they say 'no', then we will have to address another way to get the monies to Iraq - either reducing prices on future contracts or supplying additional wheat - whichever the Pool prefers.

Will discuss in more detail over the phone or when I next see you.

Cheers



Peter Geary

- 2195 ASIC submits that this was highly improper behaviour by Geary. ASIC says Geary approved payments being made to Iraq through the inland transport mechanism, despite clearly articulated corporate governance risks, despite clear DFAT advice as to how Iraq could receive compensation, and despite Geary's knowledge of Resolution 661 (from his earlier role in New York, from the introduction of the IGB fees and from the clear warning in the memorandum).
- 2196 ASIC submits that any suggestion that Geary's approval was implicitly conditional on Lindberg obtaining approval from DFAT prior to the payments being made, and therefore justifiable, is spurious in circumstances where:

- (a) DFAT had advised that it did not consider payments could be made, other than through the Escrow Account or by contract price reductions. There was no genuine basis for considering that DFAT would approve the payment through the inland transport mechanism. The memo rather hopefully notes that DFAT 'have not had a full legal argument put in front of them or been told officially.'
- (b) The legal advice obtained in relation to the payment would not go higher than that it was 'at least arguable' that AWB was complying with the terms of the UN Resolutions.
- (c) The memo does not indicate that DFAT's express approval would be obtained prior to the payments being made. The memo says that AWB's intentions should be conveyed to DFAT.
- (d) The timing of the approach to DFAT is said to be important and that it should wait until letters of credit are in place, presumably to create a sense of urgency and pressure DFAT to refrain from formally objecting (or to present it with a *fait accompli*).
- (e) Geary does not raise the Tigris issues in his note to Lindberg.

2197 ASIC submits that it is difficult to imagine a scenario whereby an officer of a company, acting bona fide in the best interests of the company, could ever approve (in the case of their subordinates) or recommend (in the case of their superiors) conduct that had so plainly been stated to be improper, and that was likely to cause harm to the company if revealed.

2198 ASIC says that even if Geary genuinely believed that the proposed payments to Iraq would not proceed, either because war would intervene, or because DFAT or the UN would reject the proposal, Geary's failure to reject the proposal outright was wrongful.

2199 ASIC submits that whilst AWB maintained its agreement with the IGB to pay in excess of US\$2 million to the government of Iraq, disguised through the inland transport mechanism, and whilst AWB intended and continued to take further positive steps to honour that agreement, the prospect that AWB would or would likely suffer harm should AWB's intention become public remained.

2200 ASIC says that there was plainly a risk of serious reputational damage if the public learned that AWB had agreed to make cash payments, via a third party conduit, that AWB knew were the very types of payments UN Security Council resolutions had called on Australia to prevent.

2201 ASIC submits that given that serious risk, when Geary first learned of the proposal, he ought to have stopped it in its tracks, for example by:

- (a) instructing Long that AWB was not to make, or agree to make, or suggest the making of any payment that was contrary to DFAT advice and the prohibitions in Resolution 661;
- (b) instructing Long to inform IGB in writing that AWB would not make any such payment as it was contrary to the advice of DFAT and the UN;
- (c) instructing Long that AWB should resolve the Iron Filings Claim on one of the bases identified by DFAT as acceptable; or alternatively seeking DFAT and UN approval for any proposal to settle the Iron Filings Claim on a different basis;
- (d) taking reasonable steps to supervise Long and ensure that his (Geary's) instructions were complied with.

2202 ASIC argues that Geary did nothing of the sort. Instead, the course Geary took was as follows:

- (a) he signed as 'approved' the 7 February 2003 memo. That act alone gave the imprimatur of senior management to the proposed payment of the Iron Filings Claim, and made it more likely to occur, and more likely to damage AWB if it came to light;
- (b) he provided the 'approved' memo to Lindberg, under cover of an ambiguous memorandum which gave qualified approval to what was plainly improper conduct.

2203 In that memo, he proposed that AWB inform Minister Downer or DFAT that AWB was contemplating conduct that the UN had expressly called upon its member states to prevent. It was proposed that the 'OK' would not be sought until the ships were on the water. ASIC says that appears to have been an attempt to pressure the Minister

or DFAT to approve the payments, or at least to make any objection moot, notwithstanding the obvious inconsistency with the UN resolutions.

2204 ASIC submits that it matters not if Geary's 'guess' was that Downer or DFAT would not approve the conduct. Geary's proposal to attempt to involve the government in AWB's improper plan, only served to further tarnish AWB's reputation when the matters became public.

2205 ASIC submits that Geary ought never have:

- (a) signed the recommendation in the form proposed by Long, nor sent it to Lindberg;
- (b) recommended the resolution of the Iron Filings Claim on any basis other than that advised by DFAT; or
- (c) suggested that Lindberg 'OK the payment mechanism with DFAT, i.e. Minister Downer' in circumstances where it was plain that such approval would not be forthcoming.

2206 ASIC says that Geary had a conversation with Lyons during which they discussed Lindberg approving the payment mechanism proposal referred to in the memorandum dated 7 February 2003.¹⁴⁰⁹ This conversation was documented in a file note prepared by Lyons, which included the statement 'have we cleared this with AL - yes' and indicated that the memorandum was provided to Lindberg 'about how sensitive/political this is + we will be informing Downer.'¹⁴¹⁰

2207 Around 7 February 2003, ASIC contends that Geary had a discussion with Whitwell regarding the Iron Filings Claim, and the possible strategies for managing the claim. The discussion was verbal and occurred at AWB's Melbourne office.¹⁴¹¹

¹⁴⁰⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (4 November 2015) T1361, L22 - T1362, L08 (Lyons).

¹⁴¹⁰ CB 5/3185.

¹⁴¹¹ Geary, FP [27].

2208 Clause 9F of the long-form contracts required any payment for damages to be made to the escrow account. That clause¹⁴¹² provided:

F. Amounts related to the settlement of claims relevant [sic] shortages, damages and any other discrepancies for each shipment (according to the confirmation of the secretary general's designee which should be sent to the secretary general within 24 hours) must be remitted to Iraqi account.

ASIC submit that the 'Iraqi Account' was clearly defined as the BNP operated UN escrow account.

2209 Whitwell gave evidence that Long wanted Whitwell to prepare a memo in which Long would recommend a proposal to Geary who was Long's superior.¹⁴¹³

2210 As noted above, there were various iterations of the memorandum.¹⁴¹⁴ The final version of the memo¹⁴¹⁵ was hand-delivered by Whitwell to the people on the 'to' and 'cc' list, including Geary, Long, Hogan, Johnson, Cooper, Hockey and Scales and Lyons. Whitwell gave evidence that he did not see those recipients in person, he gave it to their secretaries. In relation to Geary, Whitwell believes he hand-delivered it to Geary's secretary.¹⁴¹⁶

2211 The final version of the memorandum was then signed as 'recommended' by Long and subsequently 'approved' by Geary, and forwarded to Lindberg's office.

2212 Whitwell gave evidence that he had one informal discussion with Geary in relation to the memo concerning the timing, that war was imminent and it was highly unlikely AWB was going to face this issue in a pre-war scenario.¹⁴¹⁷ AWB was, according to Whitwell, playing for time. It was unlikely that the contracts were going to be

¹⁴¹² CB 3/2195.

¹⁴¹³ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1569, L11-14.

¹⁴¹⁴ CB 5/3061, 3063, 3065, 3067, 3069.

¹⁴¹⁵ CB 5/3161, 3615.

¹⁴¹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1576, L26 - T1577, L3.

¹⁴¹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1577, L14-8.

executed until after the war. But if it came before the war it was a 'different issue.' Whitwell did not recall any response from Geary.¹⁴¹⁸

2213 On or about 12 February 2003 the OIP determined that AWB was eligible for payment from the UN escrow account in relation to the sale of wheat pursuant to Contract A1680.

2214 On 14 February 2003, Lyons sent an email to Whitwell attaching an example deed of release for the Tigris transaction and stating, '... describe the circumstances of us making the payment...' and offering help with the final document.¹⁴¹⁹

2215 On or about 20 February 2003, Geary had a conversation with Lyons during which they discussed Lindberg approving the iron filings payment mechanism proposal referred to in the memorandum dated 7 February 2003.¹⁴²⁰ This conversation was documented in a file note prepared by Lyons, which included the statement 'have we cleared this with AL – yes' and indicated that the memorandum was provided to Lindberg 'about how sensitive/political this is + we will be informing Downer.'¹⁴²¹ This conversation is documented in a file note prepared by Lyons.¹⁴²²

2216 On 20 and 21 February 2003, Geary had an email exchange with Long in which Geary confirmed he signed the 7 February 2003 memo:¹⁴²³

Michael,

I did sign with a covering note to Andrew. We need to sit down face to face with Andrew and tell him all the implications before we move forward. Jess

¹⁴¹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1659, L4–8 (xxn Hill); T1676, L31 – T1677, L26 (Rexn).

¹⁴¹⁹ CB 5/3175.

¹⁴²⁰ Lyons outline CB 10/8113, [9].

¹⁴²¹ CB 5/3185, T1361, L22 – T1362, L8.

¹⁴²² Geary, sch A [49].

¹⁴²³ CB 5/3187; Lyons subsequently, in August 2004, was looking for a copy of this memorandum and emailed Geary. Geary sent an email to his secretary stating that 'this will be on the Iraq file or Tigres (sic)' (CB 5/3189).

also needs to be involved. I will try to find some time for him next week. When will the first vessel under the new contract load??

2217 At around this time, AWB made provision in the Pool accounts for the payment in respect of the iron filings compensation. That provision was still in the accounts when hostilities commenced a few weeks later. The 2003 provision for the Iron Filings compensation is recorded in a later email exchange between Whitwell, Edmonds-Wilson, Owen, Jans and Chinlook Tan (Tan) of AWB trade financing, and others (in the context of settling all historical claims between AWB and the IGB).¹⁴²⁴

2218 Whitwell prepared a draft of the Tigris agreement from the document provided to him by Lyons. He emailed his draft back to Lyons on 12 March 2003 requesting her to settle his draft, noting that he required it for discussions with the counterparties 'next week.'¹⁴²⁵

2219 The recitals in the draft were as follows:¹⁴²⁶

A. Following various correspondence between AWB representatives and the President of Tigris petroleum it was agreed that in return for an agreed facilitation fee AWB Limited would help Tigris Petroleum in their attempts to recover a debt due to them by the Grain Board of Iraq for a cargo of Australian Wheat shipped to them by Tigris Petroleum in 1996.

B. It was also agreed between AWB and Tigris that the facilitation fee of USD 500,000 would be deducted from the total debt amount and that AWB would refund USD 7,875,000 to Tigris. It was also agreed that this facilitation fee would also be deducted by AWB Limited would be on an upfront basis and that repayments to Tigris would not begin until AWB had received this fee.

C. On or about the 20–21st November 2002 during a visit to Iraq Grain Board in Baghdad it was agreed by AWB limited in conjunction with the Grain Board of Iraq and Tigris Petroleum that a contract being discussed at that time for one million tonnes would include an uplift in the contract price by US 8, 375,000 Dollars.

D. The basic contract was finally agreed on the 4th December 2002, with AWB Limited effected a sale of 1,000,000 tonnes to the Grain Board of Iraq, Baghdad. Subsequent amendments were then effected and the final contract was signed, including the agreed Tigris uplift on the 12th December 2002.

¹⁴²⁴ CB 7/4341–4353.

¹⁴²⁵ CB 5/3237.

¹⁴²⁶ CB 5/3239.

- 2220 The recitals accord with the details of the transaction to recover the Tigris Debt as revealed by the records to this time and accord with Whitwell's evidence concerning it. However, as will be seen, these recitals were removed from subsequent versions of the agreement.
- 2221 Whitwell's draft provided that AWB's commission for recovering the debt would come from the proceeds of the first shipments, and that BHP or its nominee would be paid US\$8.375 per tonne, upon payment from the UN, on each tonne delivered under contracts A1670 and A1680 up to a total of US\$7,875,000.00. It directed that AWB's commission be paid to its account at the Bank of New York.¹⁴²⁷
- 2222 On 17 March 2003, Whitwell responded to emails from Davidson Kelly stating that he (Whitwell) required sign off from the Managing director on various issues around the Tigris deal and was unable to give final confirmation for a date and time to meet until later in the week.¹⁴²⁸
- 2223 On or about 9 April 2003, Contract A1680 was amended so that:
- (a) the CIF Free in Truck price for the wheat was €247.04 per tonne CIF free out to Red Sea or Persian Gulf Ports; and
 - (b) the date for shipment of the wheat was no later than 12 May 2003.
- 2224 On or about 29 April 2003 and to 27 May 2003 in accordance with the Customs regulations, AWB received from DFAT permission to export the wheat sold under Contract A1680.
- 2225 On 2 May 2003, AWB were informed by DFAT that sanctions had ended.¹⁴²⁹
- 2226 On 6 May 2003, Geary attended a meeting of the ELG, which discussed amongst other

¹⁴²⁷ CB 5/3240.

¹⁴²⁸ CB 5/3255.

¹⁴²⁹ Exhibit G20.

issues the contents of an ELG Report dated 6 May 2003 prepared by Hockey and Whitwell which referred to the Tigris Debt. The report noted:¹⁴³⁰

Tigris Petroleum (BHP) has asked for an update of status of their agreement in light current contract execution and when they will begin receiving payments. They intimated a number of influential people will need to start receiving funds and that further delays may cause difficulties going forward.

This appears to be the first documented AWB reference to the Tigris Debt being referred to as a 'commission.'¹⁴³¹

2227 The Report also stated:¹⁴³²

AWB will complete funded contracts A1441 (196 K) and start A1680 (200 K) under this resolution the bill of lading requirement has been extended to 3rd June.

...

We are still working with Office of Iraq Program, UN Mission and WFP with respect to funding and execution A1670 (500 K) and balance of A1680 but current indications are that this will take time to achieve due to stock situation in Iraq (1.2 million tonnes) and supplies from OFF plus Humanitarian Aid.

2228 On 7 May 2003, Whitwell received an email from Davidson Kelly containing a draft agreement.¹⁴³³ The email stated:

1. We have written it in the name of Tigris, but we could just as well use one of its affiliated companies 'Maritimo Investments', also incorporated in Gibraltar (but with a different number) if you would prefer.
2. The numbers are quite simple. We are due USD 8,375,000. Less your \$500,000 leaves USD 7,875,000. Or \$7.875 per ton.
3. We have pro-rated the payments on a tonnage basis, as this is fairest for all parties, given the significant slippage in the programme and our requirement to keep all parties incentivised.

2229 At the ELG 6 May 2003 meeting, a decision was made to pay Tigris. That is confirmed

¹⁴³⁰ CB 5/3341, 3343 (refer to 'Tigris Commission' heading on page 2 of the report at CB 5/3344).

¹⁴³¹ Geary, sch [51].

¹⁴³² Geary, FP [28].

¹⁴³³ CB 5/3349, 5/3351.

by Whitwell's short email of 28 May 2003 to Lyons and Cooper, copied to Geary and two others, which commenced with the following:¹⁴³⁴

Following on from the last brief to ELG where it was agreed we would pay Tigris commission I received the following from Tigris which I have reviewed.

- 2230 Beginning on 21 May 2003 and ending 10 March 2004, AWB received payments from the UN escrow account pursuant to contract A1680, which payments were calculated by reference to the full per tonne price of the wheat, inclusive of the amount applied to the recoupment of Tigris Debt.
- 2231 On 28 May 2003, Whitwell sent Geary an email the material effect of which was that Alia had assured AWB that it would 'do everything in their power' to recover the purported inland transportation fees that AWB had 'deposited with them' and that it was a 'top priority' for Alia. The email also stated that 'Alia have advised us that the DG has lodged the debt incurred of our POFuj [Pearl of Fujairah] payment in March.'¹⁴³⁵
- 2232 On 28 May 2003, Whitwell sent an email to Lyons and Cooper with copies to Geary and others entitled 'Tigris' that referred to the Tigris Debt and forwarded the above email.¹⁴³⁶ In the email Whitwell sought legal advice in relation to the draft agreement prepared by Tigris.
- 2233 The email also forwarded an email from Davidson Kelly to Whitwell of 7 May 2003 the material effect of which was that Tigris sought to enter into a written agreement with AWB whereby AWB would pay to Tigris the amount of the Tigris Debt recovered by AWB (US\$8,375,000.00) less AWB's fee of US\$500,000.00, being US\$7,875,000.00 or US\$7.875 per tonne for Contracts A1670 or A1680 (which contracts totalled 1 million

¹⁴³⁴ CB 6/3395.

¹⁴³⁵ Geary, sch A [52].

¹⁴³⁶ Email and attachment CB 3395, 3397, versions annotated by Lyons CB 3405, 3407.

tonnes).¹⁴³⁷

2234 ASIC alleges that on 28 May 2003, Whitwell sent an email to Geary (and others) entitled 'Tigris'. The email referred to the Tigris Debt and forwarded an attached draft agreement prepared by Tigris relating to the recovery of the Tigris Debt. The email that was forwarded by Whitwell from Davidson Kelly stated that the agreement was in the name of Tigris but could be drafted using a different affiliated company, that AWB would receive \$500,000 and that the payments were proposed to be pro-rated on a tonnage basis.¹⁴³⁸

2235 On 2 June 2003, Lyons replied to Whitwell's email of 28 May 2003 and copied her email to Trotter (AWB Group Tax Manager).¹⁴³⁹ Lyons noted that she had marked up an agreement for Tigris. This draft added that the services were provided to AWBI as well as AWB,¹⁴⁴⁰ contained an acknowledgment that Tigris was uncertain whether the Government of Iraq would honour the terms of the contract, and provided that AWB would only be responsible for payment pro rata of actual tonnage shipped and paid for.¹⁴⁴¹

2236 ASIC contends that the draft agreement did not reflect the true arrangement, namely, that AWB was collecting a debt through inflating its contract prices, and that the true consideration for AWB was a payment of US\$500,000.00.

2237 On 6 June 2003, Whitwell emailed Davidson Kelly forwarding him the draft prepared by Lyons.¹⁴⁴²

¹⁴³⁷ Geary, sch A [53].

¹⁴³⁸ Email and attachment CB 6-3395, 6-3397, versions annotated by Lyons CB 6/3405, 6/3407.

¹⁴³⁹ CB 6/3415, 3417.

¹⁴⁴⁰ CB 6/3418.

¹⁴⁴¹ CB 6/3420.

¹⁴⁴² CB 6/3425, 3427.

- 2238 On 7 June 2003, Davidson Kelly emailed Whitwell regarding the Tigris Agreement, stating that he was happy with the lawyer's comments. He said 'lets pse [sic] sign off on it', and requested a schedule of expected payment dates.¹⁴⁴³
- 2239 An ELG Report dated 12 June 2003 was prepared by Whitwell which referred to the recovery of the Tigris payment and compensation for the Pearl of Fujairah.¹⁴⁴⁴ The report is noted above at paragraph 2226.¹⁴⁴⁵
- 2240 ASIC says that same day, Long sent Geary and others an email entitled 'Proton', which forwarded a memorandum of instruction from Cpt Blake Puckett about the processing of OFFP contracts.¹⁴⁴⁶ The following was the second instruction given:¹⁴⁴⁷
- II. Identify which contracts have a kickback or surcharge (often 10%). We need to know what percentage kickback or 'after sales service fee' was involved under the 'Extra Fees' category. Your Ministry is likely aware of this charge so please work with them to identify and indicate on the matrix.
- 2241 A further copy of this instruction was forwarded by Whitwell to Geary under covering email on 13 June 2003.¹⁴⁴⁸ In a separate response to Stott, to which Geary was copied, Whitwell stated that contract A1670 was in group 3, approved but not funded.¹⁴⁴⁹
- 2242 On 12 June 2003, Long sent Geary an email that included the contents of a document titled 'Memorandum of Instruction' dated 10 June 2003 from Cpt Blake Puckett to Ministry Advisers. The memorandum requested the advisers to review outstanding contracts under the OFFP and identify which contracts included a kickback, surcharge

¹⁴⁴³ CB 6/3443.

¹⁴⁴⁴ CB 6/3465.

¹⁴⁴⁵ CB 6/3467.

¹⁴⁴⁶ CB 6/3471.

¹⁴⁴⁷ CB 6/3472.

¹⁴⁴⁸ CB 6/3473.

¹⁴⁴⁹ CB 6/3479.

or after sales service fee, which was described as 'often 10%'.¹⁴⁵⁰

2243 On or around 12 June 2003, Geary, as a member of the ELG, was sent a copy of a document entitled 'ELG Report - 12th June 2003 - Iraq - Chris Whitwell.' Under the heading 'Tigris Commission', the ELG report contained the same text as that extracted from 6 May 2003 ELG report.¹⁴⁵¹

2244 On 12 June 2003, Geary, as a member of the Executive Leadership Group, attended a meeting where two PowerPoint presentations were made by Quennell to discuss the content of a complaint made by the US Wheat Associates dated 6 June 2003. During those presentations, reference was made to:

- (a) allegations that AWB contracts with the IGB were 'inflated by millions of dollars';
- (b) allegations that some of the funds from these contracts may have gone to Saddam Hussein's family;
- (c) the OFFP contract approval process;
- (d) the introduction into AWB's CIF contracts with Iraq of a 'free into truck all Governorates of Iraq' term from October 1999 onwards; and
- (e) the increase in the 'inland transport component' of AWB's contracts with Iraq from US\$12.00 per tonne in October 1999 to US\$47.75 per tonne in June 2002.

Further, one of the PowerPoint slides presented by Quennell contained text of the relevant sections of UN Resolutions 661 and 986.¹⁴⁵²

2245 On 13 June 2003, Whitwell met with Lindberg and Geary. Whitwell recorded a diary note of the meeting stating '*AL/PAG Meeting at 9AM*', beside which the note states,

¹⁴⁵⁰ Geary, sch A [54].

¹⁴⁵¹ Geary, sch A [56].

¹⁴⁵² Geary, sch A [55].

'Trip, TF, Memo.'¹⁴⁵³ Whitwell gave evidence that the 'memo' referred to was the 7 February 2003 memorandum, that 'PAG' referred to Geary, and that the meeting took place.¹⁴⁵⁴ Although Whitwell said that he could not now recall whether the memorandum was discussed at the meeting, the contemporaneous documents support the strong inference that it was.

2246 On 17 June 2003, Kate Roberson on behalf of Whitwell emailed to the management group, including Geary, an Iraq brief and trip report.¹⁴⁵⁵ The Iraq brief was an ELG report dated 15 June 2003. The ELG report noted, in respect of the 'Tigris Commission',¹⁴⁵⁶ that the issue had been put on hold in light of the need for possible further renegotiation of current contracts, and that Whitwell would meet Tigris officials in London on 22 June 2003.¹⁴⁵⁷

2247 On or about 9 July 2003, Contract A1680 was further amended so that the CIF Free in Truck price for the wheat was €259.17 per tonne and €266.22 per tonne CIF free out to Red Sea or Persian Gulf Ports respectively for the vessels Pearl of Fujairah and Andromeda.

2248 On 24 July 2003, Long sent Geary an email concerning the delivery of outstanding AWB wheat shipments. Long's email is copied at paragraph 574.

2249 On 24 July 2003, Geary was sent a copy of Whitwell's email in reply to Long's email dated 24 July 2003 (immediately above). In his response to Long's questions, Whitwell indicated that he would need to make further enquiries to ascertain whether it would be possible for AWB to organise inland transport through Alia.¹⁴⁵⁸

¹⁴⁵³ CB 6/3484.

¹⁴⁵⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T 1582, L10-26.

¹⁴⁵⁵ CB 6/3489, 3491.

¹⁴⁵⁶ CB 6/3492.

¹⁴⁵⁷ Geary, sch A [57].

¹⁴⁵⁸ Geary, sch [59].

2250 Geary attended meetings in London with Long, Whitwell and Hockey concerning Tigris in late July 2003. On 28 July 2003, Whitwell sent to Geary an email which attached a Trip Report for a trip to London, Amman and Iraq between 23 and 30 June 2003.¹⁴⁵⁹ Geary, along with Long, Whitwell and Hockey, were listed as being in attendance at some/all of the meetings. In relation to Tigris, the trip report stated:¹⁴⁶⁰

NKD [Davidson-Kelly] had just been into Baghdad and had had meetings with IGB. He confirmed that IGB wanted to honour the contracts

...

Actions:

Keep in contact over progress of contracts and look at possibly ring-fencing commissions received.

Offer from Tigris to tap into Rifkend network if appropriate and also Sabah Jumah to gauge Iraqi

2251 It is not clear whether Geary attended the meeting with Davidson Kelly.

2252 A confidential trip report in respect of visits to London, Amman and Iraq between 23 and 30 June 2003 recorded a meeting between Long, Whitwell and Davidson Kelly in London.¹⁴⁶¹ It noted that AWB would keep in contact over progress of contracts and look at possible 'ring-fencing' of commissions received. Davidson Kelly said he had recently met with IGB in Baghdad and it wished to 'honour the contracts'. The report noted that former IGB officials, now with the Iraqi Ministry of Trade, were very loyal towards AWB and would be urging prioritisation of its contracts.¹⁴⁶² An 'action' to be taken, with respect to the WFP contracting team in Rome, was to maintain close liaison with them with a view to processing any further shipments against A1670 and A1680,

¹⁴⁵⁹ CB 6/3573-3574.

¹⁴⁶⁰ Geary, FP [30]; CB 6/3571, 3573.

¹⁴⁶¹ CB 6/3573.

¹⁴⁶² CB 6/3574.

being the two contracts containing the inflated price to recover the Tigris Debt.¹⁴⁶³

2253 Geary attended 'some/all of the meetings' in London with Long, Whitwell and Hockey concerning Tigris in late July 2003 and was emailed a copy of an Iraq trip report recording these meetings on 28 July 2003.¹⁴⁶⁴

2254 On 28 July 2004, Geary was copied to an email exchange between Scales and Long. The email from Long stated:

Sarah
I am getting weekly calls from Tigris Exec. Norman Davidson Kelly. What should I tell him about the status of the Agreement?
Michael.

The email from Scales in reply stated:

Michael,
I will get to this this week.
Tell him to wait ie as per our discussion last week re : environment.
SS¹⁴⁶⁵

2255 On 13 August 2004, Geary was sent an email¹⁴⁶⁶ from Lyons in which Lyons asked Geary for a copy of the 7 February 2003 memorandum from Whitwell to Geary and Long.¹⁴⁶⁷ Geary forwarded the email to Moraitis, stating:

This will be on the Iraq file or Tigres [sic]¹⁴⁶⁸

2256 On 26 August 2003, Whitwell prepared a memorandum to Owen and Tan of AWB Trade Finance concerning 'Tigris Petroleum Commission'. Whitwell wrote:¹⁴⁶⁹

Following Telephone conversation of yesterday and your request for a memo on the subject. I confirm that with the agreement of the Pool and the (Iraq Emergency response committee) it has been agreed to provide for a payment

¹⁴⁶³ CB 3576.

¹⁴⁶⁴ CB 3571, 3573.

¹⁴⁶⁵ Geary, FP [32].

¹⁴⁶⁶ CB 5/3189.

¹⁴⁶⁷ CB 5/3161 - 3165.

¹⁴⁶⁸ Geary, FP [33].

¹⁴⁶⁹ CB 6/3653.

of a commission to Tigris Petroleum that was agreed at time of concluding contract. In agreement with Tigris the quantum value of this commission is USD 7,875,000 and is to be accumulated on a USD7.875 pmt basis against tonnage shipped and paid for under AWB contracts A1670/1680 to Iraq. Due [to] the possibility that these contracts may not be executed in full it was agreed by ML/CW with the delegated representative of Tigris that AWB will hold these funds and ensure that interest is earned on these commissions from the moment payment is received under this contract by AWB. Interest will then be added on to the initial commission that will be repayed [sic] to Tigris in due course if the contract is fully executed or is deemed appropriate by AWB. In the event that the contracts are not fully executed or other conditions change further discussions will be held with the representatives of Tigris to agree the way forward. Would you therefore kindly advise the relevant interest rate for these commissions (to be reported to Tigris) and set up the relevant reporting and accounting mechanisms.

2257 In late August to early September 2003, there were internal discussions within AWB about AWB holding onto the Tigris Debt funds once received to earn interest.¹⁴⁷⁰

2258 On or about 2 September 2003, the OIP determined that AWB was eligible for payment from the UN escrow account in relation to the sale of wheat pursuant to contract A1670.

2259 On 12 September 2003, Whitwell sent Geary an email regarding a fax received from the WFP. The email stated:¹⁴⁷¹

...[the WFP] have provided some renegotiation terms for our consideration.

point of entry to remain Umm Qasr

Cargo will be delivered Cost Insurance Freight Free on Truck all governorates Iraq. It will be suppliers [sic] responsibility to arrange private transportation from stipulated port of entry to final delivery port as advised by Ministry of Trade.

Price to be reduced by 10 pct to a new net price of 254.88 EURO (original price 280.37)

2260 On 16 September 2003, Owen updated and circulated a table entitled 'Commission's Held on Behalf of Tigris Petroleum Corp. Ltd.' [sic] which showed the payments held by AWB in relation to the Tigris Debt as at that date, and the manner in which each

¹⁴⁷⁰ CB 6/3653-3663.

¹⁴⁷¹ Geary, FP [31].

payment had been invested.¹⁴⁷² Geary's name does not appear on the recipient list.

2261 ASIC says that on 22 September 2003, Geary (and others) received an email from Whitwell entitled 'Iraq Update' attaching a memorandum which referred to the payment to AWB of a commission for its assistance in recovering the Tigris Debt. It stated, 'Commission has been ring-fenced in AWB accounts pending final execution of contract.'¹⁴⁷³ ASIC submits that this shows that funds had been recovered by AWB from the escrow account for repayment of the Tigris Debt.

2262 On 22 September 2003, a report to the ELG headed 'Iraq' made the same statement.¹⁴⁷⁴

2263 On 25 September 2003, Contract A1670 was amended so that:

- (a) the CIF Free in Truck price for the wheat was €254.88 per tonne CIF all governorates of Iraq shipped to port at Umm Qasr;
- (b) the CIF Free in Truck price for the wheat was €265.88 per tonne CIF all governorates of Iraq shipped to port at Aqaba; and
- (c) AWB agreed to ship the wheat during the period 15 December 2003 and 15 May 2004, subject to specified penalties for late shipment.

2264 On 28 November 2003, a bank statement for an account held by AWB Limited was issued,¹⁴⁷⁵ that showed AWB receiving €13,381,130.00 from the UN escrow account on 28 November 2003 in respect of contract A1680.¹⁴⁷⁶

2265 On or about 31 December 2003, Contract A1670 was further amended so that:

- (a) the CIF Free in Truck price for the wheat was €261.52 per tonne CIF all

¹⁴⁷² CB 6/3667, Table: CB 6/3669).

¹⁴⁷³ CB 6/3689, 3691 – email, CB 6/3693 – memorandum.

¹⁴⁷⁴ CB 6/3695.

¹⁴⁷⁵ CB 7/4171.

¹⁴⁷⁶ The payments can be matched to the relevant contracts using the exhibits to the affidavit of Julie Eldridge at CB 10/8488 - 8492. This payment can be seen at CB 8492 at Row G, Column 19.

- governorates of Iraq shipped to port at Umm Qasr;
- (b) the CIF Free in Truck price for the wheat was €272.52 per tonne CIF all governorates of Iraq shipped to port at Aqaba; and
 - (c) AWB agreed to ship the wheat during the period 1 January 2004 and 31 March 2004, subject to specified penalties for late shipment.

2266 On or about 31 December 2003, Contract A1670 was further amended so that:

- (a) the CIF Free in Truck price for the wheat was €261.52 per tonne CIF all governorates of Iraq shipped to port at Umm Qasr;
- (b) the CIF Free in Truck price for the wheat was €272.52 per tonne CIF all governorates of Iraq shipped to port at Aqaba; and
- (c) AWB agreed to ship the wheat during the period 1 January 2004 and 31 March 2004, subject to specified penalties for late shipment.

2267 On or about 31 December 2003, Contract A1670 was further amended so that:

- (a) the CIF Free in Truck price for the wheat was €261.52 per tonne CIF all governorates of Iraq shipped to port at Umm Qasr;
- (b) the CIF Free in Truck price for the wheat was €272.52 per tonne CIF all governorates of Iraq shipped to port at Aqaba; and
- (c) AWB agreed to ship the wheat during the period 1 January 2004 and 31 March 2004, subject to specified penalties for late shipment.

2268 On 30 January 2004, a bank statement for an account held by AWB Harvest Finance Limited was issued,¹⁴⁷⁷ which showed AWB receiving the following amounts from the UN escrow account in respect of contract A1680:

¹⁴⁷⁷ CB 6/4201.

(a) €13,303,331.60 on 16 January 2004;¹⁴⁷⁸

(a) €10,736,445.32 on 16 January 2004;¹⁴⁷⁹

(b) €6,566,847.81 on 27 January 2004.¹⁴⁸⁰

2269 On 27 February 2004, a bank statement for an account held by AWB Harvest Finance Limited was issued,¹⁴⁸¹ which showed AWB receiving the following amounts from the UN escrow account in respect of contract A1680:

(a) €1,829,964.81 on 5 February 2004;¹⁴⁸²

(b) €10,796,586.80 on 11 February 2004;¹⁴⁸³

(c) €2,435,494.58 on 23 February 2004;¹⁴⁸⁴

(d) €11,069,308.40 on 23 February 2004.¹⁴⁸⁵

2270 On 26 March 2004, Whitwell sent an email to Edmonds-Wilson forwarding a series of emails from Declan Lynch and Tan regarding the provision for the Iraqi claim for iron filings for the shipments in approximately August 2002.¹⁴⁸⁶

2271 On 31 March 2004, a bank statement for an account held by AWB Harvest Finance Limited was issued, which showed AWB receiving the following amounts from the

¹⁴⁷⁸ CB 6/4203.

¹⁴⁷⁹ Ibid.

¹⁴⁸⁰ CB 6/4205.

¹⁴⁸¹ CB 6/4207.

¹⁴⁸² Ibid.

¹⁴⁸³ Ibid.

¹⁴⁸⁴ CB 6/4209.

¹⁴⁸⁵ CB 6/4209.

¹⁴⁸⁶ CB 6/4211.

UN escrow account in respect of contract A1670 and A1680:¹⁴⁸⁷

(a) €11,598,107.50 30 March 2004 (A1670);¹⁴⁸⁸

(b) €39,220,001 on 3 March 2004;¹⁴⁸⁹

(c) €10,623,747.57 on 10 March 2004.¹⁴⁹⁰

2272 AWB began to receive payments from the UN escrow account pursuant to contract A 1670 on 30 March 2004 through to 22 November 2004.

2273 On 20 April 2004, Whitwell sent an email to Long titled 'Tigris' attaching a draft agreement between Tigris and AWB Limited.¹⁴⁹¹

2274 On 30 April 2004, a bank statement for an account held by AWB Harvest Finance Limited was produced which shows payments in Euros made between 1 and 29 April 2004, and in particular, a payment of €11,488,443.60 received on 16 April 2004 that related to contract A1670.¹⁴⁹²

2275 On 31 May 2004, a bank statement for an account held by AWB Harvest Finance Limited was issued, which showed AWB receiving the following amounts from the UN escrow account in respect of contract A1670:¹⁴⁹³

(a) €9,549,761.02 on 13 May 2004;¹⁴⁹⁴

¹⁴⁸⁷ CB 6/4215.

¹⁴⁸⁸ CB 6/4219.

¹⁴⁸⁹ CB 6/4215.

¹⁴⁹⁰ CB 6/4216.

¹⁴⁹¹ CB 6/4221, 4223.

¹⁴⁹² CB 6/4229 at CB 4230.

¹⁴⁹³ CB 7/4355.

¹⁴⁹⁴ CB 7/4356.

- (b) €2,086,949.38 on 27 May 2004;¹⁴⁹⁵
- (c) €8,630,030.00 on 27 May 2004;¹⁴⁹⁶ and
- (d) €11,119,720.40 on 27 May 2004.¹⁴⁹⁷

2276 Between 16 May & 1 June 2004, Whitwell was involved in an email exchange with Edmonds-Wilson, Owen, Jans and Tan and others (in the context of settling all historical claims between AWB and the IGB) regarding the provision made by the Pool in 2002 for the iron filings contamination claim.¹⁴⁹⁸

2277 On 10 June 2004, Rosemary Peavey (Peavey) sent an email to Whitwell titled 'Project Water' attaching a draft agreement between AWB Limited and the Tigris Petroleum Corporation Limited.¹⁴⁹⁹ By this stage the agreement no longer mentioned the Tigris Debt, and instead referred to AWB paying Tigris a 'commission' for services rendered; however payment of the 'commission' was still tied to AWB's receipt of payment from the unnamed 'purchaser.'

2278 On 30 June 2004, a bank statement for an account held by AWB Harvest Finance Limited was issued, which showed AWB receiving the following amounts from the UN escrow account in respect of contract A1670:¹⁵⁰⁰

- (a) €5,478,260.57 on 2 June 2004;¹⁵⁰¹

¹⁴⁹⁵ CB 7/4357.

¹⁴⁹⁶ CB 7/4357.

¹⁴⁹⁷ CB 7/4357.

¹⁴⁹⁸ CB 7/4341-4353.

¹⁴⁹⁹ CB 7/4359, 4361.

¹⁵⁰⁰ CB 7/4367.

¹⁵⁰¹ CB 7/4367.

- (b) €3,164,076.12 on 2 June 2004;¹⁵⁰²
- (c) €2,789,101.30 on 14 June 2004;¹⁵⁰³
- (d) €2,327,156.07 on 18 June 2004;¹⁵⁰⁴ and
- (e) €13,729,670.00 on 24 June 2004.¹⁵⁰⁵

2279 On 13 July 2004, Scales made handwritten file notes recording that the Tigris Debt was recovered by way of inflating sales contracts. The note queries whether the mechanism is 'outside OFFP?' and records that contracts A1670 & A1680 did not 'reference Tigris'. The note also refers to a need to meet with Lindberg, Long, Geary and others to discuss AWBI's need to pay Tigris the amount recovered.¹⁵⁰⁶

2280 On 16 July 2004, Peavey sent an email to David Johnson from the Pool, copied to Long and others, setting out the background of the Tigris Debt and the arrangements regarding its collection by AWB. It also set out that AWB's commission was sitting in an interest bearing account.¹⁵⁰⁷

2281 On 26 July 2004, Ingleby sent an email to Scales and Long, which discussed the accounting treatment of 'the \$.5M commission re Tigris.'¹⁵⁰⁸

2282 On 28 July 2004, Scales sent an email to Long, copied to Geary, titled 'Re: Tigris Agreement' regarding how to respond to Davidson Kelly making weekly contact regarding the status of the agreement.¹⁵⁰⁹ In the email Scales implies that she has told

¹⁵⁰² CB 7/4367.

¹⁵⁰³ CB 7/4368.

¹⁵⁰⁴ CB 7/4368.

¹⁵⁰⁵ CB 7/4369.

¹⁵⁰⁶ CB 7/4375.

¹⁵⁰⁷ CB 7/4379.

¹⁵⁰⁸ CB 7/4383.

¹⁵⁰⁹ CB 7/4385.

Davidson Kelly to wait due to the current environment (presumably a reference to the Volcker Inquiry which was by then on foot).

2283 On 30 July 2004, a bank statement for an account held by AWB Harvest Finance Limited was issued, which showed AWB receiving the following amounts from the UN escrow account in respect of contract A1670:¹⁵¹⁰

- (a) €1,608,492.93 on 9 July 2004;¹⁵¹¹
- (b) €9,777,187.48 on 22 July 2004;¹⁵¹²
- (c) €2,147,668.25 on 22 July 2004;¹⁵¹³ and
- (d) €11,119,700.40 on 22 July 2004.¹⁵¹⁴

2284 On 30 August 2004, a bank statement for an account held by AWB Harvest Finance Limited was issued, which showed AWB receiving the following amounts from the UN escrow account in respect of contract A1670:¹⁵¹⁵

- (a) €1,159,745.14 on 6 August 2004;
- (b) €3,366,789.23 on 6 August 2004;
- (c) €3,640,164.91 on 6 August 2004;
- (d) €6,628,128.69 on 6 August 2004; and
- (e) €9,513,967.60 on 6 August 2004.¹⁵¹⁶

¹⁵¹⁰ CB 7/4387.

¹⁵¹¹ CB 7/4387.

¹⁵¹² CB 7/4388.

¹⁵¹³ CB 7/4388.

¹⁵¹⁴ CB 7/4389.

¹⁵¹⁵ CB 7/4395.

¹⁵¹⁶ CB 7/4396.

2285 A further version of the draft agreement between AWBI and Tigris was created in September 2004. That draft refers at clause three to the 'Tigris' Commission'¹⁵¹⁷ and drops all reference to the Tigris Debt or loan, to the \$500,000.00 fee payable to AWB, and to payments being contingent on the receipt of funds from the 'purchaser.'

2286 On 7 September 2004, Owen emailed Whitwell copied to others confirming that AWB had collected an amount in excess of what was required to pay the Tigris Debt. Owen sought clarification of whether this excess and future payments should be refunded to buyers.¹⁵¹⁸

2287 On 8 September 2004, Ingleby sent an email to Cooper, responding to an email sent by Cooper that stated 'PJI - AWBI holds around USD8m in an account payable to Tigris. Do you know anything about this account. Jim.' Ingleby responded, 'I thought u knew all about this.'¹⁵¹⁹

2288 On 9 September 2004, Scales sent an email to Cooper, copied to Geary and Long, stating, 'Jim, What is the status re: Tigris agreement? What is the timeline on a decision? rgds ss.' Cooper responded on the same date to Scales stating, 'Seeing Andrew today', to which Scales replied on the same day to Cooper, 'Why?'¹⁵²⁰

2289 On 9 September 2004, Geary, Long and Scales received an email from Cooper entitled 'Re: tigris', advising:¹⁵²¹

There appears to be a breach of UN resolution 661 because the increase in contract payments to repay the Tigris debt and the processing of this higher amount through the OFF program was never disclosed and was not a payment for a humanitarian purpose.

2290 ASIC says that it is clear from Cooper 's email that, in his opinion, the contracts Geary

¹⁵¹⁷ CB 7/4401.

¹⁵¹⁸ CB 7/4405.

¹⁵¹⁹ CB 7/4407.

¹⁵²⁰ CB 7/4409.

¹⁵²¹ CB 7/4411.

approved in the memo dated 7 February 2003 had breached of UN sanctions. He cites the wrong resolution (it should have been Resolution 986), but apart from this his analysis is completely correct, and confirmed by external counsel. Dr Stephen Donaghue draft advice of 13 October 2004 said:¹⁵²²

16. It is plain from the opening words of paragraph 8 of Security Council Resolution 986 that the funds in the escrow account can be used to finance the purchase of foodstuffs only if the procedures specified in paragraph 8(a) were complied with. Plainly, that requirement cannot be satisfied in respect of goods sold prior to the commencement of the OFF program.

17. Consequently, the funds in the escrow account could not have been disbursed by the OFF program to pay for wheat supplied pursuant to a contract entered into and carried into effect prior to the commencement of the OFF program.

18. That is, of course, what occurred when the OFF program paid AWB in accordance with contracts 1670 and 1680, because unbeknown to the OFF program the contract price for those two contracts included approximately \$US8.3 million that related not to the value of the wheat actually shipped pursuant to those two contracts, but instead to the value of the 20,833 tonnes Australian standard wheat supplied to Iraq pursuant to contract A2741 in January 1996.

19. It seems plain that, had the OFF program been aware that the contract price for contracts 1670 and 1680 included that \$US8.3 million, it would not have paid it out of the escrow account. It is therefore necessary to consider whether the concealing of that fact from the OFF program has any consequences under Australian law.

2291 Cooper proposed having IS&M staff sign off on the written factual summary; and there 'appeared to be a breach of the UN Resolution 661 because the increase in contract payments to repay the Tigris Debt and the processing of this higher amount through the OFF program was never disclosed and was not a payment for a humanitarian purpose.'

2292 On 10 September 2004, Geary sent an email to Lyons, copied to Moraitis, titled 'Re: Fw: Iraq Memo' responding to Lyons' request for a copy of Geary's covering memo from 21 February 2003.¹⁵²³ Lyons said to Geary, 'Pete you gave me a copy of your

¹⁵²² Donaghue draft advice of 13 October 2004 CB 7/4589, 4599; Richter QC and Donaghue advice of 22 December 2004 CB 7/4720-1, 4720-11 to -12.

¹⁵²³ CB 7/4413.

covering memo.'

2293 On 16 September 2004, Geary received an email from Cooper, which stated:¹⁵²⁴

I have completed factual review and discussed with Andrew.

I have talked today to Norman Davidson-Kelly, President of Tigris, who is based in London. I have taken notes and I am satisfied with his explanation of issues.

Next step is to have Charles sign-off the factual statement as a true and correct record. As Charles is on leave next week we will provide the statement to him in the week of his return. After Charles has signed we will have Michael Long and Chris Whitwell sign-off.

Following sign-off by Charles, Michael and Chris I then recommend payment of the amount owing from AWBI to Tigris.

2294 On 30 September 2004, a bank statement for an account held by AWB Harvest Finance Limited was issued,¹⁵²⁵ that showed AWB receiving €667,037.16 from the UN escrow account on 10 September 2004 in respect of contract A1670.

2295 On 30 September 2004, Cooper sent an email to Davidson Kelly, copied to Peavey, attaching a draft agreement and stating that Cooper 'will arrange sign off from Charles Stott and Michael Long' before AWB are 'able to finish the transaction.'¹⁵²⁶ The agreement was shown to be between AWBI and Tigris. It made no reference to the moneys being a debt collected on Tigris' behalf, nor the method of their collection. The payment was described as commission, and was stated to be based on Tigris providing material assistance in procuring contracts for AWBI in 2001. No mention is made of the US\$500,000 payable by Tigris to AWB, nor that the sum to be paid to Tigris, included interest.

2296 ASIC submits that the notion that the sum payable to Tigris represented the proceeds of the recovery of a debt is inconsistent with the notion that the same amount is payable by AWB to Tigris as a commission for service allegedly rendered by Tigris to

¹⁵²⁴ CB 7/4415, Geary, FP [34].

¹⁵²⁵ CB 7/4459.

¹⁵²⁶ CB 7/4461.

AWB.

2297 On 21 October 2004, members of the ELG including Geary received an email attaching the ELG Monthly Report for the month ending September 2004. Under the heading 'Project Rose' the report provided an update on AWB's response to the US Senate Inquiry regarding the Oil for Food Programme, and then stated:¹⁵²⁷

Tigris - the chronology of facts has been finalised and is being signed off by relevant AWB management. Approval for final payment of debt owed to Tigris will be sought from Sarah Scales and Andrew Lindberg shortly.

2298 On 13 October 2004, AWB received a 'draft' advice from Dr Stephen Donaghue of counsel.¹⁵²⁸ Dr Donaghue was briefed on 5 October 2004 to advise whether the recovery of funds for Tigris breached either resolution 661 or constituted an offence under Australian law. The draft opinion was that resolution 661 had not been breached but that offences against s 70.2 of the *Criminal Code Act 1995* (Cth) and ss 81 or 82 of the *Crimes Act 1958* (Vic) may have been committed, and that payment of funds to Tigris might constitute a further offence against s 88 of the *Crimes Act 1958* (Vic). He advised the money should not be paid.¹⁵²⁹

2299 In relation to whether resolution 986 had been breached, the advice noted:¹⁵³⁰

16. It is plain from the opening words of paragraph 8 of Security Council Resolution 986 that the funds in the escrow account can be used to finance the purchase of foodstuffs only if the procedures specified in paragraph 8(a) were complied with. Plainly, that requirement cannot be satisfied in respect of goods sold prior to the commencement of the OFFP program.

17. Consequently, the funds in the escrow account could not have been disbursed by the OFF program to pay for wheat supplied pursuant to a contract entered into and carried into effect prior to the commencement of the OFF program.

18. That is, of course, what occurred when the OFF program paid AWB in accordance with contracts 1670 and 1680, because unbeknown to the

¹⁵²⁷ CB 7/4427-4450, Geary, FP [35].

¹⁵²⁸ CB 7/4589.

¹⁵²⁹ CB 7/4591.

¹⁵³⁰ CB 7/4599.

OFF program the contract price for those two contracts included approximately \$US8.3 million that related not to the value of the wheat actually shipped pursuant to those contracts, but instead to the value of the 20,833 tonnes Australian standard wheat supplied to Iraq pursuant to contract A2741 in January 1996.

19. It seems plain that, had the OFF program been aware that the contract price for contracts 1670 and 1680 included that \$US8.3 million, it would not have paid it out of the escrow account.

2300 On 14 October 2004, a back sheet with instructions to counsel was sent from BDW to Richard Tracey QC, seeking advice regarding the collection on behalf of Tigris by AWB of approximately US\$8 million and the fee to be received by AWB of US\$500,000.00.¹⁵³¹ The instructions to Mr Tracey QC included the following:¹⁵³²

In essence, the transaction in relation to which Counsel is requested to advise involves the inflation of the price of wheat sold to the Grain Board of Iraq (IGB) by AWB pursuant to contract numbers 1670 and 1680 (copies attached) as part of the Oil for Food Programme as a means of recovering a debt owed by IGB to BHP Petroleum Pty Limited (BHPP) arising out of the provision by BHPP to IGB of a cargo of wheat in 1996. The debt was subsequently assigned by BHPP to Tigris Petroleum (Tigris). AWB was able to recover on behalf of BHPP/Tigris the sum of approximately US\$8m in return for which AWB received a fee from Tigris of US\$500,000.

2301 On 26 October 2004, Richard Tracey QC provided a confirmation of advice given in conference, that no breach of Resolution 661 was involved.¹⁵³³ He advised that on a statement of facts later verified by Stott, Long and Whitwell the payment of the Tigris Debt from the UN escrow account did not breach Resolution 661 because Resolution 661 prohibited payments to Iraq, not payments from Iraq.

2302 In November 2004, a further draft of the agreement between AWBI and Tigris was prepared, which included an addition stating that:¹⁵³⁴

- 4.2 The parties agree that the Commission is the net amount payable to Tigris after deduction of the agreed success fee of US500,000 (United States Dollars Five Hundred Thousand) payable by Tigris to

¹⁵³¹ CB 7/4615.

¹⁵³² CB 7/4616.

¹⁵³³ CB 7/4617.

¹⁵³⁴ CB 7/4639.

2303 On 10 November 2004, Cooper sought approval from Lindberg and Scales to pay the Tigris Debt to Tigris less AWB's commission.¹⁵³⁶ Cooper referred to legal advice and set out the background to the transaction including the need to refund US\$250,000.00 to the IGB. Paragraph 8 of this email makes clear that the US\$500,000.00 to be paid to AWB by Tigris was for recovering the Tigris Debt. It was to be deducted from funds recovered. That being so the balance of funds held by AWB and for which approval was being sought to pay out of pool funds to Tigris, was recovered debt funds. Yet paragraph 7, which addressed the question which must be affirmatively answered before such funds could be paid out of the pool, treated the moneys differently. As Cooper pointed out, those deciding to pay the funds out of the pool had to be satisfied that the payment 'maximises the net pool return to growers ... by securing ... markets for wheat'. Cooper went on to express the opinion that: 'my view is that this transaction did assist AWBI in securing the Iraqi grain market.'

2304 On 19 November 2004, Fuller sent an email to Cooper, copied to Lindberg, stating:¹⁵³⁷

Discussion with Andrew Lindberg today. Approval, on an in-principle basis, of the Tigris payment. Formal approval to occur next week. Success fee 100% to AWB (International) Limited's account.

2305 On 22 November 2004, Cooper sent an email to Davidson Kelly, copied to Whitwell, titled 'Project Water' attaching a spreadsheet and referring to the success fee payable to AWBI needing to be deducted. The email noted 'we will address this in the agreement.'¹⁵³⁸ Davidson Kelly responded in an email that the calculations were '\$8,375,000.00 less the fee of \$500,000 = \$7,875,000 (total principal amount).'¹⁵³⁹

¹⁵³⁵ CB 7/4641.

¹⁵³⁶ CB 7/4645.

¹⁵³⁷ CB 7/4647.

¹⁵³⁸ CB 7/4649.

¹⁵³⁹ CB 7/4651.

- 2306 On 22 November 2004, Whitwell responded to Cooper's email of the same date referring to the calculation of the Tigris amount, and suggesting that the amount paid should be reduced by 10 per cent in line with the reduction on all tonnage shipped after the contract price was renegotiated.¹⁵⁴⁰
- 2307 The 10 per cent reduction refers to what occurred in September 2003 when, having identified that AWB's contracts with the IGB contained a 10 per cent after sales service fee, the WFP (which at that time was administering the remaining contracts under the OFFP) informed AWB that their contract prices would be reduced accordingly.¹⁵⁴¹
- 2308 ASIC contends that given that the 10 per cent reduction was on account of 'after sales service' fees (which AWB was no longer required to pay), it was not an actual loss to AWB. Accordingly, the 10 per cent cut to the Tigris Debt resulted in a windfall profit for AWB, as recorded in Cooper's email of 2 December 2004 discussed below at paragraph 2317.
- 2309 On 22 November 2004, Cooper sent an email to Quennell titled 'Tigris Petroleum Agreement' asking Quennell to make final amendments to the agreement including the success fee payable to AWBI.¹⁵⁴²
- 2310 On 23 November 2004, Quennell responded attaching a draft agreement and setting out in the email the payment calculations. Quennell recommended that the agreement should retain a dispute resolution clause because 'we would not want any disagreement to be aired in the public arena of the Courts.'¹⁵⁴³
- 2311 On 26 November 2004, Quennell sent by email to Cooper a further amended agreement.

¹⁵⁴⁰ CB 7/4653.

¹⁵⁴¹ CB 6/3686 (top of page) and CB 6/3683 (AWB internal email confirming 10 per cent reduction).

¹⁵⁴² CB 7/4655.

¹⁵⁴³ CB 7/4657.

- 2312 On 26 November 2004, Cooper sent an email to Davidson Kelly, copied to Long, Cooper and Lindberg, titled 'AWBI and Tigris Petroleum Agreement - final version and payment arrangements' attaching the final draft of the agreement and setting out the calculations.¹⁵⁴⁴
- 2313 On 29 November 2004, Davidson Kelly sent an email to Cooper titled 'Re: AWBI and Tigris Petroleum Agreement - final version and payment arrangements' resending another copy of the agreement from Davidson Kelly, and forwarding an email from 27 November 2004 from Davidson Kelly to Cooper stating that 'the agreement is ok, but we have changed the banking details' and making arrangements for the Tigris directors to sign the agreement.¹⁵⁴⁵
- 2314 On 30 November 2004, a bank statement for an account held by AWB Harvest Finance Limited was issued, which showed AWB receiving the following amounts from the UN escrow account in respect of contract A1670:¹⁵⁴⁶
- (a) €2,566,795.88 on 10 November 2004;¹⁵⁴⁷ and
 - (b) €187.12 on 22 November 2004.¹⁵⁴⁸
- 2315 These were the last payments obtained from the UN escrow account under the inflated contracts A1670 and A1680.
- 2316 On 1 December 2004, Davidson Kelly faxed an invoice from Tigris to AWBI in respect of a 'Service Fee' of US\$7,537,500 less a 'Success Fee' due AWBI of US\$500,000.00. Also invoiced was interest to 29 November 2004 of US\$55,224.72 less Australian withholding tax of \$5,522.46, making a total payable to Tigris of

¹⁵⁴⁴ CB 7/4663, 4665.

¹⁵⁴⁵ CB 7/4671.

¹⁵⁴⁶ CB 7/4677.

¹⁵⁴⁷ CB 7/4671.

¹⁵⁴⁸ CB 7/4679.

US\$7,087,202.24 (CB 4681). The invoice was stated to be for:¹⁵⁴⁹

The provision of services under the Agreement between AWB (International) Ltd and Tigris effective 12 December 2002.

2317 The Tigris invoice showed a reduction in the amount of the debt reduced by 10 per cent negotiated by Long, plus a specified amount for interest. The reason for the reduction in the amount of the debt appeared in an email from Cooper to Lindberg and Fuller, copied to Long and Scales, on 2 December 2004. In that email, Cooper attached a final agreement for execution by either Fuller or Lindberg. He reported:¹⁵⁵⁰

I have checked everything as follows:

1. the amount payable has been verified by the papers and by Michael Long. You need to know that last week Michael Long saved AWBI a further US\$837,000 on this deal by convincing Tigris that they should also accept the 10% reduction imposed by the World Food Program on AWBI. They reluctantly agreed and reduced the amount payable by that amount. This means that AWBI has made US\$1.375m on this transaction. I confirm our decision that 100% of this money is being retained by AWBI.
2. I have had AWB's Tax Manager sign off the agreement (Stuart Whipp);
3. Norman Davidson Kelly of Tigris has signed off on the agreement;
4. Richard – we want to leave the arbitration clause in the document. If there is any future disagreement (although we can't think what it would be given the only task is payment), then it will be resolved privately by an arbitrator, not publicly in the courts. If we do not include the arbitration clause, then any dispute would have to be resolved publicly in the courts and this is not desirable.

Andrew – I know you asked to see the final version of the agreement. If you are happy with it, I need it signed by you or Richard – only one of you needs to sign.

I have sent signing copies up to your office.

I would like to get the document signed ASAP.

In terms of the AWB internal paperwork implementing actual payment in USD by AWBI, Sarah Scales needs to approve this as GM of the AWB National Pool, accordingly to AWBI's Management Authorisations. I have separately

¹⁵⁴⁹ CB 7/4681.

¹⁵⁵⁰ CB 7/4683, 4685.

forwarded that paperwork to her for signature.

2318 The payment to Tigris was authorised on 6 December 2004 by Scales,¹⁵⁵¹ and payment transferred on 9 December 2004.¹⁵⁵²

2319 On 8 December 2004, Edmonds-Wilson sent an email to Tan titled 'Re: equipment/risk assist provisions' concerning the provisions made in the pool for quality claims being carried over into the next year. In an earlier email from Tan to Edmonds-Wilson of the same date, Tan stated that he was concerned about closing a pool with an unspent provision and that 'auditors might be concerned we are building up some sort of "slush funds"'.¹⁵⁵³

2320 On 22 December 2004, Cooper received Mr Richter QC's and Dr Donaghue's advice that in their opinion, despite the fact that the UN may have been deceived and might not have paid the money if it knew it was for other than a humanitarian purchase, no crime had been committed. Similar to Dr Donaghue's earlier advice, albeit in slightly softer tones, the Mr Richter QC advice said:¹⁵⁵⁴

10. The opening words of paragraph 8 of Security Council Resolution 986 indicate that the funds in the escrow account could be used to finance the purchase of foodstuffs only if the procedures specified in paragraph 8(a) were complied with.

11. Consequently, the funds in the escrow account could not have been disbursed by the OFF program to pay for wheat supplied pursuant to a contract entered into and carried into effect prior to the commencement of the OFF program. That is arguably what occurred when the OFF program paid AWB in accordance with contracts 1670 and 1680, because unbeknown to the OFF program the contract price for those two contracts was calculated taking into account the commercial desire of the parties to ensure that AWB was paid approximately \$US8.3 million to discharge IGB's debt to Tigris.

12. It may be that, had the OFF program been aware that the contract price for contracts 1670 and 1680 included that \$US8.3 million, it might not have

1551 CB 7/4689.

1552 CB 7/4691.

1553 CB 7/4699.

1554 CB 7/4720.1.

signed off on the payment of that amount out of the escrow account.¹⁵⁵⁵

2321 Next to paragraph 11 and 12 a handwritten note appears:

Should AWB notified the UN at the time?

2322 A copy of the agreement between AWBI and the Tigris Petroleum Corporation Limited dated December 2004 was marked with a hand written annotation 'Signed by Richard.'¹⁵⁵⁶

2323 On 6 January 2005, Moira Linton sent an email to Peavey, copied to Owen, titled 'Fw: Funds held on behalf Tigris Petroleum Corp. Ltd' finalising issues on Project Water – namely determining the reason for the difference between the amount held by AWB and the amount paid to Tigris.¹⁵⁵⁷

2324 On 9 February 2005, Peavey sent an email to Cooper titled 'Fw: Funds held on behalf Tigris Petroleum Corp. Ltd' stating:¹⁵⁵⁸

there is US\$250,000 remaining with AWBI; Chris Whitwell, Michael Long and David Johnston [sic] are putting a proposal to Management about what to do with the money. They are aware that there is a risk that the IGB may request repayment of this money sometime in the future, if the IGB is aware of the situation, however this is unclear; it is being suggested to Management that the money be used for training and machinery [sic] in Iraq.

2325 On 22 February 2005, Linton sent an email to Geary and Trewin titled 'Confidential – Project Rose' forwarding the final version of the chronology on Tigris.¹⁵⁵⁹

2326 From this evidence ASIC submits that it should be found that:

- (a) AWB (with the connivance of the IGB) agreed to assist Tigris to recover the Tigris Debt by loading up – i.e. artificially inflating the price in- contracts A1670

¹⁵⁵⁵ CB 7/4720.11–4720.12.

¹⁵⁵⁶ CB 7/4693.

¹⁵⁵⁷ CB 7/4725.

¹⁵⁵⁸ CB 7/4727.

¹⁵⁵⁹ CB 7/4731 (no attachment to the email is in evidence).

and A1680;

- (b) The intended and actual effect of the inflation of the contracts was that, without knowledge of the UN, approximately US\$8,375,000.00 was obtained from the UN escrow account, not on account of OFFP humanitarian goods, but rather to settle a pre-OFFP commercial debt said to be owing by the IGB to Tigris;
- (c) AWB received payments totalling over US\$8,375,000.00 from the UN escrow account in respect of the Tigris Debt;
- (d) The payments were not permitted by UN Resolution 986, which provided that the funds in the escrow account could only be used to purchase humanitarian goods under the OFFP; and
- (e) AWB entered into a sham agreement with Tigris that misrepresented the payment to Tigris as a fee for service, rather than a debt recovery with a commission to AWB.

2327 ASIC submits that there was no evidence which would support the view:

- (a) That there was any agreement made in December 2002 that AWB or AWBI would pay Tigris a commission;
- (b) That Tigris provided any 'service' to AWB or AWBI in relation to execution of existing wheat contracts with the IGB, or the securing of future markets.

ASIC's conclusion in relation to the Iron Filings wrongdoing

2328 In relation to the Iron Filings Claim, ASIC submits the Court should find that:

- (a) The IGB asserted the Iron Filings Claim;
- (b) It was well understood within AWB that payments to Iraq would breach UN Resolutions;
- (c) DFAT had provided advice to AWB that compensation for the Iron Filings Claim could only be repaid through the UN escrow account or by reducing the

- price of future shipments of wheat;
- (d) Despite the DFAT advice, and widespread awareness within AWB that acting contrary to that advice and the UN Resolutions carried public relations and 'corporate governance' risks, AWB agreed with the IGB to pay compensation in the amount of US\$6.00 per metric tonne of wheat affected through the mechanism of the IGB fees as settlement of the Iron Filings Claim;
 - (e) AWB set aside funds in its accounts to pay the compensation to the IGB;
 - (f) In doing so, AWB proposed to engage in conduct that the UN Resolutions had called on member states to prevent; and
 - (g) AWB did not ultimately pay the compensation because of the intervention of the Iraq war.

2329 At this stage, I do not propose to make the proposed findings. If they are relevant to the case against Geary, then I will address the issues accordingly.

Evidence concerning Geary's knowledge

2330 ASIC contends that Geary knew or had the means of knowing the IGB fees wrongdoing, the Tigris wrongdoing and the Iron filings wrongdoing, and that public revelation of this wrongdoing was likely to cause substantial and enduring harm to AWB.

2331 ASIC contends that Geary knew all these things, because he received and sent many material emails and other documents, and participated in a number of conversations within AWB.

2332 ASIC says that the documentary record in relation to Geary is detailed and compelling. ASIC says that it demonstrates that Geary knew that:

- (a) there was no contract between AWB and Alia in relation to the provision of any discharge and transportation services for which the fees were properly payable;

- (b) IGB was responsible for discharging the wheat at Umm Qasr, and transporting it to all governorates of Iraq;
- (c) prior to 2003, Alia performed no discharge or transportation services for AWB in respect of wheat sold by AWB to IGB;
- (d) Alia was a mere conduit and the fees were paid on to Iraq or an Iraqi entity in contravention of UN sanctions;
- (e) the above facts were concealed from DFAT and the UN;
- (f) the contract price in A1670 and A1680 included the sum of US\$8.375 per tonne that was not related to the price of wheat, but was for an alleged debt to Tigris that IGB had agreed with AWB would be recovered from the U N escrow account for payment by AWB to Tigris;¹⁵⁶⁰
- (g) the relevant written contracts between AWB and IGB that were submitted to DFAT and thus to the UN did not disclose that this sum was included in the price, and this fact was otherwise concealed from DFAT and the UN;
- (h) AWB was proposing and had agreed to pay the Iron Filings Compensation by using the same mechanism used to make payments of the purported fees – namely, by payments in internationally traded currency from AWB to Alia which would thereafter be paid by Alia to the Government of Iraq or one of its instrumentalities.

2333 ASIC submits that if the Court is not satisfied that Geary had actual knowledge, ASIC says that it is plain that as a recipient of the documentary evidence and by virtue of his position, he had the means of knowing these things, which a Group General Manager Trading in his position and in AWB's circumstances would have inquired into.

2334 ASIC submits that communication by email was commonplace within and outside AWB in this period. ASIC says that Geary was a regular recipient and author of various material email communications which referred to or at least strongly

¹⁵⁶⁰ (The US\$8.375 per tonne also included a sum of US\$500,000 (equivalent to US\$0.50 per tonne) to be retained by AWB as its commission for recovering the Tigris Debt).

suggested wrongdoing by AWB.

Geary's knowledge of UN Resolutions

2335 ASIC contends that the following evidence establishes that Geary understood the UN Security Council Resolutions 661 and 986.

2336 During the period 1995 to mid-1998, Geary worked in the New York office of the Australian Wheat Board. His role included assisting in the exchange of information between AWB and the UN in respect of the OFFP.¹⁵⁶¹ In that role, Geary acquired knowledge about the OFFP and educated others about matters including UN Resolution 986 and how it would affect AWB's wheat trade with Iraq.

2337 On 3 May 1996, Geary sent an email to various AWB employees which forwarded a file note created by Storey and titled 'IRAQ - UN Sanctions'.¹⁵⁶² The file note provided an overview of certain UN negotiations in respect of UN Resolution 986. The file note also said, under the heading 'RE: AWB Approaches to Sanctions Committee':¹⁵⁶³

We were advised that other nations clearly provide limited information in their applications to avoid the potential embarrassment of an application being rejected. There is political risk, of course, that should one go down the minimal information route and being subsequently found out, of being branded as a Sanction buster.

2338 On 17 March 1997, Geary sent an email entitled 'UN-90 day review of sec. 986 operation' to various AWB employees detailing the operation of Resolution 986 and the impact on AWB.¹⁵⁶⁴

2339 In late March 1997, Geary attended a meeting at the UN regarding UN procedures under the OFFP. At that meeting, the UN Secretariat told attendees (including Geary) that all contractual terms in wheat contracts with Iraq had to be clearly spelt out. The

¹⁵⁶¹ CB 1/111, 117.

¹⁵⁶² CB 1/119.

¹⁵⁶³ CB 1/120.

¹⁵⁶⁴ CB 1/155.

email Geary sent reporting on the meeting also noted that 'the Sanctions Committee will pre-screen applications before monies are available in the Escrow Account.' He added:¹⁵⁶⁵

The UN advised the following simplistic procedures on applications:

- 1) Make sure all pages of a contract are submitted
- 4) Contractual terms (i.e. C&F or CIF to be clearly spelled out etc., etc., etc.).

2340 On 24 March 1997 Geary faxed Hogan and Lister a copy of the papers that were handed out at the UN meeting;¹⁵⁶⁶ the papers included the following statement:¹⁵⁶⁷

Does the contract provide for any payment to any Iraqi entity, such taxes, duties or demurrage? If so, this may prove problematic.

2341 The papers also contained the standard terms and conditions that would apply to all contracts, one of which was in these terms:

Amounts related to the settlement of claims relevant to shortages, damages and any other discrepancies for each shipment (according to the confirmation of the secretary general's designee which should be sent to the secretary general within 24 hours) must be remitted to Iraq account.

2342 On 17 April 1997, Geary received a fax sent by Anastasia Carayanides of the Australian Mission to the UN which attached:

- (a) a chronology of the implementation of Resolution 986;
- (b) an explanatory note regarding the OFFP Distribution Plan, which materially stated that the distribution of foodstuffs under the OFFP would be undertaken by the Iraqi Ministry of Trade through the existing rationing system;
- (c) a copy of the text of Resolution 986;¹⁵⁶⁸ and

¹⁵⁶⁵ CB 1/157.

¹⁵⁶⁶ CB 1/159.

¹⁵⁶⁷ CB 1/170.

¹⁵⁶⁸ CB 1/89.

- (d) a copy of the procedures to be followed by the 661 Committee in implementing the OFFP, including the procedures for the payment of humanitarian food contracts from the UN escrow account.¹⁵⁶⁹

2343 The last document did not contain any provision permitting payment to be made from the UN escrow account on account of funds paid to the Government of Iraq or its instrumentalities. Importantly, the document contained the following provisions:¹⁵⁷⁰

36. ... payments in favour of the purchaser resulting from normal commercial resolution practices should be made to the Iraq account.

...

41. Pursuant to paragraph 8(1) of resolution 986 (1995), the Committee can approve, under its no-objection procedure, the financing from the Iraq account of reasonable expenses, other than expenses payable in Iraq, which are determined by it to be directly related to the export by Iraq of petroleum and petroleum products permitted under paragraph 1 of resolution 986 (1995) or to the export to Iraq of the parts and equipment referred to in paragraph 9 of resolution 986 (1995), and of activities directly necessary therefor.

42. Requests for meeting the expenses referred to in the previous paragraph will be submitted by the Government of Iraq together with all necessary documentation, and will be approved on a case-by-case basis by the Committee under its no-objection procedure. The Committee will seek, if necessary, the advice of the overseers or the independent inspection agents in reaching a decision.

2344 The 'Iraq account' was defined in clause 9 as the UN escrow account.¹⁵⁷¹

2345 On 25 July 2001, Geary was copied into an email from Snowball reporting on a meeting between AWB and representatives of the UN on 20 July 2001. The email noted that the UN representatives had encouraged AWB to contact the UN directly, or via the Australian Mission, 'to discuss any issues.'¹⁵⁷²

¹⁵⁶⁹ CB 1/193.

¹⁵⁷⁰ CB 1/198-199.

¹⁵⁷¹ CB 1/94.

¹⁵⁷² CB 3/1959.

2346 On 17 May 2002, Geary received an email from James Molan of AWB, the material points of which are found at paragraph 539.

2347 On 16 September 2002, in the context of the Iron Filings Claim, Geary received a memorandum which stated (inter alia) 'UN Regulations prohibit the direct payment of funds to Iraq whilst Iraq is under UN sanctions.'¹⁵⁷³

2348 On 7 February 2003, Geary received the memorandum from Long which stated, inter alia, 'payment to a company with links to the Iraqi regime may be construed to be in contravention of the UN sanctions.'¹⁵⁷⁴

Geary's alleged knowledge of the IGB Fees wrongdoing, the Single Desk and Harm

2349 On 2 June 1999, Geary entered into a new 'Employee Service Agreement' witnessed by Laskie.¹⁵⁷⁵ Laskie was Geary's supervisor at this time. Geary was the 'Manager of Export Position' working in the AWBI (Pool), reporting to Laskie, the General Manager of AWBI (Pool). The purpose of his role was to 'maximise returns to growers through effective management of the Underwritten Pools.'

2350 Geary's key accountabilities included: managing the single desk on a day to day basis, manage the team responsible for management of wheat export program, manage the relationship between the export physical position manager and treasury to ensure synergies are developed and exploited, ensuring that policies and procedures are in place to protect the integrity of the single desk and represent the Pool as a professional, ethical unit. His key working relationships included 'Regional Managers.'¹⁵⁷⁶

2351 On 16 June 1999 Hogan sent to Geary (and others) an email entitled 'IRAQ', advising

¹⁵⁷³ CB 4/2679.

¹⁵⁷⁴ CB 5/3161.

¹⁵⁷⁵ CB 1/329.

¹⁵⁷⁶ CB 1/329.

that Hogan would be travelling to Iraq in the next few days. The email stated:¹⁵⁷⁷

2. Zuhair does not wish to discuss wheat pricing at the moment, (he will call for this on 29th June), however, he wishes to discuss some Contract terms and conditions (wanted to do this personally and not via taxes / telexes).

2352 Zuhair is recorded in that email as wanting to discuss some contract terms and conditions 'personally'. There was also a note directed specifically to Geary and Scales, who worked in the pool, of price levels and tonnages for September to February – 'although Zuhair did not want to discuss pricing.'

2353 Geary considered IGB's first wheat tender containing the term 'CIF Free on Truck to all Governorate'. On 17 June 1999 Geary replied to Hogan's email of 16 June 1999 referring to details of the IGB Wheat Tender which had been received that morning.¹⁵⁷⁸ The tender is discussed at paragraph 146.

2354 In his email in reply, Geary said:

there are some things in the tender doc we cannot offer against, Darryl will go through these with you.

2355 On 24 June 1999, Hogan sent to Geary (and others) an email entitled 'IRAQ' that advised that the IGB had requested that suppliers add an amount of US\$12.00 per tonne to their wheat offers for discharge and distribution from Umm Qasr. The email stated:¹⁵⁷⁹

Snowy - Iraq have submitted the 'distribution plan' to the UN, which requests the changes to conditions - can you chase to see where this paper is and what the feeling of the UN committee is???

1. FREE IN TRUCK:

IGB have requested that the offers are submitted CIF, FREE IN TRUCK, IRAQ. The cost for this is USD12.00 per tonne which the supplier adds to their offer.

Hence this part is not an issue.

The problem which still needs to be resolved is the payment mechanism as all

¹⁵⁷⁷ CB 1/367.

¹⁵⁷⁸ CB 1/369.

¹⁵⁷⁹ CB 375.

Iraq accounts have been frozen. IGB have stated that we will be required to pay the Maritime Agents, and one possible way would be to pay this to an Iraq bank in Amman. IGB will provide details of the banks which we can pay this through.

MICHAEL – as mentioned to you, there may be a way to pay through the vessel owners. Mark will discuss this with you, so have to think about the possibilities.

2356 The email further explained that the reason for requesting payment of this amount in US dollars was to reduce the amount of Iraqi dinars required to be placed into the market by the Ministry of Finance, as this was impacting the currency rate.

2357 In the 'to do list', there was reference to finding out more about the UN Distribution Plan. The last task, allocated to Watson, was to follow up the-
payment method of USD12.00 Free in Truck (via owners).

2358 ASIC submits that the email brought to Geary's attention that there was a problem that needed to be resolved. That problem was how AWB could pay money to the IGB when all Iraq accounts have been frozen.

2359 On 25 June 1999, Snowball sent to Hogan and copied to Geary, an email entitled 'Re: IRAQ'.¹⁵⁸⁰ The email referred to a distribution plan being submitted and approved on 11 June. The email then asked: 'Can you advise what proposed changes to the contract terms and conditions would be agreed between the IGB and the UN, and which would be agreed between AWB and the IGB only.'¹⁵⁸¹

2360 On 25 June 1999, Hogan sent to Geary (and others) an email entitled 'Re: IRAQ'.¹⁵⁸² The email reproduced Owen's comment from his email of 17 June 1999, and is referred to at paragraph 148.

2361 Hogan added a comment to the email, discussed at paragraph 157.

¹⁵⁸⁰ CB 1/379.

¹⁵⁸¹ CB 1/379.

¹⁵⁸² CB 1/381.

2362 On 25 June 1999, Watson sent Geary (and others) an email entitled 'Re: IRAQ' which is discussed at paragraph 186.¹⁵⁸³

2363 On 11 October 1999, Hogan sent an email to Geary and others entitled 'Note from Iraq'. The email referred Geary to despatch and demurrage issues and noted that Iraq had no mechanism to settle any amounts:

Sarah / Peter / Stu -... we will need to do some work on the IGB to introduce carry into contracts, which I believe can be included under 986???

'Peter' was a reference to Geary. The reference to '986' was to the UN Security Council Resolution 986. The email refers to Hogan sending Emons a separate note about the FIT system.¹⁵⁸⁴

Geary's interest in trucking fees

2364 ASIC submits that in his capacity as Pool Manager and General Manager of the National Pool, Geary had an interest in matters affecting pool performance. Geary's role was focussed on maximising profit for the pool. Maximising a return involves minimising expenditure. The Pool received the proceeds of sale, net of expenses such as ocean freight. It was the Pool that ultimately bore the cost of transport fees, although because the fee was added to the contract price, this cost was essentially revenue neutral. By reason of the relationship between AWB and the National Pool and their respective responsibilities, ASIC submit that Geary would have been interested in the contracts between AWB and IGB and any associated arrangements, particularly if the arrangements resulted in a cost ultimately borne by the Pool.

2365 ASIC submits that Geary was aware of and interested in the situation in Iraq and concerned with 'contractual terms', not just pool returns.¹⁵⁸⁵ Those returns were, in any event affected by the 'trucking fees.' Arrangements for inland transport, and the inclusion of the inland transport fees in the contract (being, in this context, two entirely

¹⁵⁸³ CB 1/385.

¹⁵⁸⁴ CB 2/675.

¹⁵⁸⁵ CB 2/1207, 1209.

separate things), both had the potential to affect pool performance.

2366 Thus, by virtue of his role, ASIC submits that Geary was required to read and pay attention to emails and other documents concerning inland transport and/or the inland transport fee. ASIC says that Geary's role required close attention to AWB's obligation under the contracts, timing of payment of the inland transport fees and risk arising out of the unusual and uncertain contract terms.

2367 As at 6 June 2000, Geary was the General Manager of International (Export Pools). From June 2000 until 2006, Geary was a member of an executive committee known as the Small Executive Group, the Small Executive Management Group and the Executive Leadership Group (ELG) comprising the Managing director and senior executives of AWB. The ELG set out strategy for the business of AWB, executing against strategy, reviewing activities and keeping abreast of strategy.¹⁵⁸⁶

2368 On 6 June 2000, Geary attended a meeting of the Small Executive Management Group. This was the first of many such meetings of the ELG. At this meeting, Lindberg set out some parameters for future meetings, there was discussion about focusing on getting 'good news stories out ... Need to work more closely with PG - growers are very keen on export news', the single desk (and Flugge's and Geary's role in making a submission), the NEAT litigation.¹⁵⁸⁷ The NEAT litigation and issues concerning the single desk arrangements were constantly discussed in ELG meetings.

2369 Throughout mid to late 2000, demurrage in relation to the Iraq market was a significant issue within AWB and AWBI. It was widely discussed between the senior management of IS&M and Chartering and senior management of AWBI (which included Geary). The discussions largely concerned the amount of exposure from

¹⁵⁸⁶ The following documents show Geary's continuous membership of the ELG (in its various guises): Small Executive Management Group minutes 6 June 2000 - Geary in attendance (CB 1067); Full Executive Management Group minutes 20 June 2000 - Geary attended (CB 1071); ELG action list 19 March 2002 - Geary responsible for items (CB 1079); ELG Agenda 30 September 2003 - Geary a member (CB 2/1081).

¹⁵⁸⁷ CB 2/1083.

demurrage, how it was being contained or limited and whether AWB or AWBI should bear the cost of it. Geary attended CRRC meetings at which there was discussion of discharge and demurrage issues in Iraq.¹⁵⁸⁸

2370 A contributing factor to demurrage was the delays in unloading at Umm Qasr. That in turn was attributed to a lack of trucks. On 30 May 2000, Watson and Emons sent to Officer a report on a meeting with 'Transport Co/Protective Agent [ie Alia] and also Iraqi Trade Commissioner.'¹⁵⁸⁹

2371 The email noted the delays in unloading at Umm Qasr were due to trucks being dispatched to Egypt to collect cargoes, but that the Iraqi Minister had instructed that all trucks return to Umm Qasr effective 21 May:¹⁵⁹⁰

- 3) March - trucks dispatched to Egypt to collect cargoes thereby reducing discharging capacity at Umm Qasr.
- 4) Minister instructed that all trucks return to Umm Qasr effective 21 May.

2372 On 30 May 2000, Marie Wilson forwarded to Geary (and others) a copy of a further email from Watson and Emons relating to meetings to be held the following day with Zuhair and Abdul-Rahman of the IGB.¹⁵⁹¹ Watson's email is discussed at paragraph 391.¹⁵⁹²

2373 On 31 May 2000 Geary forwarded the above email to Scales and Richardson.¹⁵⁹³

2374 On 6 June 2000, Geary was copied on an email containing an 'action list' which appears to have arisen from a meeting relating to chartering and demurrage issues affecting

¹⁵⁸⁸ CB 2/1005, 1033.

¹⁵⁸⁹ CB 2/1043, 1041.

¹⁵⁹⁰ CB 2/1043.

¹⁵⁹¹ CB 2/1045-1048.

¹⁵⁹² CB 2/1045-1048.

¹⁵⁹³ CB 2/1049.

the three sections in relation to the Iraq trade. Item 5 stated:¹⁵⁹⁴

MEM to provide full breakdown in costs for each contract, ie seaftr, trucking, Interest etc, so AWBI can confirm current CPM and Pool model numbers...

- 2375 On 9 June 2000, Watson sent an email to Geary and others setting out details of contracts, freight rates, trucking fees. A table attached to the email showed the inland transport fees of US\$12.00 increasing to US\$15.00 in relation to some shipments under the OFFP.¹⁵⁹⁵
- 2376 On 15 June 2000, Geary attended a meeting of the CRRC during which Iraq demurrage was discussed.¹⁵⁹⁶
- 2377 On 20 June 2000, there was a meeting of the Full Executive Management Group including Geary. At this meeting, it was discussed that there was no recourse against Iraq or the UN in relation to demurrage and chartering issues. Geary was to provide an update to the group on the Iraq situation.¹⁵⁹⁷
- 2378 On 28 June 2000, Geary attended a meeting of the board of AWB, during which there was discussion of the demurrage problem in Iraq.¹⁵⁹⁸ The minutes record the following in relation to Iraq:¹⁵⁹⁹

A Director requested an update on the demurrage issue in the Iraqi market. Management responded that this has been a focus of attention over recent weeks. There have been losses incurred which have been split between AWB (International) and AWB Limited, which include some losses in the way we have been chartering vessels. There are also many quality issues in Iraq e.g. e-coli concerns and it will be necessary to send a research group to the region. As AWB enjoys very good relations with Iraq, this should not present a problem. In terms of potential future losses, AWB has a shipping program which must be maintained. Losses in terms of demurrage will also be split between AWB (I) and AWB Limited on a commercial basis. There is an

¹⁵⁹⁴ CB 2/1061, CB 1063.

¹⁵⁹⁵ CB 1087, 1089, 1091.

¹⁵⁹⁶ CB 1103.

¹⁵⁹⁷ CB 1107.

¹⁵⁹⁸ CB 1117.

¹⁵⁹⁹ CB 1119.

opportunity to align much more closely, the activities of (I) and Chartering. Iraq is the best market for high protein wheat at the moment. It was confirmed that in future contracts will be drawn up to hold management accountable and follow through on processes. The execution part of these contracts needs to be tightened up. A strategy has been designed to manage such an exposure.

ASIC submits that given that Geary had been specifically asked to look into Iraq demurrage issues, it should be inferred that the 'management' that reported to the board was Geary. ASIC submits that given that transport arrangements at the discharge port were an important factor contributing to demurrage, it should be inferred that Geary, in looking into the Iraq demurrage problem, must have apprehended that AWB had no control over trucking in Iraq and that the inland transportation payments were not paid as part of an actual trucking contract.

2379 On or about 6 July 2000, Geary received a copy of the minutes of a CRRC meeting which referred to discharge issues in Iraq and demurrage risk issues, and that AWBI (of which Geary was general manager) was working closely with Chartering to resolve those issues.¹⁶⁰⁰

2380 On 10 July 2000, Jones (AWB Chartering) sent Geary an email entitled 'Iraq' in which Jones asked a number of questions including 'What is Ronly Holdings involvement in the process i.e. chartering services.'¹⁶⁰¹ The email also attached the Iraq Brief prepared by Borlase and Hogan.¹⁶⁰²

2381 The brief set out (inter alia) the substance of UN resolution 986, the contracts AWB had entered into with the IGB since 1996, and references to demurrage.¹⁶⁰³ The last page of the Iraq Brief was headed 'SUMMARY OF ISSUES'. The last bullet point of the summary said this:¹⁶⁰⁴

Mechanism for payment of trucking fee. In existing contracts the fee is \$15.00

¹⁶⁰⁰ CB 2/1129-1131.

¹⁶⁰¹ CB 2/1141.

¹⁶⁰² CB 2/1143.

¹⁶⁰³ CB 2/1133, 1135.

¹⁶⁰⁴ CB 2/1140.

per tonne. IGB have indicated the fee will be reduced to \$14.00 for future business. Current mechanism of payment is via transport company/s in Jordan.

2382 ASIC submits that these emails show that demurrage and capacity to make payments to Iraq was a matter of concern to the pool and thus to Geary at this time. It was those and other concerns which Jones addressed in his email of 10 July 2000 to Geary. ASIC submit that it is to be inferred that Geary has knowledge from this email that:

- (a) A mechanism to pay the trucking fee was required;
- (b) That the current mechanism of payment was 'via transport company/s in Jordan.'

2383 In circumstances where the Pool was paying the inland trucking fee, ASIC submits that it ought be accepted that Geary, who was at that stage General Manager of the Pool, read the email and attachment pertaining to matters which clearly were relevant to the performance of the Pool.

2384 ASIC argues that the reference to paying the fee 'via' the transport company in Jordan showed that the money was not being paid to transport companies for transport services. ASIC says that instead, the transport company was itself being used a conduit for payments to Iraq.

2385 On 12 July 2000, Owen sent to Geary an email which identified various problems in the receipt of payment by AWB from the UN escrow account and made suggestions as to how those problems could be addressed.¹⁶⁰⁵ In the email, Owen noted that AWB had to pay for inland transport on a vessel by vessel basis, and that payment for wheat sold to Iraq was contingent upon UN authentication. On 13 July 2000, Geary was sent a reply from Snowball to Owen's email, which included the text of Owen's email.¹⁶⁰⁶

2386 On 13 July 2000, Geary attended a meeting of the CRRC during which there was

¹⁶⁰⁵ CB 2/1149.

¹⁶⁰⁶ CB 2/1155.

discussion of Iraq demurrage and the failure to meet forecast discharge rates at Umm Qasr. The current demurrage loss was noted as AU\$13 million.¹⁶⁰⁷

2387 On 18 July 2000, there was a meeting of the Executive Management Group, including Geary. There was discussion about Iraq shipping and discharge issues.¹⁶⁰⁸

2388 On 18 July 2000, Stott emailed an Iraq Situation Report to Geary and others, reporting on demurrage and discharge issues, and noting that the Iraq trade achieved a US\$18.00 per tonne premium above the benchmark for Gulf sales. The following day Geary replied, thanking Stott for the brief and stating that it was:¹⁶⁰⁹

a very good result as the Pool's bottom line was achieved and the negotiating team have given us more confidence to move forward with additional sales. We have received enquiries for more sales to Iraq via the Russian Trading houses however will need further details from International Sales before proceeding ie final quality specs, contractual terms etc.

2389 On or about 19 July 2000, Hogan sent to Geary and others an email from Hogan entitled 'Iraqi Trip Report' and attaching a document entitled 'Iraq Trip Report' prepared by Hogan.¹⁶¹⁰ The report provided a breakdown of prices on new contracts totalling 1 million tonnes, including 'trucking' at US\$14.00 per tonne.¹⁶¹¹

2390 On 27 July 2000, Geary attended a meeting of the Executive Management Group which referred to issues in the Iraq market concerning discharge, contract execution and the costs of demurrage.¹⁶¹²

2391 On 1 August 2000, Geary attended a meeting of the Executive Management Group at which the CFO (Ingleby) noted that the apportionment of Iraq demurrage costs had

¹⁶⁰⁷ CB 2/1159.

¹⁶⁰⁸ CB 2/1197.

¹⁶⁰⁹ CB 2/1207, 1209.

¹⁶¹⁰ CB 2/1211, 1213.

¹⁶¹¹ CB 2/1216.

¹⁶¹² CB 2/1251.

been an issue for some time. It was decided that Geary, Goodacre, and Beaumont (of the Pool, ISM and Chartering, respectively) would each prepare their cases in writing as to how liability for demurrage should be apportioned, so that the matter could be determined by Lindberg.¹⁶¹³ On 8 August 2000, Scales sent the Pool's case in writing to Lindberg, copied to various people including Geary.¹⁶¹⁴

2392 On 8 and 10 August and 30/31 August 2000, Geary attended meetings of the Executive Management Group in which the Single Desk and lobbying efforts to retain the Single Desk were discussed.¹⁶¹⁵ This issue was consistently discussed in Executive Management Group and later ELG meetings in which Geary attended. The 'resolution' of the internal wrangling around Iraq demurrage was also discussed – it was ultimately agreed that Iraq demurrage costs would be apportioned AWBI (65 per cent) and AWB (35 per cent).¹⁶¹⁶

2393 On 17 August 2000, Geary attended a meeting of the CRRC which discussed risks in the Iraq market including demurrage.¹⁶¹⁷

2394 On 12 September 2000, Hogan sent an email to Scales and others, copied to Geary and others, entitled 'Iraq- LC's' which detailed recent contracts. The email set out a breakdown of the selling price which included 'Trucking' at '14' (presumably US\$14.00) and the phrase 'free in truck.'¹⁶¹⁸

2395 On 21 September 2000, Geary and others were sent an email from Ingleby, which said:¹⁶¹⁹

¹⁶¹³ CB 2/1263.

¹⁶¹⁴ CB 2/1267.

¹⁶¹⁵ CB 2/1275, 1279, 1283.

¹⁶¹⁶ CB 2/1283.

¹⁶¹⁷ CB 2/1293.

¹⁶¹⁸ CB 2/1309.

¹⁶¹⁹ CB 2/1321.

just confirming that tomorrow the go fwd chartering plan will be agreed and confirmed as previously promised.

this is urgent as we seem to find new ways for chartering to lose money each month - this month Yemen demurrage (0.5m) and Iraq trucking (0.5m) - are we sure these are to charterings account??

regards PJI

2396 ASIC submits that Geary knew (or at the very least ought to have known) that Ronly was used as a conduit to pay the IGB fees. On 21 September 2000, Stott sent an email to Ingleby, including Geary as an addressee. The email included the statement:¹⁶²⁰

I am advised by David [Cowan] that the USD 300,000 (AUD500k) payment to Ronly relates to the US 0.20cents per tonne fee that we agreed to pay for Ronly making Iraq freight and land transport payments on behalf of AWB. Evidently this had not been paid and Ronly only recently sent in an invoice for 1.5million tonnes. This is an AWBI expense.

...

Please urgently confirm that our obligations to Ronly in respect to the Iraq COA are now completed and as such no further payments will be made to Ronly for Iraq business. Also please advise if there are any additional monies due to Ronly in respect to charterings current or past business with this trading house.

Cowan replied to Stott's email on 22 September 2000.¹⁶²¹

2397 ASIC submits that Geary as the General Manager of the pool was or ought to have been interested in the content of the email. The payment of half a million dollars to Ronly was an AWBI expense and as such would be taken off AWBI's bottom line. That was a very large sum to pay an entity that did no more than act as a conduit for payments.

2398 ASIC submits that an inference may be drawn that those who knew that Ronly had made the payments on behalf of AWB, rather than AWB making the payments itself, understood that the interposition of Ronly was to disguise the payment.

¹⁶²⁰ CB 2/1325.

¹⁶²¹ CB 2/1327.

2399 The 2000 AWB Annual Report for the year ended 30 September 2000 lists the members of the 'Executive Management Group' at pages 32 to 33. It states at page 33 that Geary's role was 'General Manager Export Pools' and that he was 'responsible for managing the National Wheat Pools and the Single Desk.' The Annual Report also records statements about the importance of the single desk and the national pool.¹⁶²²

2400 On 7 October 2000, in response to a request for information from Geary, Snowball sent an email to Scales copied to Geary and two others entitled 'Re: Iraq'. The email summarised the UN stance under the OFFP:¹⁶²³

The UN's stance on this oil for food program is:

- Iraq agrees to a contract for supply of wheat from Australia. This is a commercial agreement and has no involvement from UN. UN will not arbitrate/influence the terms and conditions of the contract as long as there is no threat of the oil money being used for things like purchasing weapons.
- The UN secretariat has a responsibility to execute the Oil for Food programme, but their role is centred around ensuring the goods Iraq purchases are for humanitarian food/medicine and that there are funds from the sale of oil to pay for the goods. An important part of this is inspection of goods at specific points of entry into Iraq.
- UN is not permitted to operate an inspection procedure at loadport under the current oil for food program.
- UN has inspected/tested the Pacific Champ twice and both times has confirmed the wheat is fit for human consumption. However, Iraq has decided the remaining tonnage cannot be accepted. The UN cannot force Iraq to accept the wheat. Iraq can take the vessel off the berth, UN have no control over this. The vessel can come and go from Umm Qasr without UN control.

Iraq is in total control here. Unfortunately, I think the only influence AWB may have with the UN is at a policy level with the UN Security Council via the Australian Government. I have spoken to the UN mission today and they will be following this up with Canberra again. The UN do not want to see the Oil for Food Program fail, so it will be in their best interests to encourage Australian wheat supply wherever possible. The UN knows there is no quality issue, and that Iraq is only playing games to attempt to force the eventual removal of sanctions.

AWB as a supplier should have some leverage given that the Iraqi's have to

¹⁶²² CB 2/1339.

¹⁶²³ CB 2/1447.

come to us for the bulk of their wheat supply (refer Stu's comments).

AWB has put contract terms and conditions in place with Iraq, and the responsibility rests with AWB to change them. AWB is the only supplier bending to Iraq's needs. Stu has also provided some information on Tradigrain's use of SGS for inspection.

2401 On 23 October 2000, Scales sent to Geary an email which forwarded an email that Stott had sent on 23 October 2000. In his email Stott noted that during his recent visit to Baghdad, the IGB had asserted that the 'trucking fee' in respect of particular shipments of wheat had not been paid in full and that the IGB claimed that US\$1.198 million was outstanding. The email also said:¹⁶²⁴

this figure is based on trucking fee of USD12.00 per tonne (which needs to verified [sic] against all contracts).

2402 On 24 October 2000, Scales sent to Geary (and others) a short email entitled 'Iraq questions' that stated:¹⁶²⁵

5. what is the agreement with igb on no. of trucks available to awb and has the cost been locked in?

ASIC says that implicit in this question is that the IGB, and not Alia, were responsible for the provision of trucking services within Iraq.

2403 On 31 January 2001, Scales sent a short email to Hogan copied to Geary and others in relation to discharge issues and that stated:¹⁶²⁶

What progress has been made with respect to getting IGB to GTEE berths at Umm Qsar? Can this also be included in the negotiations ... Also do they gtee trucks, as I understand at one stage a shortage of trucks was the reason behind slow discharge rates???

2404 ASIC says that this is another email that indicated that it was the IGB – not AWB or Alia – that was responsible for trucking.

2405 On 7 February 2001, Geary was sent a trip report circulated widely within AWB by

¹⁶²⁴ CB 2/1471.

¹⁶²⁵ CB 2/1487.

¹⁶²⁶ CB 3/1539.

Borlase and Hogan. It stated that Iraq was trying to extract hard currency through the trucking fee mechanism in contravention of the UN Resolution. On that day, email groups including 'International-All' (included Geary as the GM of Trading (i.e. International)) and 'Marketing-All' were sent an email¹⁶²⁷ from Borlase of AWB attaching the 'Iraq Trip Report.' It referred to the increase in the truck fee and the introduction of the 10 per cent after sales service fee by the Iraqis as discussed at paragraph 483.¹⁶²⁸

2406 ASIC argues that thus it was appreciated within AWB that the 10 per cent was an impost by the Iraqis and not a payment in any way related to trucking or the inland transportation of the wheat. The 10 per cent was calculated by reference to a contract price which included the US\$25.00 per tonne trucking fee. Thus the 10 per cent was calculated on the total contract price and therefore included 10 per cent of the trucking fee, that is, US\$2.50 per tonne.

2407 The February 2001 trip report was circulated within AWB. ASIC contends that it can therefore be concluded that, from February 2001, that it was widely known within AWB that:

- (a) the increase in the trucking fee and addition of the 10 per cent service fee was considered to be a mechanism for extracting money from the UN escrow account;
- (b) the trucking fee, which included the 10 per cent after sales service fee, was to be received by Iraq;
- (c) the trucking fee, which included the 10 per cent after sales service fee, was to be used by Iraq for purposes other than trucking.

2408 From March 2001 to November 2006, Geary was the Group General Manager Trading

¹⁶²⁷ The email address AWBI. All means the pool of AWBI. International marketing means each of the marketing desks and chartering; Transcript of hearing, *ASIC v Geary & Flugge*, (27 October 2015) T970, L16-25 (Hogan). The pool included Geary and Scales: T971, L10, 14.

¹⁶²⁸ CB 3/1557 (email), CB 3/1559 (report).

of AWB and reported to Lindberg. ASIC submits that Geary's role relevantly included:

- (a) setting and implementing long-term strategies for the sale of wheat by AWB in international markets including Iraq;
- (b) approving (or not, as the case may be) payments by AWB in relation to the sale of wheat in international markets, including the payment of 'inland transport' fees in Iraq;¹⁶²⁹
- (c) authorising and revoking arrangements entered into by the IS&M division and giving directions to its staff;¹⁶³⁰ and
- (d) taking reasonable steps to ensure that the ELG, CRRC, the Managing director and/or the Board of AWB were informed of all relevant and up-to-date information that could materially impact upon AWB's performance, financial and commercial position, or that might impact upon AWB's standing and reputation;¹⁶³¹

2409 ASIC submits that as a member of the CRRC, Geary's responsibilities included:

- (a) reading and considering reports provided to the CRRC and taking appropriate action in light of such reports;¹⁶³² and
- (b) discussing, formulating and implementing risk minimisation strategies, including such strategies relating to the conditions upon which AWB supplied wheat to Iraq.

2410 On 4 May 2001, Geary attended a CRRC meeting at which there was discussion of

¹⁶²⁹ CB 4/2263, 2633, 2697, 2995, 3143, 3191.

¹⁶³⁰ CB 5/3165, 3187.

¹⁶³¹ CB 6/4176.

¹⁶³² CB 4/2653, 2654.

discharge and demurrage issues.¹⁶³³

2411 On 17 May 2001, Geary attended another CRRC meeting, at which Stott alerted the Committee to the rising demurrage costs associated with Iraqi shipping and the potential negative Pool returns.¹⁶³⁴

2412 On 6 June 2001, AWB confirmed the details of new contract A0784 with the IGB on terms including 'Free in Truck to all governorates, Iraq' and inland transport costs of US\$46.70 per metric tonne or €55.17 100 per cent payable before vessel discharge.¹⁶³⁵ Details of this sale, including the inland transport costs, were sent by Hogan to email address 'Market_Info' on 7 June 2001.¹⁶³⁶

2413 On 13 June 2001, Snowball sent Geary an email forwarding an email sent by Hogan on 11 June 2001, in which Hogan noted that:¹⁶³⁷

- (a) the Iraqi Minister for Trade was under pressure over AWB's split payments for the 'inland transport' fee;
- (b) a new contract would provide for payment in full of the 'inland transport' fee before discharge;
- (c) the US\$0.50 fee sought by Umm Qasr Port would be built into the 'inland transport' fee; and
- (d) the IGB had confirmed that crane hire was included in the 'inland transport' fee, and that the cranes were controlled by the IGB.

2414 The 2001 AWB Annual Report for the year ended 30 September 2001 lists the members

¹⁶³³ CB 3/1611.

¹⁶³⁴ CB 3/1623.

¹⁶³⁵ CB 3/1651.

¹⁶³⁶ CB 3/1655.

¹⁶³⁷ CB 3/1657.

of the 'Executive Management Group' at pages 44 to 45. It states at page 45 that Geary's role was 'Group General Manager, Trading' and that he was 'responsible for domestic and global trading and risk management products for growers and end users.' It also states at page 53 that Geary was the fourth highest paid executive officer of AWB (and the consolidated entity) after Lindberg, Ingleby and Goodacre.¹⁶³⁸

2415 The 2001 Annual Report also noted the retention of the Single Desk as a highlight of the year and Flugge stated in the Chairman's Report, 'The year will be remembered for the successful campaign to retain the Single Desk (the sole right to export bulk wheat)...' At page 8 in his Chairman's Report, he states that 'The AWB group managed 24.1 million tonnes of grain with a value of approximately \$5.5 billion which included approximately \$3.8 billion in export income from wheat alone under the Single Desk.' At page 9, 'AWB argued vigorously and in many forums that the Single Desk provided significant benefits to Australian wheat growers and the nation's economy. We demonstrated that premiums captured by this arrangement are equal to more than \$140 million a year or \$8.72 per tonne.'¹⁶³⁹

2416 The 2001 AWB Annual Report, in the 'International sales and marketing' section of the 'AWB's Business Streams' chapter, nominates Iraq as one of six key markets for AWB, and states that demand for AWB's wheat remained strong in Iraq.¹⁶⁴⁰

2417 On 16 September 2002, Long sent to Geary, an email that was copied to two others, entitled 'Letter to Ronly' that related to a vessel damage claim. The email is copied at paragraph 328.¹⁶⁴¹

2418 Geary forwarded this email to Ingleby the same day noting that:¹⁶⁴²

¹⁶³⁸ CB 3/2044. Geary was paid a total of \$313,002 for the 2001 financial year. For the year ended 30 June 2002, Geary's total package increased to \$446,110 (CB 2777).

¹⁶³⁹ CB 3/1987.

¹⁶⁴⁰ Geary, sch A [29].

¹⁶⁴¹ CB 4/2681.

¹⁶⁴² CB 4/2683.

I have not looked at the file but based on this note I agree with Michael's position.

2419 ASIC argues that Geary knew of the involvement of Ronly in the payment of the inland transportation fees and that the reason for Ronly's involvement was because of 'alleged problems with the UN/IGB'. ASIC submits that the very nature of the payment arrangements, the use of a third party to make the payment pursuant to an undocumented deal set up by Watson and Emons but which Flugge 'sanctioned' and the payment of a 'facilitation fee' is itself telling of a scheme designed to conceal payments to Iraq from the UN. Further, ASIC submits that the language recording that Flugge 'wants to distance himself' must have suggested to Geary (if he did not already know) something untoward about the arrangements.

2420 The draft letter to Ronly attached to Long's email read in part:¹⁶⁴³

The arrangements between Ronly and AWB at that time [March 2000] were commercial arrangements whereby AWB paid you \$0.20 per ton for assisting in organising freight and trucking contracts in Iraq.

2421 Two days later, on 18 September 2002, Geary signed a form headed Euro Payment Request, approving payment of €5,539,629.63 payable to 'Alia for Transportation and General Trade' into an account held with The Jordan National Bank located in Amman, Jordan.¹⁶⁴⁴ The form indicated that the payment related to Iraq and was for the payment of 'inland transport' in relation to contract A1111. That amount was paid on 20 September 2002 by the Commonwealth Bank.¹⁶⁴⁵ ASIC submits that the continued approval by Geary to pay Alia the IGB fees came at a time when he and AWB knew that Iraq wanted payment of the Iron Filings Compensation through the IGB fees mechanism (as explained below), and in circumstances where he had just been reminded (in the 16 September memo referred to below) that such payments were contrary to Resolution 661.

¹⁶⁴³ CB 4/2684.1.

¹⁶⁴⁴ CB 4/2697.

¹⁶⁴⁵ CB 4/2699.

2422 ASIC submits that the inland transport mechanism was a method by which money was to be paid through Alia to Iraq. ASIC submits that Geary knew or at the very least ought to have known that this was so from:

- (a) the communications referred to above;
- (b) Geary's knowledge of IGB's proposal to have the iron filings rebate paid to them through the inland transport mechanism (discussed below);
- (c) emails he received in relation to the Pearl of Fujairah; and
- (d) steps taken to in fact engage Alia to transport wheat in Iraq in 2003.

2423 ASIC says that Geary also knew about, and was involved in, the payment of fees to Alia in respect of contracts A0784, A0785, A1111, A1112 and A1441. Internally, the cost of the fees was met by the Pool. The internal AWB procedure involved in generating this payment included that a payment request was made by an officer of the IS&M division, usually Hogan or Edmonds-Wilson. The payment request was required to be authorised by two managers. Pursuant to this procedure Geary authorised significant payments to Alia referable to these contracts as set out below.

2424 ASIC says that Geary authorised significant payments to Alia under contracts A0784, A0785, A1111, A1112 and A1441. Geary personally authorised in writing the following payments of purported fees to Alia.¹⁶⁴⁶

CONTRACT	DATE OF PAYMENT	AMOUNT
A0784/ A0785	18.02.02	€4,423,260.00
A0784/ A0785 / A1112	28.03.02	€7,700,743.08
A1111	30.08.02	€2,867,827.63
A1111	18.09.02	€5,539,629.63
A1441	18.12.02	€4,395,912.00
A1441	30.01.03	€2,037,840.00
A1441	24.02.03	€2,037,840.00

¹⁶⁴⁶ CB 4/2249, 2295, 2633, 2635, 2637, 2697, 2995, 3143, 3191.

- 2425 A table of all 'inland transport' payments made by AWB is exhibit P6, and a revised version with additional information is attached as schedule E.
- 2426 Edmonds-Wilson prepared payment requests and obtain authorisation from two general managers. AWB policy required that at least two general managers sign off on such a payment.
- 2427 On most occasions, he obtained authorisation from Stott and Scales. If Stott or Scales were unavailable, Edmonds-Wilson approached another manager for authorisation. Other managers who authorised the payments included Geary.
- 2428 When providing these payment requests to the relevant General Managers for authorisation, Edmonds-Wilson's practice was to also provide supporting documentation, including the relevant sales note, and a copy of the short-form and/or long-form contract. The supporting documentation also included the relevant UN 'request to ship goods.'¹⁶⁴⁷
- 2429 Edmonds-Wilson also signed the payment requests to show that he was happy with the paperwork and it was ready for approval.
- 2430 ASIC submits that it is to be inferred that Geary reviewed these documents prior to authorising the above payments. ASIC says that if he did not he ought to have.
- 2431 On 2 December 2002, Whitwell sent an email to Geary and others reporting on the most recent trip to Baghdad.¹⁶⁴⁸ The attached trip report contained the following statements:¹⁶⁴⁹

New Business

Possibly this could be put under phase 12 - we discussed 500 k ran through production problems around the world and freight and war risk and offered

¹⁶⁴⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T599, L17 - T600, L8; T655, L23 - T626, L28.

¹⁶⁴⁸ CB 5/2941.

¹⁶⁴⁹ CB 5/2943.

278 including inland transport at USD 26.50 pmt.

2432 On 5 December 2002, Geary (and others) received an email from Whitwell entitled 'SALE 1 MILLION TONNES TO IRAQ' advising that AWB had sold 1 million tonnes to Iraq. The sale was divided into two 500,000 tonne contracts, A1670 and A1680. Contracts A1670 and A1680 had a 10 per cent surcharge based on the FIT value added to the inland transport fee. The email stated 'Inland transport not included in price to be mutually agreed.'¹⁶⁵⁰ ASIC submits that was most likely due to the on-going discussions the possible offset of the Tigris and Iron filings components.

2433 The 2002 AWB Annual Report for the year ended 30 September 2002 lists the members of the 'Executive Leadership Group' at pages 26-27. It states at page 26 that Geary's role was 'Group General Manager Trading' and that he was 'responsible for Domestic and Global Trading, Risk Management products for growers and end users and Chartering.' At page 40, the report indicates that in terms of total remuneration, Geary was the fourth highest paid executive officer of AWB (and the consolidated entity) after Lindberg, Ingleby and Stott. Geary was paid \$446,110.00 for the year. At page 5 in the Director's Report, it is stated:¹⁶⁵¹

One of AWB's most enduring relationships continues with customers in Iraq. The benefits of that relationship were highlighted during the recent challenges in that market... The result was an important one for Australian growers and is testament to the benefit of the Single Desk marketing system, AWB's management and the strength of the relationships it has built with key customers over many years.

2434 The AWB 2000 Annual Report, in a section entitled 'AWB's National Pool', contains material statements about the value of the Single Desk marketing system and states that AWB's aggressive marketing has resulted in 'large volumes of discretionary tonnage being sold to the highest bidding markets such as Egypt, Indonesia, Iran and Iraq.' Geary was the General Manager of AWB's national pool at the time the 2000

¹⁶⁵⁰ CB 5/2957.

¹⁶⁵¹ CB 4/2777-2739.

Annual Report was released.¹⁶⁵²

2435 On 28 May 2003, Whitwell sent to Geary (and others) an email that referred to Alia's efforts to recover money that AWB had previously paid to them. The email is referred to at paragraph 2231. The email stated:¹⁶⁵³

Alia were very pleased to see us and have assured us they will do everything in their power to get back the money deposited with them?"

The note also stated:

FYG Alia have advised us that the DG has lodged the debt incurred of our POFuj [Pearl of Fujairah] payment in March.

2436 ASIC submits that these statements show that the funds paid to Alia for the Pearl of Fujairah shipment had already been forwarded to the IGB and were no longer under Alia's control. ASIC says that 'DG' is likely a reference to the Director General of the IGB.

2437 On 13 June 2003, Long sent to Geary and others an email entitled 'Proton', which forwarded a memorandum of instruction from Cpt Blake Puckett about the processing of OFFP contracts in which there is reference to a kickback or surcharge of 10 per cent. The email stated that they needed to know whether a kickback or after sales service fee was involved. A further copy of this instruction was forwarded by Whitwell to Geary under covering email on 13 June 2003.¹⁶⁵⁴ In a separate response to Stott, to which Geary was copied, Whitwell stated that contract A1670 was in group 3, approved but not funded.¹⁶⁵⁵

2438 On 17 June 2003, Kate Robertson (on behalf of Whitwell) sent to Geary (and others)

¹⁶⁵² Geary, sch A [23].

¹⁶⁵³ CB 6/3391; following the invasion of Iraq by the US and its allies in March 2003, the requirement to pay inland transport fees to the IGB ended. AWB was seeking to recover inland transportation fees that had already been paid in respect of wheat that had been diverted from Iraq due to the invasion.

¹⁶⁵⁴ CB 6/3473.

¹⁶⁵⁵ CB 6/3479.

email 'Iraq Brief plus trip Report' that attached a document entitled 'Jordan/Iran Trip Report' prepared by Whitwell and Edmonds-Wilson. The trip report stated:¹⁶⁵⁶

... the matter of the EUR2.5m inland transport paid for the MV Pearl of Fujairah was brought up ... as soon as someone with authority to sign the appropriate documentation from the Iraqi side, the money would be returned to Alia and then to the company in question.

2439 On 24 July 2003, Long sent Geary (and others) an email entitled '500k' concerning, amongst other matters, the arrangements for the delivery of wheat within Iraq.¹⁶⁵⁷ The text of Long's email is copied at 574. Relevantly, Long poses the question:

can we arrange inland transport to all governorates if it goes to umm qasr ie really deliver on the cnf all governorates

2440 The same day, Whitwell sent Geary and others received comments on Long's email.¹⁶⁵⁸ Immediately below Long's question as to whether AWB can 'really deliver' to all governorates within Iraq, Whitwell said:¹⁶⁵⁹

I think there are many hoops to jump through first in new environment. lots of organisation and possible risk.

2441 On 12 September 2003, Whitwell sent an email to Geary and others referring to AWB's obligations under the WFP to arrange private transportation from port to final delivery, and for the price to be reduced by 10 percent.¹⁶⁶⁰ This was confirmed by facsimile dated 17 September 2003 from WFP to AWB.¹⁶⁶¹

2442 In November 2003, the AWB helped prepare presentation slides for Minister Vaile in relation to the importance of defending the Single Desk for Australia's upcoming trade negotiations with the US. The slides also detail the costs of losing the Single Desk. A

¹⁶⁵⁶ CB 6/3489, 3491, 3495.

¹⁶⁵⁷ CB 6/3541.

¹⁶⁵⁸ CB 6/3543.

¹⁶⁵⁹ CB 6/3544.

¹⁶⁶⁰ CB 6/3683.

¹⁶⁶¹ CB 6/3685.

report was given to the ELG on this issue and a draft letter was also drafted to Prime Minister Howard on the importance of the Single Desk.¹⁶⁶²

2443 On 29 October 2004, an AWB Memorandum was sent to the boards of AWB AWBI, copied to the ELG, which summarised the strategy that was being implemented in 2004/2005 'to best position AWB to influence Doha WTO negotiations and protect the Single Desk.' A key objective was listed as to 'retain the Single desk with no, or at most minimum of, substantive change ...'¹⁶⁶³

2444 On 22 February 2005, Linton sent an email to Geary and Trewin titled 'Confidential - Project Rose' forwarding the final version of the chronology on Tigris.¹⁶⁶⁴

2445 ASIC submits that Geary had no reasonable basis to assume that payment of the purported inland transport fees through Alia to Iraq in relation to contracts A1111, A1112, A1441, 1670 and 1680 in currencies other than Iraqi dinar were approved by the UN given:

- (a) His knowledge of the UN Resolutions and the OFFP.
- (b) Geary by his own admission knew AWB's sales of wheat to Iraq under the OFFP were subject to scrutiny and authorisation by the UN. Had the contracts on their face clearly and transparently disclosed the true nature of the arrangements the UN would not have approved same.
- (c) Over a lengthy period in 2000 the issue of Iraq demurrage was a significant issue for AWB and AWBI, and Geary was personally tasked with looking into it. He must therefore have understood the true nature of the inland transportation arrangements in Iraq, and that these were not related to AWB's payment of inland transportation fees.

¹⁶⁶² CB 6/4141, 4143, 4147.

¹⁶⁶³ CB 7/4629.

¹⁶⁶⁴ CB 7/4731, 4711 (see entry at 13 December 2004 above).

- (d) Geary himself identified that there were certain things sought by IGB in the June 1999 wheat tender that AWB could not offer against;¹⁶⁶⁵
- (e) Geary received a number of emails that indicated AWB intended to conceal the true nature of the payments from the UN which contained statements such as the following:
- (i) the problem which still needs to be resolved is the payment mechanism as all Iraq accounts have been frozen. IGB have stated that we will be required to pay the Maritime Agents, and one possible way would be to pay this to an Iraq bank in Amman. IGB will provide details of the banks which we can pay this through;¹⁶⁶⁶
 - (ii) the US\$12.00 will be added onto CIF price - so no skin off our nose - however we need to find a way to implement the payments as Iraq a/c's frozen. Discretion is required here;¹⁶⁶⁷
 - (iii) payment method of US\$12.00 Free in Truck (via owners);¹⁶⁶⁸ and
 - (iv) mechanism for payment of trucking fee. In existing contracts the fee is \$15.00 per tonne. IGB have indicated the fee will be reduced to \$14.00 for future business. Current mechanism of payment is via transport company/s in Jordan.¹⁶⁶⁹
- (f) ASIC submits that Geary knew (or at the very least ought to have known) that Ronly was used as a conduit to pay the IGB fees because AWB did not have UN approval to pay Iraq foreign currency. ASIC says that Geary received emails

¹⁶⁶⁵ CB 1/369.

¹⁶⁶⁶ CB 1/375.

¹⁶⁶⁷ CB 1/381.

¹⁶⁶⁸ CB 1/375.

¹⁶⁶⁹ CB 2/1140.

stating:

- (i) the US\$300,000.00 (AU\$500,000.00) payment to Ronly relates to the US\$0.20cents per tonne fee that AWB agreed to pay for Ronly making Iraq freight and land transport payments on behalf of AWB;¹⁶⁷⁰
- (ii) Ronly were involved in paying inland trucking charges and chartering vessels for us because of alleged problems with the UN/IGB. AWB paid Ronly in advance (\$12.00 per tonne) and Ronly paid (via some shelf company) the Jordanian trucking company.¹⁶⁷¹
- (g) ASIC submits that Geary knew that each separate contract was subject to UN approval. ASIC argues that no reliance could reasonably be placed on the wording in the first four contracts suggesting the discharge cost was to be a 'maximum' of US\$12.00, and the trucking fee under the later contracts was substantially more. ASIC says that if there was a genuine belief that the transport fees were approved by the UN, there would have been no need to interpose third parties, such as Ronly and shipowners, to act as conduits for the payments;
- (h) ASIC says that Geary was aware that the inland transport mechanism was a mechanism designed to facilitate and disguise payments of foreign currency to Iraq, as demonstrated by his approval of the 7 February 2003 memo. ASIC submits that it was commonly understood within AWB that the reference to paying the inland transport mechanism meant paying Alia and then Alia paying the Iraqis.¹⁶⁷²
- (i) Geary admits that he knew AWB's sales of wheat to Iraq under the OFFP were

¹⁶⁷⁰ CB 2/1325.

¹⁶⁷¹ CB 4/2681.

¹⁶⁷² Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1559, L25-9; T1562, L8-11; T1613, L21-5 (Whitwell).

subject to scrutiny and authorisation by the UN.

- (j) The contracts did not include any reference to the inland transport fee.
- (k) AWB never received any approval from the UN in relation to the inland transport and after sales service fees.
- (l) It was a generally held view in AWB that had AWB not agreed to the inland transport fees it would not have been awarded the business.¹⁶⁷³

2446 Moreover, ASIC submits that Geary's knowledge of the IGB Fees wrongdoing can be inferred from his approval of the iron filings and Tigris wrongdoing. ASIC says that Geary did not recommend instead that AWB adopt one of the two DFAT recommendations in relation to the payment of the iron filings rebate.¹⁶⁷⁴

ASIC's submissions on Geary's knowledge of the Iron Filings and Tigris wrongdoing

2447 ASIC contends that Geary knew that there was a proposal for AWB or AWBI to receive moneys from the UN escrow account representing Iraq's repayment of the Tigris 'debt', that AWB would receive a US\$500,000.00 fee for its assistance, and that I would pay the received moneys to Tigris.

2448 ASIC contends that Geary also knew that AWB was proposing and had agreed to pay the Iron Filings Compensation by using the same mechanism used to make payments of the purported fees – namely, by payments in internationally traded currency from AWB to Alia which would thereafter be paid by Alia to the Government of Iraq or its instrumentalities.

2449 ASIC says that the following matters in particular establish Geary's knowledge.

¹⁶⁷³ Transcript of hearing, *ASIC v Geary & Flugge*, (29 October 2015) T1185, L16–19 (Officer).

¹⁶⁷⁴ ASIC says that this is apparent from Geary's approval itself and is further evidenced by Whitwell T1564, L22–3.

ASIC's summary of Geary's knowledge

- 2450 ASIC submits that in summary, the documentary evidence establishes the following:
- (a) Geary was in New York in 1996 and 1997 helping to disseminate detailed information about the UN resolutions and the OFFP procedures. It should be inferred that he had a good deal of knowledge about the UN resolutions, understood the essential elements of resolutions 661 and 986: no payment to the government of Iraq or to any commercial industrial or public utility undertaking in Iraq (Resolution 661) and the UN escrow account could only be used to pay for export under the OFFP (Resolution 986).
 - (b) In mid-1999, Geary was among a small group of AWB executives who were discussing and formulating ideas on how to pay the IGB fees despite the 'greyness' of the issue. He received many emails recording these proposals.
 - (c) Geary was a regular recipient of internal emails and communications concerning AWB's assistance to Tigris to recover the Tigris Debt, proposals and implementation of the recovery of the Tigris Debt through the loading up of contracts A1670 and 1680, entry into contracts A1670 and 1680, and the entry into the sham Tigris agreement purporting to justify, on a false basis, AWB paying Tigris the amount AWB had recovered from the UN escrow account less AWB's commission.
 - (d) Geary was a regular recipient of internal emails and communications concerning the settlement of the Iron filings claim and the agreement to pay compensation to Iraq in the amount of US\$6.00 per metric tonne through 'the inland transport mechanism.' Geary was specifically requested to support a proposal to pay this amount in smaller instalments ('not a lump sum payment') through the inland transport mechanism and 'preferably to a company other than the IGB and in a country other than Iraq.' Despite known corporate governance risks and the fact that Resolution 661 prohibited such payments, Geary acceded to the request and approved the proposal.

2451 ASIC submits that the Court should find that Geary received and understood the material communications. ASIC says that the irresistible inference to that effect arises on the basis of the documents.

2452 ASIC submits that Geary expressed no surprise or otherwise adverse reaction when receiving any of the documents. ASIC says that was because he knew that the conduct was occurring and accepted that the conduct – although the very thing that the UN sanctions were designed to prevent – should be engaged in because this was the accepted cost of doing business in Iraq, one of the biggest and profitable wheat markets for AWB.

2453 ASIC also relies on oral evidence from Whitwell against Geary in connection with his knowledge and involvement in the Iron Filings wrongdoing. ASIC submits that Whitwell delivered the final version on the memo¹⁶⁷⁵ to Geary's secretary.¹⁶⁷⁶ Lyons made a file note of meetings with Geary about the 7 February 2003 memo.¹⁶⁷⁷ She received an email from Geary on 21 February 2003 which read, 'Michael, I did sign with a covering note to Andrew.'¹⁶⁷⁸

2454 ASIC submits that from the combined force of this evidence (largely documentary), the Court should find that Geary knew or had the means of knowing that:

- (a) UN Resolutions prevented hard currency being diverted to Iraq;
- (b) funds could only be recovered from the UN escrow account for humanitarian goods supplied to Iraq during the OFFP;
- (c) the IGB fees were being paid to Alia directly or through intermediaries including shipping companies and Ronly as a means of distancing and

¹⁶⁷⁵ CB 5/3161.

¹⁶⁷⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1576, L26 – T1577, L3.

¹⁶⁷⁷ CB 5/3185; Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1361, L22 – T1362, L8.

¹⁶⁷⁸ CB 5/3189, T1396; Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) L17 – T1396, L24.

- disguising the payments made by AWB;
- (d) there was a 'greyness' and great deal of concern within AWB about the payment of the IGB fees in connection with the UN Resolutions;
 - (e) AWB was entering into contracts with the IGB which included the IGB fees as a component of the price;
 - (f) the IGB fees were being paid to Iraq and the amount recovered out of the UN escrow account and therefore there was no cost to AWB;
 - (g) two IS&M employees had expressed the view that the increase in trucking fees and the introduction of the after sales service fees were a means of extracting more than money from the UN escrow account;
 - (h) he was authorising payments of the IGB fees;
 - (i) Alia was the recipient of the fees but simply passed them onto Iraq;
 - (j) AWB was paying vast amounts of 'trucking fees', but neither it nor Alia had any control over trucking and did not receive any benefit for it in terms of improved discharge rates or reduced demurrage;
 - (k) AWB had agreed to pay to the IGB the iron filings compensation of US\$6.00 per metric tonne using the 'inland transport mechanism' – being the payment of internationally traded currency through Alia to the IGB;
 - (l) AWB's agreement to pay Iraq in excess of US\$2,000,000.00 through the 'inland transport mechanism', in respect of the Iron Filings Claim, contravened UN Resolution 661, was contrary to DFAT advice received and was likely to give rise to reputational and corporate governance risks to AWB;
 - (m) AWB had recovered the Tigris Debt by loading up contracts A1670 and A1680 and obtaining funds from the UN escrow account reflecting the amount of the Tigris Debt;

- (n) the recovery of the Tigris Debt was for a pre-OFFP commercial debt and not for a humanitarian purpose recognised by Resolution 986;
- (o) the Single Desk was of great financial and commercial value to AWB
- (p) the public revelation of the IGB fees wrongdoing, the Tigris wrongdoing and the Iron filings wrongdoing would be likely to cause substantial and enduring harm to AWB.

2455 ASIC contends that in so concluding, the Court should draw the following inferences from the documents, having regard to Geary's failure to give evidence and the principle in *Jones v Dunkel*.

2456 ASIC submits that first, the Court should generally infer that Geary's evidence would not have assisted any aspect of his case, or his defence of ASIC's case.

2457 Secondly, ASIC submits that the Court should more confidently and readily infer each of following matters (set out more expansively above):

- (a) Geary understood the purpose of UN Resolutions was to prevent hard currency being diverted to Iraq and that receipt of payments from the UN escrow account was for the supply of humanitarian goods under the OFFP.
- (b) Geary read the emails and attachments referred to in 'Evidence concerning Geary's knowledge' referred to at paragraph 2330 and following, and from those documents understood the following matters:
 - (i) from June 1999 AWB's contracts with IGB included terms such as FIT, FOT and Free into Truck to all silos within all governorates of Iraq;
 - (ii) the purported inland obligation was a sham in that AWB did not arrange to deliver or transport wheat within Iraq prior to 2003;
 - (iii) from November 2000 and March 2003 the price of wheat supplied to Iraq also included an after sales service that was not a genuine fee for any

service provided by AWB;

- (iv) AWB paid the purported fees to the Iraq via shipowners, Ronly and Alia;
 - (v) the amount AWB received out of the escrow account pursuant to the contracts included the amount of the purported fees;
 - (vi) in 2002 AWB agreed to pay the IGB the sum of US\$6.00 per tonne via the inland transport mechanism in respect of the Iron Filings Claim;
 - (vii) AWB assisted Tigris to recover in excess of US\$7,000,000.00 dollars by inflating the price of wheat in contracts 1670 and 1680 to recoup the amounts out of the UN escrow account;
 - (viii) AWB retained a recovery fee of US\$500,000.00 from the funds obtained from the UN escrow account through the inflation of contracts A1670 and A1680.
 - (ix) that revelations of payment of the purported fees and iron filings compensation through the inland transport mechanism, and receipt of payments in respect of the Tigris Debt from the UN escrow account, which payments were concealed from the UN, would cause harm to AWB.
- (c) Geary read the ELG Reports, agendas and meeting papers in the Court Book in the relevant period.
 - (d) Geary read, understood and approved the recommendation contained in the 7 February 2003 Memorandum.
 - (e) Geary's evidence would not assist him to establish that he took reasonable steps to prevent AWB's wrongdoing.

ASIC's submissions on what the AWB board was informed about the Iraq trade

IGB fees wrongdoing

2458 At a board meeting of AWB on 25 August 1999 a document entitled 'Chief Financial Officer's Report' was tabled. The document was prepared by Ingleby and referred to an AWB marketing delegation that had visited Iraq at the 'urgent request' of the IGB to discuss 'changed terms and conditions being sought by Iraq for the distribution of food under the OFFP.'¹⁶⁷⁹ ASIC contends that none of the former AWB board members recall anything discussed concerning this item.

2459 The Board was informed from time to time about demurrage issues.¹⁶⁸⁰

2460 Stewart requested the Project Rose presentation at the board meeting on 26 May 2004 following a conversation with Cooper. Stewart did so because he wanted an assurance that the internal review was being conducted properly and covering all the bases to ensure that if there was anything inappropriate it was brought to Stewart's and the board's attention.¹⁶⁸¹ There was no prior investigation by AWB into the Iraq trade.¹⁶⁸²

2461 The presentation on 26 May 2004 assured the board that at that time there was no impropriety found and that all contracts were within policy and approved by the UN and the Australian Government.¹⁶⁸³ This is the first time the name Alia was mentioned at board level.¹⁶⁸⁴ The board accepted the assurances and asked to be kept briefed on further developments — both positive and negative.¹⁶⁸⁵

¹⁶⁷⁹ CB 1/559, 567, 611.

¹⁶⁸⁰ See, for example, Board meeting on 28 June 2000, CB 2/1117, 1119.

¹⁶⁸¹ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1529, L11-22 (Stewart).

¹⁶⁸² Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1529, L24.

¹⁶⁸³ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1530, L2-5.

¹⁶⁸⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1530, L10-13 (Stewart), T1476, L19 (Moffet).

¹⁶⁸⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1530, L16-19.

2462 ASIC submits that the evidence shows that whilst the Board was aware that there was an inland transportation component to AWB's contracts with Iraq, it was not informed prior to late 2005¹⁶⁸⁶ that:

- (a) the payments were made in hard currency to the Iraq government entities via Alia;
- (b) there were issues of impropriety or wrongdoing in connection with the Iraq trade;¹⁶⁸⁷
- (c) there were integrity risks and red flags in connection with the Iraq trade through the use and payment of the IGB fees or the Arthur Andersen report;¹⁶⁸⁸
- (d) AWB was using a number of methods including shipping companies and Ronly¹⁶⁸⁹ to disguise and distance itself from the payments of IGB fees;
- (e) the IGB fees were in steadily increasing amounts,¹⁶⁹⁰ payable in hard currency and from late 2000 incorporated an after sales service fee;
- (f) the IGB fees were payable to Alia, a Jordanian company which did not itself provide transport services to AWB prior to October 2003;¹⁶⁹¹
- (g) the initial payments to Alia were made via third parties, including Ronly.

2463 The board was informed by Lindberg, however, that the payment of the inland

¹⁶⁸⁶ E.g. table summarising relevant board minutes of AWB; Stewart affidavit Exhibit P29, [19]; CB 11/8722.

¹⁶⁸⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1523, L5-10. Further, Stewart was not aware of any specific complaint about a competitor in March 2000 in connection with alleged impropriety by AWB in relation to trade with Iraq: T1521, L7-14.

¹⁶⁸⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1530, L31 - T1531, L1-4, 17-19; T1532, L22-3 (Stewart); T1478, L11-22 (Moffet), T1479, L13 - T1480, L15; T1480, L26; T1481, L30; T1482, L6-15.

¹⁶⁸⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (8 November 2015) T1482, L23 - T1483, L1.

¹⁶⁹⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (8 November 2015) T1483, L23-5.

¹⁶⁹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1481, L11.

transportation fee had been approved by the UN.

ASIC's submissions on Tigris wrongdoing

2464 ASIC submits that on 14 December 2004, a Board meeting was held of AWBI. The minutes record that 'the Board noted that a Joint Information Session – attended by directors of both AWBI and AWB – had been held prior to this Board meeting ...' and that presentations had occurred on Iraq, Iraq Debt Senate Enquiry and Project Water – Tigris. The minutes record that 'the Managing director briefed the Board in relation to the Tigris transaction. It was noted that Tigris had assisted AWB in recovering threatened wheat sales in Iraq in 2002; in consideration for that assistance AWB had assisted Tigris in recovering a debt owed to Tigris by the Grains Board of Iraq; Tigris had paid a commission for the recovery of the debt and all of that commission was paid to AWB (International) Limited and therefore to growers. The Company had received advice from Senior Counsel that having collected the debt it was lawful to pay it to Tigris.'¹⁶⁹²

2465 ASIC submits that none of the directors of AWB and AWBI were notified of the Tigris transaction until the meetings of the Boards in December 2004.¹⁶⁹³

2466 There were three meetings attended by directors in December 2004 at which the Tigris transaction was discussed. The first was a joint information session on 14 December 2004. Later that day there was a meeting of the Board of AWBI. On 15 December there was a meeting of the board of AWB.

2467 In relation to the Tigris transaction, the joint boards were informed in December 2004 that a debt had been recovered on behalf of a third party, and that management had sought advice on whether it was rightful to pay it to that third party and the advice received was that having received it, it was right to pay it. The Board was not required

¹⁶⁹² CB 7/4703 [emphasis added by ASIC].

¹⁶⁹³ Stewart affidavit, Exhibit P29, [20] CB 8723; Moffett affidavit, Exhibit P28, [23] CB 10/8632.

to make a decision. The information was provided only for noting.¹⁶⁹⁴

2468 ASIC contends that the Board was not told about the circumstances or manner in which the Tigris Debt was recovered or anything else about the Tigris transaction.¹⁶⁹⁵ ASIC says that the Board was not told whether there were any issues of impropriety arising from its recovery (as distinct from its payment to Tigris). At the Board meeting in December 2004, there was a degree of concern by board members and disapproval about collecting a payment for a third party under any circumstances and the message left with management was that it was never to be done again. Stewart recalls one Board member – he thinks Mr Thame – making the comment, ‘This doesn’t pass the front page of the Australian test.’¹⁶⁹⁶

2469 Moffet recalls the issue of Tigris was first discussed at board level in December 2004. Lindberg told the Board it was a problem, but it was solved. The Board was told the commission of \$500,000.00 would flow through to growers.¹⁶⁹⁷

2470 The minutes of the later meeting of the Board of AWB record:¹⁶⁹⁸

The Managing director briefed the Board in relation to the Tigris transaction. It was noted that Tigris had assisted AWB in recovering threatened wheat sales in Iraq in 2002; in consideration for that assistance AWB had assisted Tigris in recovering a debt owed to Tigris by the Grains Board of Iraq; Tigris had paid a commission for the recovery of the debt and all of that commission was paid to AWB (International) Limited and therefore to growers. The Company had received advice from Senior Counsel that having collected the debt it was lawful to pay it to Tigris.

2471 The minutes record that AWBI received a commission for assisting Tigris in recovering a debt. ASIC says that is not what the agreement between AWBI and

¹⁶⁹⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1534, L17-24 (Stewart), CB 11/9455, 9457.

¹⁶⁹⁵ Stewart affidavit, Exhibit P29, [21] CB 8723, (10 November 2015) T1534, L26-31 (Stewart); T1487, L21 (Moffet).

¹⁶⁹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1535, L8-21.

¹⁶⁹⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1487, L10-19.

¹⁶⁹⁸ CB 11/9465.

Tigris recorded, but the Board was not informed of the substance of the document signed on behalf of AWBI by its executives.

Iron filings

- 2472 Stewart does not believe the Board was told about the mechanism by which the settlement price would be paid.¹⁶⁹⁹
- 2473 Moffet was not aware of a proposal to pay the Iron Filings Claim through the inland transport. ASIC says that the issues of implications for AWB on a corporate governance basis and direct payments to a company with links to Iraq were not raised at board level in any context. ASIC says that the Board was not informed about or told about DFAT's advice in connection with how to pay the iron filings compensation.¹⁷⁰⁰
- 2474 ASIC submits that Moffet would have expected the Board to be aware of the proposal outlined in the iron filings/Tigris memorandum because it is riddled with a potential legal disaster and bordering on unconscionable conduct to even contemplate doing it – the Board should have been informed and then nipped it in the bud.¹⁷⁰¹

ASIC's submissions on the duties and responsibilities of Geary

- 2475 ASIC submits that the tenth key issue is whether Geary's duties and responsibilities included those pleaded by ASIC.

ASIC's submissions: legal principles concerning the duties of executive officers

- 2476 ASIC submits that in his amended defence dated 3 December 2015, Geary admits that he was an officer of AWB within the meaning of s 9 of the Act on the basis that he is 'a person who participated in the making of decisions that affected the whole or a

¹⁶⁹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1528, L18-22; also Stewart affidavit, Exhibit P29, [21] CB 10/8723.

¹⁷⁰⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1489, L8-16; T1490, L6-7.

¹⁷⁰¹ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1491, L8-14.

substantial part of the business of AWB.’

2477 ASIC cites *Morley v Australian Securities and Investments Commission*,¹⁷⁰² where the Court said:¹⁷⁰³

The submissions advanced on behalf of Mr Shafron were dealt with by his Honour at LJ [386]–[393], which we have set out. Only those concerning participation in making decisions are presently material. If Mr Morley was an officer because he participated in making decisions that affected the whole or a substantial part of the business of JHIL, his “responsibilities within the corporation” in s 180(1) were those of a person who so participated.

2478 ASIC submits that, accordingly, Geary is to be assessed on the basis that his responsibilities were those of a person who participated in the making of decisions that affected the whole or a substantial part of the business of AWB.

2479 In *ASIC v Vines*,¹⁷⁰⁴ Austin J considered whether the statutory duties of care and diligence applied to, amongst others, the CFO of GIO (Mr Vines). He stated:¹⁷⁰⁵

After Mr Fox arrived, Mr Robertson retained responsibilities to be performed in dealings with Mr Fox as Executive Director, and with Mr Vines as Chief Financial Officer and Executive Officer responsible for the takeover defence process and Pt B statement. They were also in the first layer of management of GIO Australia Holdings with respect to a crucially important part of that company’s activities, namely the determination of the GIO Insurance contribution to the Pt B profit forecast. Each defendant was concerned in ‘management’ of the relevant entity (GIO Australia Holdings for all three, and GIO Insurance for Mr Robertson and Mr Fox), whether the broader or the narrower concept is applied.

2480 Further, Austin J said:¹⁷⁰⁶

[I]n the case of an executive officer appointed to a designated position, the words ‘in a like position’ refer to a position having the same characteristics as the designated position: for example, the degree of care and diligence that a reasonable person ‘in a like position’ to the chief financial officer of a corporation would exercise in the corporation’s circumstances is the objective degree of care and diligence flowing from the position of chief financial officer,

¹⁷⁰² (2010) 274 ALR 205 (*Morley v ASIC*).

¹⁷⁰³ *Morley v ASIC*, 414 [1081].

¹⁷⁰⁴ (2005) 55 ACSR 617 (*ASIC v Vines*’).

¹⁷⁰⁵ *ASIC v Vines*, 855 [1052].

¹⁷⁰⁶ *ASIC v Vines*, 857 [1059], [1060], 858 [1065], [1067].

encompassing the special skill that is to be brought to such an office.

...

It follows that each defendant, to the extent that he was appointed to a designated executive office, was subject to objective statutory duties of care, skill and diligence measured by the degree of care, skill and diligence that a reasonable person in an equivalent executive position in the corporation would exercise in the corporation's circumstances.

...

[A] non-director executive officer is subject to a statutory duty of skill referable to his or her executive position, as well as (or as part of) duties of care and diligence.

...

[T]he requirement in s 232(4) to compare the particular officer with a person in a 'like' position enables the court to 'look both at any special expertise held by individual directors [or non-director executive officers] and the distribution of functions within the corporation.' *Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 341; [2003] NSWSC 85, at [42]. ... [T]he statutory words involve an examination not just of the formal position which the defendant held, but the manner in which that position was exercised in the corporation's circumstances.

The 'corporation's circumstances' include the type of company, the size and nature of the company's business, the composition of its board, and the distribution of its work between the board and other officers.

ASIC's submissions on the duties and responsibilities of Geary in AWB

2481 ASIC submits that from the facts that ASIC relies on as set out above and the circumstances surrounding AWB including its corporate changes, the promulgation of the code of conduct and his role as Group General Manager of Trading of AWB which oversaw IS&M, the Court should find that Geary had the following responsibilities:

- (a) setting and implementing long term strategies for the sale of wheat in international markets, including Iraq;
- (b) approving (or not) payments by AWB in relation to the sale of wheat in international markets, including the payment of inland transportation fees in Iraq;

- (c) authorising and revoking arrangements entered into by AWB's IS&M division and giving directions to its staff;
- (d) taking reasonable steps to ensure that the ELG, CRRC, the Managing director and/or the Board were informed of all relevant and up-to-date information that could materially impact on AWB's performance, financial and commercial position, or that might impact upon AWB's standing and reputation;
- (e) reading and considering reports provided to the CRRC and taking appropriate action; and
- (f) discussing, formulating and implementing risk minimisation strategies, including terms and conditions upon which AWB supplied wheat to Iraq.

2482 ASIC submits that by reason of these responsibilities and Geary's knowledge or means of knowledge of the IGB fees wrongdoing, the Tigris wrongdoing, and the Iron filings wrongdoing and the likely harm to AWB if there was public revelation of such wrongdoing, the Court should find that Geary owed duties to AWB to:

- (a) take reasonable steps to:
 - (i) ensure that AWB did not engage in conduct that resulted in the IGB fees wrongdoing contrary to the UN Resolutions;
 - (ii) inform the ELG, the CRRC or the Managing director of AWB of the relevant facts and to recommend against AWB's payment of the IGB fees and its receipt of payments from the UN escrow account in respect of such fees;
 - (iii) prevent AWB from entering into Contracts A1111, A1112, A1441, A1670 and A1680 and the carrying out of the first three of these contracts which contracts resulted in the IGB fees wrongdoing;
 - (iv) prevent AWB from making payments of the IGB fees to Alia;

- (v) prevent AWB from obtaining payments from the UN escrow account ;
- (b) not further the IGB fees wrongdoing by authorising various payments of the IGB fees to Alia pursuant to Contracts A1111, A1112 and A1441.
- (c) in relation to the Tigris wrongdoing to take reasonable steps to:
 - (i) ensure AWB in obtaining payments from the UN escrow account pursuant to Contracts A1670 and A1680 did not engage in conduct that resulted in AWB obtaining funds from the UN escrow account to recover the Tigris Debt contrary to the UN Resolutions;
 - (ii) recommend against AWB's inflation of the contract price for contracts A1670 and A1680 to recover the Tigris Debt and AWB's obtaining payments from the UN escrow account to recover the Tigris Debt;
 - (iii) prevent AWB from entering into contracts A1670 and A1680 when each contract enabled AWB to obtain funds from the UN escrow account in respect of the Tigris Debt; and
 - (iv) notwithstanding the effect of contracts A1670 and A1680, to prevent AWB from obtaining payments from the UN escrow account in respect of the Tigris Debt.
- (d) in relation to the Iron filings wrongdoing, to:
 - (i) ensure that any payment of or arrangement to pay the Iron Filings Claim did not constitute conduct that the UN had called on member states to prevent, particularly conduct which resulted in the payment of internationally traded currency to the Government of Iraq; and
 - (ii) recommend against the proposed payment of the Iron Filings Claim by using the mechanism of the IGB fees.

ASIC's submissions on the alleged contraventions by Geary

- 2483 ASIC submits that the final key issue is whether Geary contravened his duties owed to AWB under ss 180 and/or 181 of the Act.
- 2484 ASIC submits that Geary was a very senior, highly paid, officer of AWB. ASIC says that as Group General Manager Trading (including having responsibility for IS & M), former AWB USA manager and former General Manager of the National Pool, Geary more than anyone would have understood the importance of AWB's reputation, its good relationships with the Australian government and the UN, and the Single Desk.
- 2485 ASIC says that having regard to his position, and to the code of conduct promulgated by the board emphasising integrity and ethical behaviour, Geary's duties required him to ensure that AWB's conduct in Iraq was ethical and consistent with UN resolutions. Not to do so exposed AWB to risk of enormous damage.
- 2486 ASIC submits that instead, Geary permitted, and did not object to, AWB engaging in all three forms of misconduct committed by AWB. ASIC submits that Geary expressly authorised a number of payments to Alia knowing that they were improper payments. ASIC submits that Geary must or at least ought to have realised that if the payments to Alia and Tigris, and the proposal to make (further) payments to Iraq on account of the Iron Filings Claim, were revealed, substantial harm to AWB would result.
- 2487 ASIC submits that once Geary learned of each form of misconduct, Geary had a duty to do what he could to stop it. ASIC submits that Geary also had a duty to inform other senior officers of AWB of the misconduct, and to recommend against it. ASIC argues that even if Geary did not have actual knowledge of the wrongdoing, Geary could not simply shut his eyes to the misconduct. ASIC says that Geary had a duty to look, investigate and inquire. ASIC says that Geary was repeatedly put on notice that AWB might be doing something improper in connection with AWB's trade with Iraq.
- 2488 ASIC submits that Geary had a duty to take reasonable steps to prevent AWB from engaging in each form of misconduct.
- 2489 ASIC says that by failing to take reasonable steps to prevent AWB from engaging in

this conduct (which steps included bringing the matters to the attention of the CRCC, the ELC and the Managing director and taking other positive steps to prevent the misconduct), Geary did not exercise his powers or duties with the degree of care and diligence that a reasonable officer in his position and in AWB's circumstances would have exercised which was a breach of s 180.

2490 ASIC contends that by being knowingly involved in each form of AWB misconduct, Geary did not act or exercise his powers honestly or bona fide and therefore did not exercise his powers or discharge his duties in good faith in the best interests of AWB in contravention of s 181.

2491 ASIC submits that at an absolute minimum, by receiving a large volume of written communications that (at least) put him on notice that inquiry should be made and by failing to make proper inquiries and thereafter to take reasonable steps to prevent the misconduct and/or failure to bring it to others' attention, Geary breached his statutory duties.

2492 As discussed earlier, I will address these submissions, where relevant, when I deal with the relevant allegations made by ASIC against Geary in the pleadings.

Geary's submissions on context

2493 Before turning to the pleaded case against Geary, it is appropriate to refer to submissions by Geary on the relevance of context.

2494 Geary submits that the allegations against him must be considered in the context of his responsibilities at the various relevant times, the responsibilities of others, the internal organs of the corporation and the circumstances of the corporations as a whole.

2495 Geary submits that the allegations must be viewed in light of the circumstances at the relevant material times – not with hindsight. Geary says that the following circumstances must frame consideration of the allegations. Geary refers to the 1999 Annual Report that reveals:

- (a) AWB was an unlisted public company and the AWB Group's holding company had a number of subsidiaries operating various areas of the business. One subsidiary, AWBI was responsible for maximising net returns to growers from the national wheat export pool.
- (b) The Wheat Export Authority (WEA) controlled the export of wheat from Australia and monitored the performance of AWBI.
- (c) In 1998/99 AWB shipped almost 16 million tonnes of Australian wheat to countries around the world.
- (d) Sales and marketing functions were undertaken by two teams:
 - (i) the IS&M division of AWB, comprising different desks: North Asia, South East Asia and Middle East/Africa Europe – for all products in international markets including all pool wheat exports;
 - (ii) AWB (Australia) Limited – for all products in the Australian and Pacific markets and grains other than wheat for export.
- (e) In 1998 AWB employed over 400 people.¹⁷⁰⁷
- (f) AWB had at all times been a global organisation with offices in Australia and around the world.¹⁷⁰⁸
- (g) IS&M had more than 50 staff and AWB marketed wheat and other grains to more than 50 countries.¹⁷⁰⁹
- (h) As the integrated service provider to the Single Desk, AWB operated under a range of regulatory and reporting requirements. AWB was one of the most

¹⁷⁰⁷ CB 2/1339 – 2000 Annual Report; CB 2/1370.

¹⁷⁰⁸ CB 4/2739 - 2002 Annual Report at CB 4/2761.

¹⁷⁰⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1104, L23 (Officer – XN); CB 3/1987 – 2001 Annual Report; CB 3/1991.

heavily scrutinised exporting companies in the world.¹⁷¹⁰

- (i) Under the OFFP, every single contract between AWB and the IGB was subject to the scrutiny of, and had to be approved by:
 - (i) the UN OIP Contracts Processing and Monitoring Division; and
 - (ii) DFAT.¹⁷¹¹
- (j) Each shipment of wheat also required a Permission to Export granted by DFAT, after further consideration of each relevant AWB contract.
- (k) Payments to AWB from the UN escrow account were authorised by the UN Treasury.
- (l) From 1998 to June 2000 (the alleged purported fees¹⁷¹² were introduced in about July 1999), Geary was a Pool Manager of the AWB National Pool.¹⁷¹³ AWBI was a separate entity to AWBL (who was the service company selling wheat to Iraq). Geary reported to the General Manager, Laskie. Laskie reported to the Chief Operations Officer, Tighe, who reported to the Managing director (Murray Rogers and from April 2000, Lindberg).¹⁷¹⁴
- (m) In July 1999, at about the same time the trucking fee was introduced in OFFP contracts, sweeping reforms to the organisation commenced when the Australian Wheat Board was transformed and AWBI incorporated to hold the single desk export rights under the *Wheat Marketing Act*.

¹⁷¹⁰ CB 7/4258 – 2003–2004 AWB National Pool Performance Report; CB 7/4295.

¹⁷¹¹ Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T872, L12–17 (Bowker).

¹⁷¹² ASIC use the term ‘purported fees’ to mean the inland trucking fee and the 10 per cent after sales service fee – FASOC filed 22 October 2010 (FASOC) 23 & 24.

¹⁷¹³ FASOC 4 (c).

¹⁷¹⁴ CB 1/317 draft Corporate Structure.

- (n) The transformation from the old statutory marketing authority was not without internal difficulties. There was a culture of tension and competition between the Pool (of which Geary was a member) and IS&M that took some time to improve.¹⁷¹⁵ Hogan referred to an ‘us versus them’ culture between the Pool and IS&M, and the two divisions ‘had a barrier and that stemmed from our two previous managers...that disliked each other.’¹⁷¹⁶
- (o) From June 2000 to March 2001, Geary was General Manager of the National Pool, having replaced Laskie. It was at this time, Geary became a member of the ELG; when the incorporation of the trucking fee into the OFFP contracts was well established – seven OFFP contracts including the trucking fee had been approved by the UN and DFAT.¹⁷¹⁷
- (p) The function of the Pool was to manage the exposure and revenue of the Pool during the life of each seasonal pool. The Pool would set benchmarks for IS&M to sell wheat on behalf of the Pool. The predominant interest of the Pool was the net FOB return to the farmers of Australian wheat. It was not the task of the Pool to negotiate contracts or concern itself with the contents of contract terms and conditions which did not impact on the FOB return to farmers.¹⁷¹⁸
- (q) The inland trucking fee did not impact on the FOB so the Pool did not need to pay attention to it. The Pool’s primary focus on the FOB was confirmed by Scales and Hogan during the course of their evidence.¹⁷¹⁹
- (r) From March 2001 (when ASIC alleges Geary assumed the alleged duties),

¹⁷¹⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T2024, L13 – T2025, L20 (Scales).

¹⁷¹⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1057, L10–14 (Hogan – XXN Hill).

¹⁷¹⁷ A4653 (CB 1/399), A4654 (CB 1/401), A4655 (CB 1/403), A4822 (CB 2/683), A4970 (CB 2/885), A4971 (CB 2/891), A4972 (CB 2/897).

¹⁷¹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T2018–2019 and T2023–2024 (Scales); T1059, L28; T1061, L9 (Hogan – XXN Hill).

¹⁷¹⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T2023, L31 – T2034, L7 (Scales).

Geary was Group General Manager Trading. In this role Geary was responsible for domestic and global trading and risk management products for end users.¹⁷²⁰ This role did not include responsibility for IS&M or the Middle East Desk.¹⁷²¹

- (s) On 22 August 2001, AWB became a public company listed on the Australian Stock Exchange.¹⁷²² Flugge, the Chairman at the time, noted in his Chairman's Report, in AWB's 2001 Annual Report, that 'This was the completion of sweeping reforms that turned a 60-year old statutory marketing authority into a modern, global grains manager...'¹⁷²³
- (t) It was not until about February 2002 that the Trading Group headed by Geary took on IS&M. By this time the trucking fee arrangements had been in place for two and a half years and 17 OFFP contracts had been approved by the UN and DFAT.¹⁷²⁴
- (u) During 2002, Geary was heavily focused on strategic rather than operational matters, as discussed below.
- (v) By 2003, Geary's title was changed from Group General Manager Trading to Group General Manager Trading and Commodities.¹⁷²⁵

¹⁷²⁰ CB 3/1987 – 2001 Annual Report; CB 3/2033.

¹⁷²¹ Tim Goodacre (Goodacre), remained Group General Manager, Sales & Marketing, which included responsibility for ISM and the Middle East Desk.¹⁷²¹ Goodacre reported to Lindberg. CB 3/1987 – 2001 Annual Report; CB 3/2032 and CB 3/1581 – draft Corporate Structure, 19 March 2001.

¹⁷²² FASOC 2 (b); CB 3/1987 – 2001 Annual Report; CB 3/1991.

¹⁷²³ CB 3/1987 – 2001 Annual Report; CB 3/1996.

¹⁷²⁴ A4653 (CB 1/399), A4654 (CB 1/401), A4655 (CB 1/403), A4822 (CB 2/683), A4970 (CB 2/885), A4971 (CB 2/891), A4972 (CB 2/897), A0265 (CB 2/1167), A0266 (CB 2/1169), A0267 (CB 2/1173), A0430 (CB 2/1445), A0552 (CB 3/1541), A0553 (CB 3/1547), A0784 (CB 3/1663), A0785 (CB 3/1665), A1111 (CB 3/2143) & A1112 (CB 3/2145).

¹⁷²⁵ CB 6/3715 – 2002 Annual Report; CB 6/3748.

Geary's duties

- 2496 Geary makes the following submissions on his duties. Geary says that he was not a director of AWB or AWBI.
- 2497 Geary submits that analysis of his duties must take into consideration his responsibilities within AWB, including as between the directors and as between other officers.
- 2498 Geary contends that notwithstanding his title, from March 2001 (when ASIC alleges Geary's duties commenced), the work distributed within AWB and the expectations placed on Geary's individual shoulders meant he had almost nothing to do with AWB's OFFP contracts with Iraq.
- 2499 Geary submits that there is no evidence he was a member of the CRRC from January 2001 to March 2002.¹⁷²⁶ Accordingly, Geary submits that he therefore had no duties¹⁷²⁷ or responsibilities¹⁷²⁸ by reason of such alleged membership during this time.
- 2500 Geary says that his membership of the ELG from June 2000, ought not be considered in isolation. Other members throughout the period included:
- (a) Lindberg,
 - (b) Ingleby; and
 - (c) Stott, who was for a significant period of time the General Manager of IS&M, and widely considered to be an expert in relation to Iraq.¹⁷²⁹

2501 Geary reported to Lindberg.¹⁷³⁰ Geary contends that as Managing Director, Lindberg

¹⁷²⁶ FASOC [4(f)].

¹⁷²⁷ FASOC [41], [52], [63].

¹⁷²⁸ FASOC [6(e) & (f)].

¹⁷²⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T646, L6 (Edmonds-Wilson - XXN Hill); T798, L11-28 (McClelland - XXN Hill).

¹⁷³⁰ FASOC [4(d)].

had the responsibility to inform the Board of AWB information that could materially impact upon AWB's performance, financial or commercial position, or that might impact upon AWB's standing and reputation. Geary submits that there is no evidence to support the allegation that he had such responsibility from March 2001 as alleged.¹⁷³¹

2502 Geary submits that under his executive employment contract that from 1 October 2003, he had a duty to report to Lindberg and also a duty to provide prompt and full information to the Board.¹⁷³²

2503 Geary submits that his obligation to provide information to the Board was different to the duty to report. He says that the duty to report was a proactive duty. The duty to inform was a reactive duty (to provide full information promptly upon request).

2504 Geary submits that Lindberg was aware of all of the relevant matters in connection with Tigris Debt (the only matter that is relevant to the period from October 2003). Geary submits that it was reasonable for him (or a person in his position) to expect Lindberg had informed the Board of the Tigris Debt.

2505 Geary submits that the Board looked to Stott and Lindberg, not to him to provide information on Iraq.¹⁷³³

2506 Geary says that the Board had several committees of its members to support effective corporate governance, including the Audit Committee and the Corporate Risk Committee.¹⁷³⁴

¹⁷³¹ FASOC [6(d)].

¹⁷³² CB 6/4173 – Geary's Executive Employment Contract of December 2003.

¹⁷³³ Transcript of hearing, *ASIC v Geary & Flugge*, (26 October 2015) T798, L11 – T799, L6 (McClelland - XXN Hill).

¹⁷³⁴ CB 3/2025.

Geary concessions

- 2507 Geary in his submissions concedes several matters as being uncontentious as follows.
- 2508 Iraq was a crucial market for AWB. Each contract for AWB's sales of wheat to the IGB under the OFFP was subject to scrutiny and authorisation by the UN and DFAT. From about July 1999 to December 2002, AWB entered contracts (OFFP contracts) for the sale of wheat to the IGB which included a price for the transportation of wheat within Iraq, called an inland transportation fee or a trucking fee (the trucking fee). Each OFFP contract provided by AWB to DFAT and the UN included reference to the price being CIF Free in Truck.
- 2509 From June 2000, Geary was a member of the ELG, which comprised Lindberg and senior executives of AWB. From March 2001, Geary:
- (a) was promoted to Group General Manager Trading;
 - (b) was an officer within the meaning of s 9 of the Act;
 - (c) reported to Lindberg.
- 2510 From about February 2002, Geary, in his position as Group General Manager Trading, assumed responsibility for IS&M division of AWB.
- 2511 AWB paid the trucking fee under the OFFP contracts to Alia from the funds it received from the UN escrow account. The trucking fee increased over time. Geary personally authorised six (of a total 107) trucking fee payments to Alia.¹⁷³⁵
- 2512 As to the Tigris Debt, AWB agreed to assist Tigris Petroleum Ltd (Tigris) to recover the Tigris Debt. In October 2002, in consideration of AWB agreeing to recover the Tigris Debt, Tigris agreed to pay AWB a commission of US\$500,000.00.
- 2513 By agreement between the AWB and the IGB, the prices in the last two OFFP contracts, A1670 & A1680, were inflated by an amount calculated to recoup the Tigris Debt. On

¹⁷³⁵ See appendix E to PCS.

about 9 December 2004, AWB paid the Tigris Debt.

2514 As to the Iron Filings Compensation, in about late July 2002, the IGB asserted that certain shipments of wheat were contaminated with iron filings and sought compensation from AWB (the Iron Filings Claim).

2515 In August 2002, a senior AWB delegation, which included the Managing Director/CEO (Lindberg), the former Chairman (Flugge) and the General Manager of IS&M (Long), visited the IGB and Iraqi Minister of Trade to seek a resolution of the Iron Filings Claim.

2516 When in Iraq, in August 2002, Lindberg, on behalf of AWB, agreed to settle the Iron Filings Claim by paying the IGB US\$6.00 per metric tonne of wheat by paying such compensation to Alia as an addition to the trucking fee.

2517 The wholesale price of the wheat in the last two OFFP contracts, A1670 & A1680, included an amount calculated to pay the Iron Filings Compensation from the UN escrow account. Following the war in Iraq in March 2003, AWB did not pay the Iron Filings Compensation.

ASIC's pleaded case against Geary

2518 ASIC's case against Geary is set out in its Further Amended Statement of Claim dated 22 December 2010 (FASOC) and the particulars thereto as referred to above at paragraph 2531.

Emails

2519 ASIC's case against Geary is largely documentary and based on emails and other documents sent to Geary.

2520 ASIC submits that I should infer that Geary received and read the emails and memorandum sent to him. Subject to reservations that I have when Geary was absent from his duties at AWB, in my view usually the inference is open that as a relatively senior officer of AWB that Geary would have read correspondence sent to him when

he was attending to his duties at AWB whether it was addressed to him or copied to him.

2521 Whether emails and documents sent to Geary when he was absent from his duties at AWB, were received and read by him is a different matter. Evidence led by Geary establishes, that Geary was often absent from his duties at AWB. No evidence was led by ASIC from any one at AWB with knowledge of Geary's practice in reading emails sent to him. For example, no evidence was led by ASIC on whether or not it was Geary's practice to have his personal assistant read his emails and then bring his attention to those that the assistant thought should be, or whether his practice varied as between emails sent to him as opposed to copied to him. The assistants of Geary were not called.

2522 In the case of Flugge, ASIC did call evidence that established he did not read emails on a computer but only those selected by his personal assistants and printed out for him to read. As indicated, no such evidence was led by ASIC in respect of Geary.

2523 ASIC did not lead evidence as to whether or not emails sent to Geary at AWB could be remotely accessed when Geary was away from his office at AWB. Whitwell was asked about this issue and said in substance that AWB did acquire such a service for its employees but he did not recall whether that was in place in 2002.

2524 Geary submits that there are several important points to make generally about these emails as follows:

- (a) It is reasonable to infer staff working in a very large company such as AWB would have regularly received a significant amount of emails on a regular and daily basis – either as direct addressed recipients or as persons on a 'cc' (copy) list. The Court has also heard direct evidence of this.¹⁷³⁶

 Scales: '...we got an enormous number of emails constantly, and copied onto numerous emails.'

¹⁷³⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T2021, L27-9 (XXN – Hill).

- (b) ASIC has failed to identify how Geary or a reasonable person in his position, was expected to act upon emails not specifically addressed to him, or included him as one of an often long list of recipients (many which included Lindberg and/or other executives).
- (c) There is no reliable evidence to show Geary could access emails whilst travelling at material times. Hogan deposed (August 2000 onwards) – ‘we could access emails...IS&M guys had their lap tops. I don’t know about the others... It was probably the start of mobile communication I think...’¹⁷³⁷
- (d) It is well established that the primary focus of the Pool was the FOB price and it had no interest in matters that did not affect the FOB. It is reasonable to infer that any emails Geary may have been received from 1999 to March 2001 would have been read with such focus in mind.

2525 On the other hand, ASIC submits that there was no evidence that Geary did not have remote access to his emails during his periods of absence whilst on leave for eye surgery.¹⁷³⁸ ASIC also contends that there is no evidence that Geary did not review his emails upon his return and ordinary human experience strongly supports the opposite inference.

2526 I accept that the inference does ordinarily arise that a senior executive such as Geary would have read his emails after returning to work from an absence. Geary’s duties would require him to acquaint himself with what had been happening at AWB during his absence. Barring any evidence to the contrary, I do infer that Geary would have carried out his duties as a senior executive and read emails and documents relevant to his duties.

2527 Under the rule in *Jones v Dunkel*, I am more readily able to draw the inference that Geary did read emails and documents sent to him as Geary did not give evidence to

¹⁷³⁷ Transcript of hearing, *ASIC v Geary & Flugge*, (28 October 2015) T1090, L16–31 (Hogan – RE-XN).

¹⁷³⁸ PCS [376].

deny receiving and reading the emails. This is an important consideration.

2528 Under the *Briginshaw* test and s 140(2) of the *Evidence Act 2008* (Vic), I must feel an actual persuasion of the fact in issue before it may be found. These principles obviously apply to ASIC's case that Geary's knowledge can be established on the content of emails and documents sent to him.

2529 In my opinion, speaking generally, where a fact or matter was referred to in several emails that Geary received I am able to more readily find to the required degree of satisfaction that Geary did know of the fact or matter alleged. Where, however, it is alleged that Geary knew of a fact or matter that was only contained in one email or attachment to an email, I consider that it is less open to draw the conclusion that Geary did become aware of that fact or matter particularly where there is no other evidence that tends to suggest that he otherwise became aware of that fact or matter. Each instance will have to be considered carefully taking into account Geary's duties at the time and the context in which that information was allegedly communicated to Geary.

The evidence generally against Geary

2530 Geary submits that whilst ASIC contends that its case relies on both documentary and oral evidence in the proceedings, not one witness gave evidence of conversations with Geary or statements made by Geary to support ASIC's contentious allegations.

2531 Geary also submits that ASIC is limited to the particulars in its pleaded case – that Geary's knowledge of the contentious matters being the purported fees, Tigris Debt and the Iron Filings Compensation, can be inferred by reason of him receiving or sending specific documents. ASIC's pleadings specifically identify the precise documents it relies on to infer that Geary had knowledge of the contentious matters. The documents are identified in:

- (a) the particulars to each relevant paragraph of the FASOC in particulars alleged to the FASOC. I have referred to these particulars as 'particular' or Sch A [particular]; and

(b) the Further Particulars of the FASOC dated 1 September 2015. I have referred to these particulars as FP.

2532 Geary submits that the documents relied upon by ASIC in its pleaded case to establish his knowledge or duty to inform himself is limited by the documents referred to in the pleadings (including the particulars) and are the only documents that Geary need address

2533 Subject to one qualification, I accept that proposition. The particulars are detailed and precise. In my opinion, ASIC is limited in the case it makes to establish Geary's alleged knowledge or his alleged duty to inform himself, to the documents identified in the FASOC and the particulars thereto and such other oral evidence that it relies on in its particulars or is otherwise relevant to establishing his alleged knowledge or duty to inform himself made in the FASOC and the particulars thereto.

2534 The qualification relates to ASIC's case that certain matters were widely known within AWB (see for example those matters ASIC alleges were widely known at paragraph 281). As it is I have found that contrary to ASIC's case it was not widely known within AWB that the UN had not knowingly approved the payment of inland transportation fees or that the payment of these fees was improper. On the contrary, the evidence shows that it was widely believed that the UN had approved the payment of inland transportation fees and their payment was proper.

2535 Accordingly, I have not sought to provide a general discussion of the relevant events as one might find in a normal commercial case. Rather, because of the way ASIC has defined its case by detailed pleadings and bearing in mind that this is a civil penalty case, generally I have approached the matter by setting out each of the pleaded elements in ASIC's case and, where appropriate, given a finding on whether or not ASIC has or has not established that element.

FASOC – paragraphs 1, 2 and 3

2536 ASIC pleads that it is a body corporate:

- (a) established by s 7 of the *Australian Securities and Investments Commission Act 1989* (Cth);
- (b) continued by s 261 of the *ASIC Act*; and
- (c) able to sue in its corporate name by reason of s 8 of the *ASIC Act*.

2537 AWB is and was at all material times:

- (a) a corporation duly incorporated; and
- (b) from 22 August 2001, listed on the Australian Securities Exchange.

2538 AWBI was at all material times a corporation duly incorporated and a wholly-owned subsidiary of AWB.

2539 Geary admits these allegations.

FASOC – paragraph 4

2540 ASIC pleads that Geary was:

- (a) at all material times from 1985 to November 2006 an employee of the Australian Wheat Board and its successor, AWB, who in the financial years ended 30 September 2001 and 30 September 2002 received the fourth highest remuneration at AWB;
- (b) at all material times from 1998 to June 2000, the Pool Manager of the AWB National Pool, a system (also referred to as the Single Desk) by which Australian wheat was acquired, managed and marketed in Australia and internationally by AWB;
- (c) at all material times from June 2000 to March 2001, the General Manager of the AWB National Pool;
- (d) at all material times from March 2001 to November 2006, the Group General Manager Trading of AWB, reporting directly to Lindberg, Managing director of AWB;
- (e) at all material times from at least June 2000, a member of an executive committee of AWB, the ELG; and

- (f) at all material times from at least January 2001 to March 2002, a member of an executive committee of AWB known as the CRRC, the purpose of which was to monitor National Pool hedging, traded business market risk and associated operational risks including reputational risks arising out of AWB's trade with Iraq and which regularly discussed and considered logistics and demurrage issues arising from AWB's sales of wheat to Iraq.

2541 As to paragraph 4, Geary says as follows:

- (a) he admits that at all material times from 1985 to November 2006 he was an employee of the Australian Wheat Board and its successor, AWB, but otherwise does not admit sub-paragraph 4(a);
- (b) he admits sub-paragraph 4(b);
- (c) he admits sub-paragraph 4(c);
- (d) he admits sub-paragraph 4(d) but says further that the role of Group General Manager Trading did not include IS&M until about February 2002;
- (e) he admits that from about 6 June 2000 he was a member of an executive committee of AWB, the ELG, but otherwise denies sub-paragraph 4(e);
- (f) he denies sub-paragraph 4(f);

and says further that:

- (i) from the beginning of 2003, the AWB Iraq Emergency Response Team (IERT), which he did not attend, was set up to:
 - (aa) coordinate all activities with regard to Iraq;
 - (bb) make all contractual decisions with regard to Iraq, including the partly executed contracts with the Iraq Grain Board, namely contracts A1441, A1670 and A1680; and
- (ii) on various dates and times during the period October 2000 to 2005 he was

interstate, overseas, on annual leave, sick leave, or executive study leave.

- (iii) on 20 March 2003 the IERT was restructured into an ELG sub-committee:
 - (aa) which did not include him as a member;
 - (bb) whose meetings he did not attend.

Geary provides particulars of the matters in relation to 4(f), including a schedule of the dates he was on leave.

FASOC – paragraph 5

2542 ASIC pleads that, further, Geary had the following significant experience and expertise relating to the sale of wheat in international markets including Iraq:

- (a) between 1981 and 1985, Geary was employed by the Grain Elevators Board of Victoria (now Grain Corp, a company servicing domestic and international grain markets);
- (b) between 1987 to 1990, Geary was employed by the IS&M for the Middle East, African and European markets, and travelled regularly throughout these regions, particularly the Middle East and Africa;
- (c) between 1990 to 1992, Geary was employed at the London offices of the Australian Wheat Board;
- (d) from 1995 to 1998, Geary was employed at the New York offices of the Australian Wheat Board, which role included representing the Australian Wheat Board in the United States, marketing the Australian Wheat Board wheat into South America, attending meetings concerning UN Resolutions which impacted upon the sale and export of the Australian Wheat Board wheat and providing assistance to the Australian Mission to the UN in relation to the establishment of the OFFP (as defined in paragraph 2555 below); and
- (e) between 1998 and November 2006, Geary was employed by AWB as alleged at paragraph 2540 above.

2543 As to paragraph 5, Flugge says that save that he denies having had significant

experience and expertise relating to the sale of wheat in Iraq, he admits sub-paragraphs 5(a), (c) and (d), and admits sub-paragraph 5(b), save that he did not travel to Iraq. Geary denies sub-paragraph 5(e) and refers to paragraph 4 of his defence.

FASOC – paragraph 6

2544 ASIC pleads that, by reason of Geary's position as Group General Manager Trading from March 2001 to November 2006, his membership of the ELG from June 2000 and the matters pleaded at paragraphs 4 (d) to (f) and 5 (2540 and 2542 above), during the period from March 2001 to November 2006, Geary's responsibilities relevantly included the following:

- (a) setting and implementing long term strategies for the sale of wheat by AWB in international markets including Iraq;
- (b) approving (or not, as the case may be) payments by AWB in relation to the sale of wheat in international markets, including the payment of inland transportation fees in Iraq;
- (c) authorising and revoking arrangements entered into by the IS&M division and giving directions to its staff; and
- (d) taking reasonable steps to ensure that the ELG, CRRC, the Managing director and/or the Board of AWB were informed of all relevant and up-to-date information that could materially impact upon AWB's performance, financial and commercial position, or that might impact upon AWB's standing and reputation;

and, as a member of the CRRC, Geary's responsibilities included:

- (e) reading and considering reports provided to the CRRC and taking appropriate action in light of such reports; and
- (f) discussing, formulating and implementing risk minimisation strategies, including such strategies relating to the conditions upon which AWB supplied wheat to Iraq.

2545 Geary denies these allegations.

FASOC – paragraph 7

2546 ASIC pleads that, in the premises, Geary was at all material times from March 2001 to November 2006:

- (a) a person who participated in the making of decisions that affected the whole or a substantial part of the business of AWB; and/or
- (b) a person who had the capacity to affect significantly AWB's financial standing; and

by reason of which Geary was an officer of AWB within the meaning of s 9 of the Act.

2547 Geary admits these allegations, save that he denies sub-paragraph 7(b).

Geary's statutory duties

FASOC – paragraph 8

2548 ASIC pleads that by reason of the matters alleged at paragraphs 2540 to 2545 above, during the period from March 2001 to November 2006, Geary owed a duty to AWB to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) were an officer of a corporation in AWB's circumstances; and
- (b) occupied the office held by Geary and had the same responsibilities as Geary.

This duty arises by s 180 of the Act.

2549 Geary admits during the period from March 2001 to November 2006, he owed a duty to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they were an officer of a corporation in AWB's circumstances, and occupied the office held by him and had the same responsibilities as he had, but otherwise denies paragraph 8.

Geary's statutory duties

FASOC – paragraph 9

2550 ASIC alleges that by reason of the matters alleged at paragraphs 2540 to 2545 above,

during the period from March 2001 to November 2006, Geary owed a duty to AWB to exercise his powers and discharge his duties:

- (a) in good faith in the best interests of AWB; and
- (b) for a proper purpose.

This duty is alleged to arise by s 181 of the Act.

2551 Geary admits that during the period from March 2001 to November 2006, he owed a duty to AWB to exercise his powers and discharge his duties in good faith in the best interests of AWB and for a proper purpose, but otherwise denies paragraph 9.

United Nations Resolutions on trade with Iraq

FASOC – paragraph 10

2552 ASIC pleads that by Resolution 661, the Security Council, inter alia:

- (a) decided that member states should prevent the sale or supply by their nationals or from their territories of any commodities or products to any person or body in Iraq or to any person or body for the purposes of any business carried on in or operated from Iraq, but not including supplies intended for strictly medical purposes and, in humanitarian circumstances, foodstuffs;
- (b) decided that all member states should not make available to the Government of Iraq or its instrumentalities any funds or any other financial or economic resources and should prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to the Government of Iraq or its instrumentalities any such funds or resources; and
- (c) established the 661 Committee.

2553 Geary admits Resolution 661 and its terms but otherwise does not admit paragraph 10.

FASOC – paragraph 11

2554 ASIC pleads that by Resolution 687, the Security Council determined, inter alia, that

the prohibitions on the sale of commodities or products and prohibitions on financial transactions related thereto contained in Resolution 661 should not apply to foodstuffs notified to the 661 Committee.

2555 Geary admits Resolution 687 and its terms but otherwise does not admit paragraph 11.

FASOC – paragraph 12

2556 ASIC pleads that by Resolution 986, the Security Council, inter alia:

- (a) authorised member states to permit the importation of petroleum and petroleum products originating in Iraq, notwithstanding Resolution 661, of a value not exceeding one billion US dollars every 90 days;
- (b) required the funds paid for the purchase of Iraqi petroleum and petroleum products to be paid into the UN escrow account; and
- (c) decided that the funds in the UN escrow account should be used to meet the humanitarian needs of the Iraqi population, including to finance the export to Iraq of foodstuffs in accordance with the procedures established by the 661 Committee.

2557 ASIC says that the initiative became known as the OFFP.

2558 Geary admits Resolution 986 and its terms but otherwise does not admit paragraph 12.

FASOC – paragraph 13

2559 ASIC pleads that Resolution 986 authorised the operation of the OFFP for an initial period of 180 days. Subsequent resolutions of the United Nations Security Council extended the operation of the OFFP for further periods of up to 180 days. ASIC provides particulars of the phases of the OFFP from 1997 to 2002.

2560 Geary admits the UN Resolutions referred to in paragraph 13 and their terms, but otherwise does not admit paragraph 13.

FASOC – paragraph 14

2561 ASIC pleads that by Resolution 1472, the Security Council, inter alia approved adjustments to the OFFP and authorised:

- (a) the review of the approved funded and non-funded contracts concluded by the Government of Iraq to determine the relative priorities of the contracts; and
- (b) the negotiation and agreement on necessary adjustments in the terms or conditions of these contracts and their respective letters of credit.

2562 Geary admits Resolution 1472 and its terms but otherwise does not admit paragraph 14.

FASOC – paragraph 15

2563 ASIC pleads that at all material times from 15 October 1997 to 21 November 2003:

- (a) in order to obtain payment from the UN escrow account, exporters of foodstuffs to Iraq were required to submit to the OIP the concluded contract for each transaction in respect of which payment was sought;
- (b) each concluded contract was required to be submitted through the exporter's UN embassy;
- (c) the contracts were examined by the OIP for, inter alia, price and value; and
- (d) if the OIP approved the relevant contract, the exporter became eligible for payment from the UN escrow account.

2564 Geary says, save that he admits from 15 October 1997:

- (a) in order to obtain payment from the UN escrow account, exporters of foodstuffs were required to submit to the OIP the contract for each transaction in respect of which payment was sought;
- (b) the contract was required to be submitted through the exporter's UN embassy;
- (c) the contracts were examined by the OIP for, inter alia, price and value;

he otherwise denies paragraph 15.

FASOC – paragraph 16

2565 ASIC pleads that as a signatory of the UN Charter, the UN Resolutions bound Australia and all other nations which were signatories, including relevantly Canada and the United States of America.

2566 Geary does not plead to paragraph 16 as it alleges matters of law.

FASOC – paragraph 17

2567 ASIC pleads that, further and alternatively, by reason of each of the UN Resolutions, the UN called upon its member states – including Australia – to ensure that their nationals (including corporations registered in each member state) acted in accordance with the UN Resolutions, including by:

- (a) preventing the payment by their nationals of currency other than Iraqi Dinars (hereafter, internationally traded currency) to the Government of Iraq or its instrumentalities; and
- (b) ensuring that their nationals obtained payment from the UN escrow account only on account of goods supplied to the people or Government of Iraq under the OFFP, to meet the humanitarian needs of the people of Iraq (OFFP humanitarian goods).

2568 Geary does not plead to paragraph 17 as it alleges matters of law.

FASOC – paragraph 18

2569 ASIC pleads that in compliance with Australia's obligations referred to at paragraph 2565 above or alternatively in response to the UN's call upon its member states referred to at paragraph 2566 above, the Commonwealth Parliament inter alia passed into law regulation 13CA of the Customs Regulations.

2570 Geary admits paragraph 18.

FASOC – paragraph 19

2571 ASIC pleads that pursuant to the Customs Regulation, at all material times prior to 9 May 2003, AWB was prohibited from exporting wheat to Iraq unless it received

permission for the export of wheat from the Minister of Foreign Affairs and Trade or his authorised representative.

2572 Geary admits paragraph 19.

AWB's sales of wheat to Iraq and the purported fees

FASOC – paragraph 20

2573 ASIC pleads that at all material times, AWB's wheat sales to Iraq constituted a substantial part of AWB's overall annual wheat sales and were highly profitable for AWB, and therefore, commercially, Iraq was a crucial market for AWB.

2574 Save that Geary admits AWB's wheat sales to Iraq constituted a substantial part of AWB's annual wheat sales and Iraq was a crucial market for AWB, Geary otherwise does not admit paragraph 20.

2575 I find that wheat sales to Iraq were profitable.

FASOC – paragraph 21

2576 ASIC pleads that in the period between 1996 and 21 November 2003, AWB entered into various contracts with the Grain Board of Iraq (IGB) for the sale of wheat under the OFFP. ASIC gives particulars of contracts A1111, A1112, A1441 and A1630.

2577 Geary does not admit paragraph 21.

2578 I find that ASIC did enter into the contracts as alleged.

FASOC – paragraph 22

2579 ASIC pleads that in the period between 1996 and June 1999, AWB and the IGB entered into at least 20 contracts for the sale of wheat and each of those contracts provided that the contractual basis on which AWB sold wheat to the IGB was either:

- (a) 'C and F Umm Qasr' or 'C&F Free Out Umm Qasr', which meant that the price per tonne for which the wheat was sold included:

- (i) the price of the wheat; and
- (ii) the cost of the carriage of the wheat from Australia to the port of Umm Qasr, Iraq;

or

- (b) 'CIF Umm Qasr' or 'CIF Free Out Umm Qasr', which meant that the price per tonne for which the wheat was sold included:
 - (i) the price of the wheat;
 - (ii) the cost of the carriage of the wheat from Australia to the port of Umm Qasr, Iraq; and
 - (ii) the cost of insuring the shipment against the risk of loss of or damage to the wheat during its carriage to Iraq.

2580 Geary does not admit paragraph 22.

2581 I find that the allegation in paragraph 22 is made out.

FASOC – paragraph 23

2582 ASIC pleads that in the period between June 1999 and March 2003 the IGB imposed a fee on AWB:

- (a) that was described as an inland transportation or trucking fee in relation to the supply of wheat by AWB to Iraq;
- (b) in amounts that were:
 - (i) denominated in US dollars, Euros or another internationally traded currency;
 - (ii) fixed by the IGB from time to time in steadily increasing amounts ranging from US\$12.00 to US\$51.15 per metric tonne of wheat; and

- (iii) not negotiated with, or otherwise explained or justified to, AWB by reference to any costs actually incurred in transporting wheat within Iraq;
 - (c) that was payable in cash in an internationally traded currency to an entity nominated by Iraq, and not to the IGB;
 - (d) that was not a genuine fee for transport services provided to or by AWB;
- (the purported inland transportation fee).

2583 Geary says that from about July 1999 to December 2002 some of AWB's contracts for the sale of wheat to the IGB included an inland transport or trucking fee that were denominated in US dollars, Euros or other internationally traded currency, he otherwise denies paragraph 23. Geary provides particulars of the AWB contracts which included an inland transport or trucking fee.

2584 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1084 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 24

2585 ASIC pleads that in the period between November 2000 and March 2003, the IGB also imposed a fee on AWB:

- (a) that was described as a payment for 'after sales service' in relation to the supply of wheat by AWB to Iraq;
- (b) in an amount that was:
 - (i) fixed by the IGB at the rate of 10 per cent of the total price per tonne of all wheat shipped to Iraq by AWB (including the purported inland transportation fee);
 - (ii) expressed as an increase in the purported inland transportation fee; and
 - (iii) not negotiated with, or otherwise explained or justified to, AWB by

reference to any costs actually incurred in the provision of 'after sales service' in relation to wheat supplied by AWB to Iraq; and

(c) that was payable in cash in an internationally traded currency to an entity nominated by Iraq, and not to the IGB;

(d) that was not a genuine fee for any service provided to or by AWB;

(the purported after sales service fee).

ASIC refers to the purported inland transportation fee and the purported after sales service fee together as the 'purported fees.'

2586 Geary denies paragraph 24.

2587 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1109 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 25

2588 ASIC pleads that the written terms of each contract for the sale of wheat entered into between AWB and the IGB in the period between June 1999 and March 2003 under Phases VI to XIII of the OFFP (the OFFP Contracts) used expressions which suggested that AWB had an obligation to deliver or transport wheat to all silos within all Governorates of Iraq (the purported inland transport obligation).

2589 ASIC says that the inland transport obligation was implied by the use of various terms in the OFFP Contracts such as 'FIT', 'FOT', 'Free into Truck', 'Free Onto Truck', 'Free into Truck to all silos within all governorates of Iraq' and the imposition of the inland transportation fee by the means previously alleged.

2590 Geary does not admit paragraph 25.

2591 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1116 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 26

2592 ASIC pleads that the purported inland transport obligation was a sham, in that, contrary to the written terms of the OFFP Contracts, neither AWB nor the IGB intended that AWB would deliver or transport or arrange to deliver or transport wheat within Iraq. ASIC alleges that the absence of an intention on the part of AWB and the IGB that AWB would deliver or transport wheat within Iraq is to be inferred from the fact that at no time in the period between June 1999 and March 2003 did AWB deliver, transport, or arrange to deliver or transport, any wheat to any silo within any Governorate of Iraq.

2593 Geary denies paragraph 26.

2594 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1120 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 27

2595 ASIC alleges that the price payable to AWB pursuant to each of the OFFP Contracts included the amount of the purported fees.

2596 Geary does not admit paragraph 27.

2597 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1143 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 28

2598 ASIC pleads that in respect of the OFFP Contracts:

- (a) AWB was paid out of the UN escrow account amounts that reflected the full contract price agreed between the IGB and AWB in respect of each such contract, inclusive of the purported fees;
- (b) AWB did not deliver or transport or arrange to deliver or transport any wheat to any silo within any Governorate of Iraq; and
- (c) neither AWB nor any person acting on its behalf provided any 'after sales

service' to Iraq in consideration for AWB's receipt from the UN escrow account of the amount of the purported after sales service fees.

2599 Geary does not admit these allegations.

2600 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1148 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 29

2601 ASIC pleads that in the period between June 1999 and March 2003, in addition to or as part of the OFFP Contracts, AWB agreed to pay and in fact paid the purported fees to or at the direction of the IGB. ASIC provides full particulars of the agreements and tendered the relevant contracts.

2602 Geary denies paragraph 29.

2603 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1158 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 30

2604 ASIC pleads that by reason of the matters alleged at paragraphs 23 to 29 referred to above:

- (a) the purpose and effect of the purported fees was to enable the Government of Iraq to obtain payments of internationally traded currency from AWB, which payments the UN Nations had called on its member states to prevent, as alleged at paragraph 17(a) above; and
- (b) the purpose and effect of the purported inland transportation obligation was to enable AWB to inflate the contract prices in the OFFP Contracts by amounts equal to the purported fees paid to or at the direction of the IGB, and thereby to enable AWB to recover from the UN escrow account the amount of the purported fees paid, such recovery constituting payments that the UN had called on its member states to prevent, as alleged at paragraph 17(b) above.

2605 Geary denies paragraph 30.

2606 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1162 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 31

2607 ASIC alleges that at all times from July 1999 to November 2003, Alia was a company partly owned by the Iraq Ministry of Transport. ASIC alleges that Alia was incorporated in Jordan in 1994 as a joint venture between Al-Khawam and the Iraqi Ministry of Transport. In the period between July 1999 and November 2003, the Iraq Ministry of Transport held a 49 per cent shareholding in Alia.

2608 Geary does not admit paragraph 31.

2609 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1170 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 32

2610 ASIC pleads that prior to 21 October 2003, there was no agreement (whether in writing or otherwise) between AWB and Alia in relation to the supply of transport or other services by Alia to AWB, or AWB's payment for such services, other than the agency appointment alleged at paragraph 34 discussed below.

2611 Geary does not admit paragraph 32.

2612 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1180 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 33

2613 ASIC alleges that prior to 21 October 2003, other than as specified in the agency appointment referred to below:

- (a) Alia played no role in the purchase, importation or transportation of the wheat delivered in respect of the OFFP Contracts – including Contracts A1111,

A1112, A1441, A1670 and A1680 – and Alia was not entitled to any amount on account of such purchase, importation or transportation; and

- (b) Alia's only role was to collect the purported fees on behalf of the ISCWT and remit such fees to the ISCWT, an instrumentality of the government of Iraq.

2614 ASIC alleges that on or about 13 November 1999, Alia entered into a written agreement with the ISCWT to collect inland transportation fees on behalf of the ISCWT (the collection agreement). Pursuant to the collection agreement, between late 1999 and mid-2003, Alia:

- (a) notified the ISCWT upon receipt of purported fees (including any purported inland transportation fees or purported after sales service fees) which were deposited into Alia's bank account; and
- (b) remitted the amount of such fees, less Alia's commission, to the ISCWT's bank account at the Al-Rafidain Bank in Jordan.

2615 Geary does not admit to paragraph 33.

2616 I dealt with a similar plea by ASIC in the case against Flugge at paragraph 1184 and following. I repeat my findings in the case against Geary.

FASOC – paragraph 34

2617 ASIC pleads that on or around 17 April 2000, AWB appointed Alia as its protective agent in respect of vessels carrying AWB wheat upon their arrival at Umm Qasr (agency appointment).

2618 Geary admits paragraph 34.

Payments to Alia

FASOC – paragraph 35

2619 ASIC pleads that in the period between July 1999 and March 2003, AWB used three different methods to make payments to Alia of the purported fees in connection with

contracts with the IGB for the sale of wheat:

- (a) amounts were paid indirectly to Alia via the owners or operators of the vessels chartered by AWB to carry the wheat to Iraq;
- (b) amounts were paid indirectly to Alia via Ronly and Tse Yu Hong Metal Ltd as nominee of Ronly; and
- (c) amounts were paid directly into a bank account maintained by Alia, which account was referred to by Alia as 'the ISCWT account.'

2620 Geary does not admit paragraph 35.

2621 I am satisfied on the evidence canvassed above, that this allegation is made out.

The Single Desk and the risk of harm to AWB if it was lost

FASOC – paragraph 36

2622 ASIC pleads that at all material times, AWB and its wholly-owned subsidiary AWBI held the Single Desk statutory monopoly for the export of wheat from Australia.

2623 Geary admits paragraph 36.

FASOC – paragraph 37

2624 ASIC pleads that the Single Desk was of great financial and commercial value to AWB.

2625 Geary denies paragraph 37.

2626 I am satisfied on the evidence canvassed below that ASIC has established that the Single Desk was of great financial and commercial value to AWB.

FASOC – paragraph 38

2627 ASIC pleads that by reason of the matters alleged at paragraphs 36 and 37 above, the risk of harm or substantial threat to AWB's standing or reputation as an exporter of wheat constituted a risk to AWB's right to operate the single desk and was therefore

a serious threat to AWB as a whole.

2628 Save that he admits the risk of harm or substantial threat to AWB's standing or reputation as an exporter of wheat constituted a risk to AWB's right to operate the Single Desk, Geary denies paragraph 38.

2629 I am satisfied on the evidence canvassed below that the allegation has been made out by ASIC.

FASOC – paragraph 39

2630 ASIC pleads that revelation of AWB's conduct of the sort alleged at paragraphs 25 to 29, 35, 47 to 50 and 59 was likely to cause and in fact caused substantial and enduring harm to AWB. ASIC sets out detailed particulars of the alleged harm that are the same as those alleged against Flugge save that an allegation concerning Standard & Poor's adversely revising its credit rating for AWB as a result of the Cole Inquiry has been included as against Flugge but not pleaded against Geary. In my opinion, little or nothing turns on this omission.

2631 Save that Geary admits revelation of the matters alleged at paragraph 25 to 29, 35, 47 to 50 and 59 caused substantial harm to AWB, Geary denies paragraph 39.

2632 I have already considered the harm arising out of the revelations of AWB's conduct at paragraph 1648 and following. I make the same findings in the case against Geary.

FASOC – paragraph 40

2633 At this point in the claim, ASIC pleads as to Geary's knowledge. I will deal with each of the pleas in detail. In summary, however, the consideration of these pleas and the evidence canvassed below establishes the following about Geary's position in AWB and his knowledge of the OFFP program and the imposition of the inland transportation fees.

2634 The OFFP was introduced in 1995. At that time, Geary was the AWB representative of AWB in New York. His duties included assisting in the exchange of information

between AWB and the UN of the OFFP.

- 2635 Geary knew that under the OFFP, moneys from the sale of Iraq crude would be deposited in an escrow account under the control of the UN. He knew that the moneys could be used for humanitarian needs or aid that included medical supplies, food products, agricultural equipment to produce food (including pesticides and the like). Geary knew that the provision of these needs or goods or services under the OFFP required approval of the UN sanctions committee and that applications had to be made to the sanctions committee by the provider of such goods or services to provide the same to Iraq. In 1997, Geary was provided with details of the procedure to be followed in obtaining approval of the 661 Committee under the OFFP to provide such goods or services to Iraq.
- 2636 In June 1999, Iraq sought the payment by AWB of the inland transportation fee. At that stage, Geary was the pool manager. Geary knew of Iraq's request for the payment of the inland transport fee as he had read the invitation to tender and was also sent details of proposed terms of the new contract.
- 2637 Geary knew that the inland transportation fee was US\$12.00 per metric tonne and that the Iraqis had asked for that sum to be paid to the Land Transport Co. Geary knew that there was no obligation under the proposed contracts for AWB to organise or conduct any inland transportation of wheat. Geary knew that the sole imposition on AWB was to pay the fee.
- 2638 Geary knew that the cost of the inland transportation fee was to be added to the CIF price that was to be recovered from the escrow account. Geary knew that the imposition of the inland transportation fee would not adversely affect the FOB price recovered by the Pool.
- 2639 Geary knew that the payment of the fee by AWB to the Land Transport Co presented practical difficulties to AWB. Geary knew that Hogan and Emons visited Iraq to sort out the issue of the payment in June 1999.

- 2640 Geary knew that the IGB had requested that the contract of sale provide that in lieu of the usual CIF provision that the contract specify CIF free in truck Iraq.
- 2641 Geary knew in June 2000, that AWB had entered into several contracts for the supply of wheat to Iraq that included the payment by AWB of an inland transportation fee.
- 2642 In July 2000, Geary knew that the inland transportation fee had been increased to US\$15.00 per metric tonne and that the fee was being paid via transport company/s in Jordan.
- 2643 In September 2000, Geary knew that AWB was using Ronly to pay the inland transportation fee on AWB's behalf
- 2644 In October 2000, Geary was told that the IGB was responsible for providing trucks for the unloading of AWB's wheat shipments to Iraq.
- 2645 In March 2001, Geary was appointed Group General Manager Trading reporting directly to the managing director Lindberg. After this date Geary began authorising payments of the inland transportation and service fees to Alia and continued to do so until the invasion of Iraq in March 2003.

Allegations as to Geary's knowledge

- 2646 In paragraph 40, ASIC pleads that at all material times as particularised below, Geary knew the following:
- (a) each of the matters alleged at paragraphs 36 to 38 (discussed at 2622 to 2627) inclusive above;
 - (b) that AWB's wheat sales to Iraq constituted a substantial part of AWB's overall annual wheat sales and were highly profitable for AWB and therefore, commercially, Iraq was a crucial market for AWB;
 - (c) that the UN had called on Australia, as a member state, to ensure that Australian nationals (including corporations registered in Australia) acted in accordance with the UN Resolutions, including by:

- (i) preventing the direct or indirect payment by Australian nationals of internationally traded currency to the Government of Iraq or its instrumentalities; and
 - (ii) ensuring that Australian nationals obtained payment from the UN escrow account only on account of OFFP humanitarian goods;
- (d) that AWB's sales of wheat to Iraq under the OFFP were subject to scrutiny and authorisation by the UN;
- (e) that the IGB imposed the purported fees on AWB and that those fees were included in the contract prices in AWB's contracts for the sale of wheat to the IGB;
- (f) that the purported fees were not identified or referred to in AWB's contracts for the sale of wheat to the IGB that were submitted to DFAT and the OIP for approval of payment from the UN escrow account;
- (g) that AWB had made and (until March 2003) was continuing to make payments of the purported fees in connection with its trade with the IGB;
- (h) that the purported fees were being paid or had been paid to Alia,
- (i) of the matters alleged at paragraphs 23 to 28 and 33(b) referred to above, and that the payment of the purported fees resulted or was likely to result:
 - (i) either directly or indirectly, in the payment of internationally traded currency to the Government of Iraq or its instrumentalities, and
 - (ii) in AWB receiving payment from the UN escrow account, other than on account of OFFP humanitarian goods supplied to Iraq.
- (j) of the matters alleged at paragraphs 23 to 28 and 33(b) referred to above, and that the payment of the purported fees resulted or was likely to result:
 - (i) either directly or indirectly, in the payment of internationally traded

currency to the Government of Iraq or its instrumentalities, and

- (ii) in AWB receiving payment from the UN escrow account, other than on account of OFFP humanitarian goods supplied to Iraq.

2647 On the basis of the evidence canvassed below, I am satisfied that at all material times Geary knew the matters alleged in paragraph 40(a). In his submissions, Geary conceded that Iraq was a crucial market.

2648 On the basis of the evidence canvassed below, I am satisfied that at all material times Geary knew the matters alleged in paragraph 40(b).

2649 Geary concedes that at all material times he knew the matters alleged in paragraph 40(c)(i) but denies 40(c)(ii). I not satisfied that at all material times Geary knew that the UN had called on Australia, as a member state, to ensure that Australian nationals (including corporations registered in Australia) acted in accordance with the UN Resolutions by ensuring that Australian nationals obtained payment from the UN escrow account only on account of OFFP humanitarian goods as alleged in paragraph 40(c)(ii).

2650 My issue is with the allegation that the use of the escrow account was limited to the supply of 'OFFP humanitarian goods' as defined in paragraph 17 of the FASOC. There, OFFP humanitarian goods are defined as 'goods supplied to the people or Government of Iraq or its instrumentalities under the OFFP, to meet the humanitarian needs of the people of Iraq (OFFP humanitarian goods).'

2651 The escrow account could be used to meet humanitarian needs which went beyond goods. Johnston conceded that operation the sanctions was complex.¹⁷³⁹ The evidence of Johnston about the OFFP conceded that the escrow account could be used for the payment for small services provided at local level provided the costs were reasonable and were paid in local currency.¹⁷⁴⁰ There was no suggestion that Johnston had

¹⁷³⁹ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1772.

¹⁷⁴⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (12 November 2015) T1772.

conveyed this information to Geary.

- 2652 On the evidence canvassed below, I am not satisfied that ASIC has established that Geary knew or believed that the escrow account could not be used for transporting foodstuffs. Resolution 986 referred to humanitarian needs.
- 2653 Further the memorandum of 3 May 1996 referred to at paragraph 146 above, acknowledges that the escrow account could be used to pay for agricultural equipment and for goods and services used in the cultivation of food stuffs. Also, the escrow account was used to pay for the cost of transport and insurance to AWB in shipping the wheat from Australia to Iraq. Thus the escrow account could be used for services that went beyond 'goods'. I am not satisfied that ASIC has established that the UN would not have permitted the escrow account to pay for the transportation of wheat within the governates of Iraq to enable the wheat to reach the people of Iraq.
- 2654 Under OFFP there was a distribution plan and under the plan moneys were set aside for the distribution of foodstuffs within Iraq.
- 2655 In my opinion, I am unable to infer that Geary knew that humanitarian needs did not include the transport of foodstuffs to those who needed the foodstuffs.
- 2656 Accordingly, I am not satisfied that at all material times Geary knew that the UN had called on Australia, as a member state, to ensure that Australian nationals (including corporations registered in Australia) acted in accordance with the UN Resolutions including by ensuring that Australian nationals obtained payment from the UN escrow account only on account of OFFP humanitarian goods.
- 2657 Subject to the qualification concerning humanitarian needs and aid as opposed to humanitarian goods, I am satisfied on the evidence canvassed below that at all material times Geary was aware of the matters alleged in paragraph 40(c).
- 2658 Geary admits that at all material times he knew that AWB's sales of wheat to Iraq under the OFFP were subject to scrutiny and authorisation by the UN as alleged in paragraph 40(d).

FASOC – paragraph 40(e)

2659 In paragraph 40(e), ASIC pleads that at all material times Geary knew that the IGB imposed the purported fees on AWB and that those fees were included in the contract prices in AWB's contracts for the sale of wheat to the IGB. The purported fees are defined to mean the purported inland transportation fee and the purported after sales service fee.¹⁷⁴¹

2660 Geary says that from about July 1999 to December 2002, the price referred to in AWB's contracts was on each occasion identified as 'CIF Free in Truck', which price included the inland transport or trucking fee; he otherwise denies sub-paragraph 40(e).

2661 I am satisfied from the evidence relied on by ASIC that at all material times Geary knew that IGB had imposed on AWB an inland transportation fee and that those fees were included in the contract prices in AWB's contracts for the sale of wheat to the IGB.

2662 For the reasons discussed below, I am not satisfied on the evidence relied on by ASIC that at all material times Geary knew of the existence of the after sales service fee being imposed by IGB on AWB, or that, if contrary to my finding he did know of the existence of the after sales service fee, I am not satisfied that he knew the fee was not genuine.

2663 ASIC relies on the following evidence.

2664 On 16 June 1999, Hogan emailed Geary (and nine others) entitled 'IRAQ', advising that Hogan would be travelling to Iraq in the next few days.¹⁷⁴² The email stated:

2. Zuhair does not wish to discuss wheat pricing at the moment, (he will call for this on 29th June), however, he wishes to discuss some Contract terms and conditions (wanted to do this personally and not via taxes / telexes).¹⁷⁴³

2665 Zuhair is recorded in that email as wanting to discuss some contract terms and

¹⁷⁴¹ FASOC [24].

¹⁷⁴² CB 1/367.

¹⁷⁴³ CB 1/367.

conditions 'personally'. There was also a note directed specifically to Geary and Scales, who worked in the Pool, of price levels and tonnages for September to February – 'although Zuhair did not want to discuss pricing.'

2666 Geary submits that the email says nothing about trucking fees. Further, he says that the reference to the meeting with Zuhair to discuss contract terms and conditions is under the heading 'Darryl' and is not directed to Geary.

2667 Geary says that the email asks him and Scales to provide price levels and tonnage.¹⁷⁴⁴

On 17 June 1999, Geary emailed Hogan replying to Hogan's email of the day before, referring to details of the IGB Wheat Tender which had been received that morning by AWB.¹⁷⁴⁵ As discussed above (paragraph 146), the tender referred to payments of 'CIF Free on Truck to Silo at all Governorate;' and 'Land Transport will be U.S.D. 12 per metric ton.'

2668 In his email in reply, Geary said:

[T]here are some things in the tender doc we cannot offer against, Darryl will go through these with you.

2669 ASIC submits that the above email indicates that Geary had read the tender document and discussed it with Borlase. I accept that submission.

2670 Geary submits that as he was with the Pool at the time he received the tender document, it is reasonable to conclude his only concern in the wheat tender was matters that affected the Pool, such as the FOB price, wheat quality and when the wheat would be required for delivery.

2671 Geary submits that no evidence was introduced to suggest that he had any interest or concern in the trucking fee. Geary says that as at 17 June 1999, the first OFFP contracts

¹⁷⁴⁴ In relation to a great number of documents and emails tendered by ASIC against Geary, Geary submits that the inferences sought to be made from the email of document cannot be reliably established. Rather than repeat this submission in relation to the documents and emails put against Geary I will proceed on the basis that the submission is made without repeating it in this judgment.

¹⁷⁴⁵ CB 1/369.

containing the trucking fee were still four weeks away from being signed.

2672 Geary submits that the only concerns he had in relation to the wheat tender or contracts whilst employed in the Pool was on matters that affected the FOB price that was receivable by the Pool. I do not accept this submission. Geary would have been concerned to ascertain whether or not the extra fee was a cost that would affect the FOB price receivable by the Pool. Accordingly, he would have had to ascertain whether the fee did affect the Pool.

2673 On 24 June 1999, Hogan emailed Geary (and 11 others) with an email entitled 'IRAQ' that advised that the IGB had requested that suppliers add an amount of US\$12.00 per tonne to their wheat offers for discharge and distribution from Umm Qasr (see paragraph 2355).¹⁷⁴⁶

2674 ASIC submits that the email further explained that the reason for requesting payment of this amount in US dollars was to reduce the amount of Iraqi dinars required to be placed into the market by the Ministry of Finance, as this was impacting the currency rate.

2675 In the 'to do list', there was reference to finding out more about the UN Distribution Plan. The last task, allocated to Watson was to follow up the-
Payment method of USD12.00 Free in Truck (via owners).

2676 ASIC submits that the email brought to Geary's attention that there was a problem that needed to be resolved. That problem was how AWB could pay money to the IGB when all Iraq accounts had been frozen. The answer proposed was to make the payments 'via owners'.

2677 ASIC says that the reason for this is obvious. From the outset of the introduction of the inland transportation fee, ASIC says that it was understood that, notwithstanding the terms of the 1999 Iraqi tender and of the contracts AWB subsequently concluded with the IGB, AWB had no obligation to arrange or effect the discharge or

¹⁷⁴⁶ CB 1/375.

transportation of the wheat within Iraq. Its obligation was to pay a fee to an Iraqi entity. ASIC says that the difficulty was how to achieve that when payments to an Iraqi entity were prohibited by UN sanctions. ASIC says that the need to find a means to pay the fee to Iraq other than directly necessarily involved absence of UN approval of such payments. ASIC submits that paying the fee to Iraq via interposed third parties was completely unnecessary if it was UN approved. ASIC submits that the use of third party conduits was explicable only on the basis that AWB knew that there was no such approval, and that there was therefore a need to disguise the payments.

2678 I am not satisfied that this is so. The unchallenged evidence of Hogan was to the effect that a problem with payment of the inland transportation fee was the USA banking sanctions, which prevented bank transfer by AWB of moneys to Iraq or an Iraq instrumentality. I have addressed Hogan's evidence at paragraph 1397 and following.

2679 Geary submits that there is no evidence that Geary received or read this four page email, particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2680 Geary says that he was one of the eight recipients to this email (in fact there were twelve recipients). Geary submits that as he was with the Pool at the time, it is reasonable to conclude his only concern in the wheat tender were matters that concerned the Pool, such as the FOB price, wheat quality and when the wheat would be required for. As discussed above, I do not accept this submission.

2681 Geary says that as at 24 June 1999, the first OFFP contracts containing the trucking fee were still three weeks away from being signed.

2682 Geary says that he was not included in the 'TO DO LIST' – which was directed to Snowball and Watson.

2683 On 25 June 1999, Hogan emailed Snowball with copies to eleven others including Geary entitled 'Re: IRAQ'.¹⁷⁴⁷ The email reproduced Owen's comment from an email

¹⁷⁴⁷ CB 1/381.

of 17 June 1999¹⁷⁴⁸ that he sent to Borlase with copies to others (not including Geary), which is copied above at paragraph 148. Hogan added a comment to the email as discussed at paragraph 157.

2684 ASIC submits that the clear implication of the email is that AWB had to find a discrete way in which to pay the land transport costs of US\$12 to the Iraqis. As discussed at paragraph 1397 and following, Hogan gave undisputed evidence that the difficulty with payment was the USA banking sanctions.

2685 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with Hogan about the contents of the email.

2686 Geary says that email was sent to Snowball and that he was merely one of many persons copied into it. Geary says that he was not concerned with trucking fees as it did not impact on the FOB price.

2687 On 25 June 1999 at 7.45 am, Snowball emailed Hogan, copied to eleven others including Geary entitled 'Re: IRAQ.'¹⁷⁴⁹

2688 The email referred to a distribution plan being submitted and approved on 11 June. The email then asked:¹⁷⁵⁰

Can you advise what proposed changes to the contract terms and conditions would be agreed between the IGB and the UN, and which would be agreed between AWB and the IGB only.

2689 ASIC submits that this email suggests that AWB was not providing full and frank information to the UN regarding the terms of its dealings with the IGB. In the words of Storey's 1996 memo (which Geary had forwarded at the time to several AWB

¹⁷⁴⁸ CB 1/371.

¹⁷⁴⁹ CB 1/379.

¹⁷⁵⁰ CB 1/379.

officers), AWB was going down the 'minimal information route' and running the risk of 'being subsequently found out, of being branded as a Sanction buster.'¹⁷⁵¹

2690 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email. Geary says that the email was directed to Snowball and Geary was only merely one of the eleven persons copied in.

2691 Geary says that as he was with the Pool at the time, it is reasonable to conclude his only concern was matters that affected the Pool, such as the FOB price, wheat quality and when the wheat would be required for delivery. For reasons discussed above at paragraph 2672 and following, I do not accept this submission.

2692 Geary submits that the reference to 'changes on contract terms and conditions to be agreed b/w IGB and UN and what will agreed b/w AWB and IGB only' is not sinister as ASIC seems to imply. Geary submits that there were numerous matters the UN advised were 'commercial' matters and to be left for agreement between the parties – for example war risk insurance. Geary submits this is clear from exhibit G23.

2693 On 25 June 1999 at 4.45 pm Watson sent an email to Hogan and copied to eleven others, including Geary, entitled 'Re: IRAQ' (see paragraph 2362).¹⁷⁵²

2694 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2695 Geary says that the email was directed at Hogan and that Geary was merely one of eleven others copied in.

2696 Geary says that he was not concerned with trucking fee as it did not impact on the FOB price. He says this is amplified by Watson stating he would discuss Mark

¹⁷⁵¹ CB 1/119.

¹⁷⁵² CB 1/385.

(Emons) 'a suitable method' to pay the trucking fee.

2697 On 30 May 2000, Marise Wilson sent an email to Geary (and Snowball and Jeffrey) entitled 'Iraq' that forwarded an email from Watson (on behalf of himself and Emons), sent from Jordan, relating to meetings to be held the following day with Zuhair and Abdul-Rahman.¹⁷⁵³

2698 Watson's email is discussed above at paragraph 391.

2699 ASIC submits that the statement that the UN had approved the payment of trucking fees was patently false, as the UN had never approved the payment of so-called trucking fees out of funds extracted from the escrow account.

2700 ASIC says that moreover, it was intrinsically unlikely (to say the least) that the UN would permit the payment of international (that is, non-Iraqi) currency to the IGB in circumstances where the entire purpose of the OFFP was to provide food to Iraq without the Iraqis ever getting their hands on hard currency.

2701 Lastly, ASIC says that the email also noted this:¹⁷⁵⁴

AWB has been approached by IGB to provide 'after sales service'

Current Action Plan:

...

Determine what 'after sales service required' i.e. equipment /cash (Board approval may be required for this)

2702 ASIC submits that the email plainly told Geary that what the IGB may be after from AWB was 'cash.'

2703 Geary submits that the email was sent to himself, Snowball and Campbell Jeffrey as an afterthought. Geary says that the email said that trucking fees were UN approved. Geary says that there is no mention of after sales service but rather an approach to

¹⁷⁵³ CB 2/1045.

¹⁷⁵⁴ CB 2/1045.

provide 'after sales service.'

2704 Geary says that the email suggests AWB was to provide a service.

2705 On 31 May 2000, Geary forwarded the above email to Scales and Richardson.¹⁷⁵⁵

2706 ASIC submits that obviously any requirement for AWB to provide after sales service had the potential to affect the bottom line for the Pool.

2707 Geary says that the email he forwarded said that trucking fees were UN approved. Geary says that the email only mentions an 'approach' in regard to after sales service fees and that the content suggests that AWB was to provide a service.

2708 Geary says that in June 2000, he was promoted to General Manager National Pool. Also in June 2000, Geary was appointed a member of the Executive Leadership Group.¹⁷⁵⁶

2709 On 9 June 2000, Watson sent an email to Geary and four others setting out details of contracts A4334, A4654, A4821, A4822, A4906, A4908, A4653, A4993, A0062, A0101, A4970, A4971 and A4972, freight rates and trucking fees. A table attached to the email showed the inland transport fees of US\$12.00 increasing to US\$15.00 in relation to some shipments under the OFFP.¹⁷⁵⁷

2710 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2711 Geary submits that there is no reliable evidence to show that the payment was a sham or Geary knew of a sham regarding the trucking fees.

2712 On 10 July 2000, Jones sent an email to Geary and Scales entitled 'Iraq' in which Jones

¹⁷⁵⁵ CB 2/1049.

¹⁷⁵⁶ FASOC [4(e)].

¹⁷⁵⁷ CB 2/1087, 1089, 1091.

listed a number of unresolved issues in relation to the Iraq market, including 'What is Ronly Holdings [sic] involvement in the process...' ¹⁷⁵⁸ The email attached a document entitled 'Iraq Brief June 2000' which materially set out the background to the OFFP and the effect of UN Resolution 986 (including that the resolution permitted Iraq to purchase humanitarian goods). The Iraq Brief also stated as the last item on the fourth page in relation to the purported inland transportation fee: ¹⁷⁵⁹

Mechanism of payment for trucking fee. In existing contracts the fee is \$15.00 per tonne. IGB have indicated the fee will be reduced to \$14.00 for future business. Current mechanism of payment is via transport company/s in Jordan.

2713 ASIC submits that this email shows that demurrage and capacity to make payments to Iraq was a matter at the forefront of concerns to the Pool and thus to Geary at this time. ASIC says that it was those and other concerns which Jones addressed in his email of 10 July 2000 to Geary. ASIC submits that it is to be inferred that Geary has knowledge from this email that:

- (a) a mechanism to pay the trucking fee was required;
- (b) the current mechanism of payment was 'via transport company/s in Jordan.'

2714 ASIC says that in circumstances where the Pool was paying the inland trucking fee and in circumstances where there is no evidence from Geary to the contrary, it ought be accepted that Geary, who was at that stage General Manager of the Pool, read the email and attachment pertaining to matters which clearly were relevant to the performance of the Pool.

2715 ASIC says that the reference to paying the fee 'via' the transport company in Jordan plainly showed that the money was not being paid to transport companies for transport services. Instead, the transport company was itself being used was a conduit for payments to Iraq. ASIC submits that the need to use a conduit recognised that the

¹⁷⁵⁸ The particulars alleged FASOC [14].

¹⁷⁵⁹ CB 1/1148.

payments were improper. At the very least, ASIC says that understanding of the email is an available inference, and that Geary has not given evidence to refute it.

2716 In response, Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2717 Geary submits that there is no reliable evidence to show that the payment was a sham or Geary knew of a sham regarding the trucking fees.

2718 On 12 July 2000, Owen sent an email to Snowball with copies to Geary and six others,¹⁷⁶⁰ which identified various problems in the receipt of payment by AWB from the UN escrow account and made suggestions as to how those problems could be addressed. In the email, Owen noted that AWB had to pay for inland transport on a vessel by vessel basis, and that payment for wheat sold to Iraq was contingent upon UN authentication.

2719 On 13 July 2000, Snowball emailed a reply to Owen, with copies to Geary and six others which included the text of Owen's email.¹⁷⁶¹

2720 In response, Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2721 He also says that the email was directed to Snowball and that Geary was merely one of seven person copied in. Geary says that he was not concerned with the trucking fee as it did not impact on the FOB price.

2722 On 19 July 2000, Hogan sent an email to Stott with copies to Geary and six others entitled 'Iraqi Trip Report' and attaching a document entitled 'Iraq Trip Report'

¹⁷⁶⁰ CB 1/1149.

¹⁷⁶¹ CB 2/1155.

prepared by Hogan.¹⁷⁶² The report provided a breakdown of prices on new contracts totalling 1 million tonnes, including 'trucking' at US\$14.00 per tonne.¹⁷⁶³

2723 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2724 Geary says that the email was addressed to Stott and that Geary was merely one of seven persons copied in. Geary says that he was not listed on the Action List in the trip report. Geary says that there is no mention of the 10 per cent fee in the itemized price.

2725 On 12 September 2000, Hogan sent an email to Goermsall and three others, with copies to Geary and Stott, which set out a breakdown of the pricing of contracts A0265, A0266 and A0267 showing that the contract price included a 'trucking' fee of US\$14.00.¹⁷⁶⁴

2726 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2727 Geary says that the email was directed to four others. Geary says that he was merely one of two persons copied in, Stott being the other recipient who was the Iraq expert. Geary repeats that at the time, the Iraq market was Stott's responsibility.

2728 Geary submits that there is no reliable evidence to show the payment was a sham or that Geary knew of a sham regarding the trucking fees.

2729 Geary also points out the email said that three contracts were approved by the UN. He says that there was no mention of the 10 per cent service fee.

¹⁷⁶² CB 2/1211, 1213.

¹⁷⁶³ CB 2/1216.

¹⁷⁶⁴ CB 2/1309-1310; Geary, sch [17].

2730 On 21 September 2000, Ingleby sent an email to Geary and four others with a copy to Cowan, which said:¹⁷⁶⁵

Just confirming that tomorrow the go fwd chartering plan will be agreed and confirmed as previously promised.

this is urgent as we seem to find new ways for chartering to lose money each month - this month Yemen demurrage (0.5m) and Iraq trucking (0.5m) - are we sure these are to chartering's account??

regards PJI

2731 ASIC submits that Geary knew (or at the very least ought to have known) that Ronly was used as a conduit to pay the IGB fees.

2732 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2733 On 21 September 2000, Stott sent an email to Geary, Ingleby and three other. The email included the statement:¹⁷⁶⁶

I am advised by David [Cowan] that the USD 300,000 (AUD500k) payment to Ronly relates to the US 0.20cents per tonne fee that we agreed to pay for Ronly making Iraq freight and land transport payments on behalf of AWB. Evidently this had not been paid and Ronly only recently sent in an invoice for 1.5million tonnes. This is an AWBI expense.

...

Please urgently confirm that our obligations to Ronly in respect to the Iraq COA are now completed and as such no further payments will be made to Ronly for Iraq business. Also please advise if there are any additional monies due to Ronly in respect to charterings current or past business with this trading house.

2734 Cowan replied to Stott's email on 22 September 2000.¹⁷⁶⁷

2735 ASIC submits that Geary as the General Manager of the Pool was or ought to have

¹⁷⁶⁵ CB 2/1321.

¹⁷⁶⁶ CB 2/1325.

¹⁷⁶⁷ CB 2/1327.

been interested in the content of the email. The payment of half a million dollars to Ronly was an AWBI expense and as such would be taken off AWBI's bottom line. ASIC says that was a very large sum to pay an entity that did no more than act as a conduit for payments.

2736 ASIC says that again, there was no question asked by Geary or anyone else why it was necessary to use Ronly to make payments on behalf of AWB.

2737 On the other hand, ASIC led no evidence to establish that there was no question asked by Geary or anyone else why it was necessary to use Ronly to make payments on behalf of AWB.

2738 I accept that Geary ought to have been interested in the fee payable to Ronly. Geary ought to have been concerned to ascertain whether or not this fee was an expense that would affect the FOB price of the wheat that was to be received by the Pool. The email said, referring to the payment to Ronly, 'This is an AWBI expense.'

2739 ASIC submits that a strong inference may be drawn that those who knew that Ronly had made the payments on behalf of AWB, rather than AWB making the payments itself, understood that the interposition of Ronly was to disguise the payment.

2740 ASIC refer to the 2000 AWB Annual Report for the year ended 30 September 2000 lists the members of the 'Executive Management Group' at pages 32 to 33. It states at page 33 that Geary's role was 'General Manager Export Pools' and that he was 'responsible for managing the National Wheat Pools and the Single Desk.' The Annual Report also records statements about the importance of the single desk and the national pool.¹⁷⁶⁸

2741 Geary submits that the email is a reply by Stott to Ingleby's email earlier that day but Stott has added Alfia Sachak, an AWB senior corporate lawyer, as a recipient.

2742 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion

with/by Geary about the contents of the email.

2743 Geary submits that there is no reliable evidence to show the payment was a sham or that Geary knew of a sham regarding the trucking fees.

2744 On 23 October 2000, Scales sent an email to Geary and three others forwarding an email that Stott had sent on 23 October 2000 to Watson with copies to others. In his email Stott noted that during his recent visit to Baghdad, the IGB had asserted that the 'trucking fee' in respect of particular shipments of wheat had not been paid in full and that the IGB claimed that US\$1.198 million was outstanding. The email also said:¹⁷⁶⁹

[T]his figure is based on trucking fee of USD12.00 per tonne (which needs to verified [sic] against all contracts).

2745 ASIC submits that the fact that this enquiry came from the IGB – and not a trucking company – plainly indicated that the IGB was the recipient of the fees.

2746 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2747 Geary says that the email was directed to Watson and copied to four others and that the email was merely forwarded to Geary and another four persons as an afterthought.

2748 Geary says that the email was from Stott, the Iraq expert and General Manager of IS&M.

2749 Geary says that he was not concerned with the trucking fee as it did not impact on the FOB price.

2750 Geary submits that there is no reliable evidence to show the payment was a sham or that Geary knew of a sham regarding the trucking fees.

2751 On 7 February 2001, Borlase sent an email to AWB International (which ASIC alleges included the Pool and Geary) attaching a trip report circulated widely within AWB by

¹⁷⁶⁹ CB 2/1471.

Borlase and Hogan.

- 2752 ASIC says that the trip report clearly states that Iraq was trying to extract hard currency through the trucking fee mechanism in contravention of the UN Resolution.
- 2753 ASIC relies on the 7 February 2001 email sent to groups including 'International-All' (included Geary as the GM of Trading (i.e. International)) and 'Marketing-All' from Borlase of AWB attaching the 'Iraq Trip Report' discussed at 483.
- 2754 ASIC submits that it was appreciated within AWB that the 10 per cent was an impost by the Iraqis and not a payment in any way related to trucking or the inland transportation of the wheat.
- 2755 ASIC says that the 10 per cent was calculated by reference to a contract price which included the US\$25.00 per tonne trucking fee. Thus the 10 per cent was calculated on the total contract price and therefore included 10 per cent of the trucking fee, that is, US\$2.50 per tonne.
- 2756 ASIC submits that whatever else may be said about the total 10 per cent calculation that component of it which relates to 10 per cent of the trucking fee could in no way have been understood to itself be an additional trucking fee.
- 2757 ASIC submits that the February 2001 trip report was widely circulated within AWB. ASIC submits that it can therefore be concluded that, from February 2001, it was widely known within AWB that:
- (a) the increase in the trucking fee and addition of the 10 per cent service fee was considered to be a mechanism for extracting money from the UN escrow account;
 - (b) the trucking fee, which included the 10 per cent after sales service fee, was to be received by Iraq; and
 - (c) the trucking fee, which included the 10 per cent after sales service fee, was to be used by Iraq for purposes other than trucking.

- 2758 Geary submits that there is no evidence that he read this email or its attachment particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.
- 2759 Geary says that exhibit BFC-1 to Caridi affidavit sworn 24 February 2015, is a letter from Allens stating Geary was on the list 'Int Marketing-All' but only from 28 September 2002.
- 2760 Geary submits that he was still with the Pool and the information of interest to the Pool was adequately set out in the email. Geary says that the email makes no reference to the trucking fee or the services fee.
- 2761 I accept the submission that the email does set out the FOB price which was the relevant amount the Pool would receive.
- 2762 I shall return to this email when I finish discussing the evidence relied on by ASIC.
- 2763 In March 2002, Geary moved to the position of General Manager Trading. Geary says that that position did not include IS&M until February 2002.
- 2764 On 13 June 2001, Snowball sent an email to Geary forwarding an email sent by Hogan on 11 June 2001, in which Hogan noted that:¹⁷⁷⁰
- (a) the Iraqi Minister for Trade was under pressure over AWB's split payments for the 'inland transport' fee;
 - (b) a new contract would provide for payment in full of the 'inland transport' fee before discharge;
 - (c) the US\$0.50 fee sought by Umm Qasr Port would be built into the 'inland transport' fee; and
 - (d) the IGB had confirmed that crane hire was included in the 'inland transport'

fee, and that the cranes were controlled by the IGB.

2765 The 2001 AWB Annual Report for the year ended 30 September 2001 lists the members of the 'Executive Management Group.' It states that Geary's role was 'Group General Manager, Trading' and that he was 'responsible for domestic and global trading and risk management products for growers and end users.' It also states that Geary was the fourth highest paid executive officer of AWB (and the consolidated entity) after Lindberg, Ingleby and Goodacre.¹⁷⁷¹

2766 The 2001 Annual Report also noted the retention of the Single Desk as a highlight of the year and Flugge stated in the Chairman's Report 'The year will be remembered for the successful campaign to retain the Single Desk (the sole right to export bulk wheat)...' The Chairman's Report, states that 'The AWB group managed 24.1 million tonnes of grain with a value of approximately \$5.5 billion which included approximately \$3.8 billion in export income from wheat alone under the Single Desk' and that 'AWB argued vigorously and in many forums that the Single Desk provided significant benefits to Australian wheat growers and the nation's economy. We demonstrated that premiums captured by this arrangement are equal to more than \$140 million a year or \$8.72 per tonne.'¹⁷⁷²

2767 The 2001 AWB Annual Report, in the 'International sales and marketing' section of the 'AWB's Business Streams' chapter, nominates Iraq as one of six key markets for AWB, and states that demand for AWB's wheat remained strong in Iraq.¹⁷⁷³

2768 On 5 December 2002, Whitwell sent the email entitled, 'SALE 1 MILLION TONNES TO IRAQ' to Lindberg and many others including Geary, as referred to above at paragraph 2432.¹⁷⁷⁴

¹⁷⁷¹ CB 5/2044. Geary was paid a total of \$313,002 for the 2001 financial year. For the year ended 30 June 2002, Geary's total package increased to \$446,110 (CB 4/2777).

¹⁷⁷² CB 3/1987.

¹⁷⁷³ Geary, sch A [29].

¹⁷⁷⁴ CB 5/2957; Geary, sch [44].

- 2769 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.
- 2770 Geary says that he is merely one of twenty recipients. Geary says that the CEO, CFO and Stott are recipients as well.
- 2771 Geary says that the email does not provide reliable evidence to show the payment was a sham or Geary knew of sham regarding the trucking fees.
- 2772 Geary says that there is no mention of after sales service fees, iron filings or Tigris.
- 2773 On 13 December 2002, Edmonds-Wilson sent an email to Geary and seven others detailing the new contracts, A1670 & A1680.¹⁷⁷⁵
- 2774 The email referred to the payment of inland transportation fees of €51.30 per tonne and an additional component of €8.40 per metric tonne incorporated into contracts A1670 and A1680 on account of the Tigris Debt. It also stated that AWB was to deduct US\$500,000.00 for providing the debt collection service to Tigris.¹⁷⁷⁶ The email is referred to above at paragraph 2160.
- 2775 Edmonds-Wilson made a handwritten note showing that the price of contracts A1670 and A1680 included components for inland transportation fees and Tigris.¹⁷⁷⁷
- 2776 Geary says that on this date, he was sick on leave for eye surgery from 12 to 17 December 2002.
- 2777 On 17 June 2003, Kate Roberson on behalf of Whitwell emailed to the management group, including Geary, an Iraq brief and trip report.¹⁷⁷⁸ The Iraq brief was an ELG

¹⁷⁷⁵ CB 5/2977; referred to above at paragraph 845.

¹⁷⁷⁶ Geary, sch [45].

¹⁷⁷⁷ CB 5/2981; Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T633, L26 – T634, L7.

¹⁷⁷⁸ CB 6/3489, 3491.

report dated 15 June 2003. The ELG report noted, in respect of the 'Tigris Commission',¹⁷⁷⁹ that the issue had been put on hold in light of the need for possible further renegotiation of current contracts, and that Whitwell would meet Tigris officials in London on 22 June 2003.¹⁷⁸⁰

2778 On 12 September 2003, Whitwell sent an email to Geary and others referring to AWB's new obligations under the WFP to arrange private transportation from port to final delivery, and for the price to be reduced by 10 per cent.¹⁷⁸¹

2779 ASIC submits that this was confirmed by facsimile dated 17 September 2003 from WFP to AWB, in which the WFP attached the terms of the contract amendment as agreed between AWB and WFP, discussed at paragraph 579.

2780 ASIC submits that in September 2003, the WFP renegotiated the contract price for contract A1670. The reason for the amendments sought by the WFP was to remove the 10 per cent after sales service fee that had been included in the calculation of the original contract price.¹⁷⁸² The reduction in 10 per cent was a blanket policy decision from Washington applying to all of the OFFP contracts. AWB and the CPA negotiated a further amendment to contract A1670, in particular an increase in the contract price to support the accelerated delivery of approximately 220,000 tonnes under the contract.

2781 Geary says that there is no evidence he read this email as he was on study leave. Geary says that this email does not constitute reliable evidence to show that the payment was a sham or Geary knew of a sham regarding the trucking fees.

2782 Geary says that WFP re-negotiated all unexecuted contracts previously approved by the OFFP. He says all contracts were reduced by 10 per cent and that the email does

¹⁷⁷⁹ CB 6/3492.

¹⁷⁸⁰ Geary, sch [57].

¹⁷⁸¹ CB 6/3683.

¹⁷⁸² CB 10/8718.5.

not say why.

2783 Geary says that the contract terms remain the same. That is CIF free on trucks to all governates. Geary says that this is post war and after UN sanctions have been lifted.

Resolution of paragraph 40(e)

2784 On the basis of the above evidence I am satisfied that at all material times Geary was aware that the IGB had imposed on AWB an inland transportation fee that AWB was permitted to add to the CIF contract price between AWB and the IGB. This information was contained in several of the emails sent to Geary. I am satisfied that due to his position and responsibilities it is reasonable to infer that he read these emails or sufficient number of them to convey the relevant information to him. I am more readily able to draw that inference as Geary did not give evidence to rebut the inference that he would have read emails sent to him in the course of his duties as a senior executive of AWB. I accept that he may have been absent on occasion but the inference is open that he read the emails on his return to work. Geary did not seek to rebut that inference.

2785 I am not satisfied that ASIC has established that at all material times Geary knew that the inland transportation fee was not a genuine fee for transport services provided to or by AWB.

2786 The email of 30 May 2000 states that trucking fees were UN approved, and the email of 12 September 2000 refers to the procedure with contracts as obtaining UN approval.

2787 Importantly, ASIC did not lead any evidence to show that Geary was not of the same view as other AWB officers, that the UN had approved the contracts that included the inland transportation fees and had done so for sound reasons.

2788 As I have noted earlier, ASIC did not call any witness from AWB to give evidence that he or she knew that the UN had not approved the contracts that included the inland transportation fee or that he or she was privy to any conversations where that view was expressed.

2789 From the evidence given by the AWB witnesses, that they believed that the UN had approved of the payment of inland transportation fees, I infer that it is likely that Geary also held that view. As mentioned above, the Geary received the 30 May 2000 email from the IGB that informed AWB that the UN had approved the payment of an inland transportation fee. I also am more readily able to draw that inference as ASIC did not lead evidence to rebut that inference. In any event, it is only necessary for me to find that ASIC has not satisfied me that Geary did know that inland transportation fees had not been approved by the UN and have not satisfied me that he did know that AWB was engaging in conduct in paying the inland transportation fees contrary to the UN resolutions.

2790 ASIC submits that the email of 10 July 2000 with attachment, would have informed Geary that Ronly was used as a conduit to pay IGB fees. ASIC submits that the reference to paying the fee 'via' the transport company in Jordan in the attachment plainly showed that the fee was not being paid to transport companies for transport services. ASIC submits that instead, the transport company was itself being used as a conduit for payments to Iraq. ASIC submits that the need to use a conduit recognised that the payments were improper. ASIC says that at the very least, that understanding of the email is an available inference, and Geary has not given evidence to refute it. As indicated above, Geary says that the document does not establish reliable evidence to show that the payment was a sham or Geary knew of a sham regarding trucking fees.

2791 ASIC also relies on the email of 21 September 2000. That email indicated to the reader that Ronly was being paid a fee for making the land transport payments on behalf of AWB. Geary submits that ASIC has not established that he knew that the transportation fee was not a genuine fee because of the payment to Ronly. I accept that submission.

2792 ASIC has not sought to meet the fact that according to Hogan that it was US sanctions that prevented payments being made to Iraq or its instrumentalities by bank transfer. ASIC has not established to my satisfaction that Geary knew that the imposition of

Ronly was to disguise the payment (presumably from the UN), particularly as according to Hogan, the problem with payments direct to Iraq was due to USA banking sanctions.

2793 ASIC also relies on the trip report attached to the email of 7 February 2001. Geary says that all the information that he required was in the email and by inference there was no need to open and read the attached trip report.

2794 A major issue facing ASIC's case against Geary is the total lack of any viva voce evidence from any AWB employee about the matters Geary is alleged to have known.

2795 ASIC relies exclusively on the assumption that Geary read all the emails and attachments sent to him and seek to draw inferences of his knowledge from those documents. In the case of the inland transportation fees, ASIC relies on many emails. It is not necessary for me to be satisfied that he read each and every email relied upon by ASIC to be satisfied that Geary knew of the payment of the inland transportation fees and that they were added to the CIF price.

2796 As for the trip report attached to the email of 7 February 2001, ASIC has not satisfied me that Geary read the attachment. The allegation that the email was widely circulated doesn't take the matter any further. ASIC called none of the people to whom it was circulated to give evidence that they had discussed it with Geary or heard or saw anything to suggest Geary had read the attachment.

2797 Geary submits that no witness was called by ASIC who gave evidence that Geary had the requisite knowledge of the IGB fees wrongdoing. ASIC did not suggest otherwise.

2798 ASIC bears the onus of satisfying me that Geary read the attachment. ASIC has not done so. The reference to the after sales service fee was only in the attachment.

2799 ASIC has not satisfied me that Geary knew that the inland transportation fees were a sham.

2800 Paragraph 40(e) also includes the allegation (through the adoption of the definition of

‘the purported after sales service fee’) that at all material times Geary knew of the imposition by the IGB of the after sales service fee and that it was not a genuine fee for any service provided to or by AWB.

2801 In support of the allegation, ASIC relies on the email of 30 May 2000 from Edmonds-Wilson to Geary that referred to AWB being approached for after sales service (particular 12), Geary says that there is no reference to a fee in this email. ASIC points to the statement, ‘determine what “after sales service required” ie equipment/cash (Board approval may be required for this).’

2802 In my opinion, this email does not show that any fee was imposed or that Geary would have known it was not genuine. The reference to Board approval does not suggest some sort of improper conduct was being contemplated. Board approval does not suggest that what was being discussed was not genuine.

2803 Secondly, as discussed above, I am not satisfied that Geary read the attachment to the 7 February 2001 email.

2804 Geary also refers to an email of 13 June 2003, that Long sent to him and others entitled ‘Proton’ which forwarded a memorandum of instruction from Cpt Blake Puckett about the processing of OFFP contracts in which there is reference to a kickback or surcharge of 10 per cent.

2805 The email stated that they needed to know whether a kickback or after sales service fee was involved. A further copy of this instruction was forwarded by Whitwell to Geary under covering email on 13 June 2003.¹⁷⁸³ In a separate response to Stott, to which Geary was copied, Whitwell stated that contract A1670 was in group 3, approved but not funded.¹⁷⁸⁴ Therefore Geary received the Puckett memorandum three times in two days.

2806 Although this is not pleaded by ASIC in respect of the allegation in paragraph 40(e),

¹⁷⁸³ CB 6/3473.

¹⁷⁸⁴ CB 6/3479.

Geary says this email is dated after Geary's alleged duties in respect of the purported fees, ceased. ASIC does not allege AWB paid purported fees after March 2003.

2807 ASIC also relies on the email of 5 December 2002 from Whitwell to Geary. ASIC submits that contracts A1670 and A1680 had a 10 per cent surcharge based on the FIT value added to the inland transport fee. Geary submits, and I accept, that there is no mention of after sales service fees in the email.

2808 Geary says that there is no evidence he read this email as he was one of 20 recipients. There is no reply from Geary. Geary says there was no mention of after sales service fees or iron filings or Tigris. Geary says that this email does not constitute reliable evidence to show that the payment was a sham or Geary knew of a sham regarding the trucking fees.

2809 Geary says that WFP re-negotiated all unexecuted contracts previously approved by the OFFP. He says all contracts were reduced by 10 per cent and that the email does not say why.

2810 Geary says that the contract terms remain the same. That is CIF free on trucks all governates. Geary says that this is post war and after UN sanctions have been lifted. Geary submits that the inferences relied cannot be drawn.

2811 I am not satisfied on the evidence relied on by ASIC that Geary at all material times knew of the existence of the after sales service fee being imposed by IGB on AWB or that if contrary to my view he did know that he knew it was not genuine.

2812 In conclusion, Geary submits that ASIC's pleaded case in paragraph 40(e) relies on both the trucking fee and the after sales service fee being in its definition of purported fees and that any failure to establish the requisite knowledge of one of the two must be fatal to its pleaded case.

2813 I find that ASIC has not made out paragraph 40(e), although it has established that Geary knew of the imposition of the inland transportation fee and that the contract prices were adjusted accordingly to permit the moneys to obtained from the UN

escrow account.

FASOC - paragraph 40(f)

- 2814 ASIC pleads that at all material times Geary knew that the purported fees were not identified or referred to in AWB's contracts for the sale of wheat to the IGB that were submitted to the DFAT and the OIP for approval of payment from the UN escrow account.
- 2815 Geary says that from about July 1999 to December 2002, the price referred to in AWB's contracts submitted to DFAT and the OIP (referred to in the particulars to paragraph 23 of the defence) was on each occasion identified as 'CIF Free in Truck', which price included the inland transport or trucking fee; he otherwise denies sub-paragraph 40(f).
- 2816 ASIC alleges that Geary's knowledge is to be inferred from the matters particularised at paragraphs 8, 10, 38 and 54 of the particulars alleged. Geary's knowledge is alleged to be cumulative and commenced no later than June 1999. ASIC also relies on further particulars 26 and 31. These matters are as follows.
- 2817 On 25 June 1999, Hogan sent an email to Snowball with copies to eleven others including Geary entitled 'Re: IRAQ'.¹⁷⁸⁵ The email reproduced Owen's comment from an email of 17 June 1999¹⁷⁸⁶ that he sent to Borlase with copies to others (not including Geary). As discussed above, Hogan added a comment to the email which is copied at paragraph 157.
- 2818 ASIC submits that the clear implication of the email is that AWB had to find a discrete way in which to pay the land transport costs of US\$12.00 to the Iraqis. As discussed at paragraph 1289 and following Hogan gave undisputed evidence that the difficulty with payment was the USA banking sanctions.

¹⁷⁸⁵ CB 1/381.

¹⁷⁸⁶ CB 1/371; referred to [148].

2819 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with Geary about the contents of the email. Geary says that email was sent to Snowball and that he was merely one of many persons copied into it. Geary says that he was not concerned with trucking fees as it did not impact on the FOB price. On 25 June 1999 at 7.45 am, Snowball sent an email to Hogan, copied to eleven others including Geary entitled, 'Re: IRAQ.'¹⁷⁸⁷

2820 The email referred to a distribution plan being submitted and approved on 11 June. The email then asked:¹⁷⁸⁸

Can you advise what proposed changes to the contract terms and conditions would be agreed between the IGB and the UN, and which would be agreed between AWB and the IGB only.

2821 ASIC submits that this email suggests that AWB was not providing full and frank information to the UN regarding the terms of its dealings with the IGB. In the words of Storey's 1996 memo (which Geary had forwarded at the time to several AWB officers), AWB was going down the 'minimal information route' and running the risk of 'being subsequently found out, of being branded as a Sanction buster.'¹⁷⁸⁹

2822 Geary submits that there is no evidence that he read this email, particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email. Geary says that the email was directed to Snowball and Geary was only merely one of the eleven persons copied in.

2823 Geary says that as he was with the Pool at the time, it is reasonable to conclude his only concern was matters that affected the Pool, such as the FOB price, wheat quality and when the wheat would be required for delivery. For reasons discussed at paragraph 2672 and following, I do not accept this submission.

¹⁷⁸⁷ CB 1/379.

¹⁷⁸⁸ CB 1/379.

¹⁷⁸⁹ CB 1/119.

2824 Geary submits that the reference to ‘changes on contract terms and conditions to be agreed b/w IGB and UN and what will agreed b/w AWB and IGB only’ is not sinister as ASIC seems to imply. Geary submits that there were numerous matters the UN advised were ‘commercial’ and to be left for agreement between the parties – for example war risk insurance. Geary submits this is clear from exhibit G23.

2825 On 16 September 2002, Long sent an email to Geary with copies to two others, subject ‘Letter to Ronly’ which stated:

I just want to check with you before I send the letter below.

Background is that this vessel hit the berth at Wallaroo. 10/4/00 and there is currently an arbitration in London going on between Amarantos Shipping Co (owner) and Atlantic and Orient Shipping (A and O), operator / time charterer. Legal advice is that owners claim is unlikely to be upheld as it revolves around the issue of charterers providing a safe port. If owners win, they will pursue Ronly. Nori has been working with us for several weeks. He wants an indemnity from AWB for the AUD4m in case the arbitration rules in favour of the owner.

Mark Emons and Mike Watson set the deal up.

Based on the paper work we have from Ronly (our files are thin) there is not enough evidence to prove that AWB has liability or agreed to indemnify Ronly for acting as charterer. AWB paid Ronly USD20 cents per tonne facilitation fee. Ronly argue the opposite but can’t substantiate it to our satisfaction.

Nori has mentioned that Paul and Trevor are aware of the deal and that sanctioned it.

Nori called T Flugge Fri night complaining about our position. TF called me and wants to distance himself. [sic]

2826 Geary forwarded this email to Ingleby on 16 September 2002.

2827 Geary says that in his email to Ingleby saying:¹⁷⁹⁰

Paul do you know anything about this. I have not looked at the file but based on this note I agree with Michael’s position.

2828 Geary says that his lack of knowledge concerning Ronly accords with ASIC having stated during the course of the trial that according to AWB HR officer, by June 2000,

Flugge was the only person left who knew about the Ronly arrangements.

2829 Geary says that his attention was directed to the draft letter to Ronly. The draft letter says, *inter alia*, that:¹⁷⁹¹

The arrangement between Ronly and AWB at that time (referring to March 2000) were commercial arrangements whereby AWB paid you US\$0.20 per ton for assisting in organising freight and trucking contracts in Iraq.

2830 On 24 December 2002, Whitwell sent an email to Lindberg and eleven others, including Geary, with copies to eight others. In relation to contracts A1670 and A1680, Whitwell stated:¹⁷⁹²

We now have the contracts in from the IGB signed and they have gone to DFAT for onward transfer to the UN.

2831 On 12 June 2003, Long sent an email to eleven senior officers including Geary that included the contents of a document titled 'Memorandum of Instruction' dated 10 June 2003 from Cpt Blake Puckett to Ministry Advisers. The memorandum requested the advisers to review outstanding contracts under the OFFP and identify which contracts included a kickback, surcharge or after sales service fee, which was described as 'often 10%'.¹⁷⁹³

2832 Geary says that there is no evidence that Geary read this email, particularly having regard to the fact there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.

2833 Geary says that this email is after UN sanctions have been lifted. Geary says that the email was addressed to all members of the IERT amongst others.

2834 On 12 September 2003, Whitwell sent an email to Stott and ten others including Geary, regarding a fax received from the WFP. The email is copied above at paragraph

¹⁷⁹¹ CB 4/2684-1.

¹⁷⁹² CB 5/3035; Geary, FP [26].

¹⁷⁹³ Geary, sch A [54]; CB 6/3471-3472.

- 2835 ASIC contends that this was confirmed by facsimile dated 17 September 2003 from WFP to AWB in which the WFP attached the terms of the contract amendment as agreed between AWB and WFP.¹⁷⁹⁵ The facsimile is discussed at 579.
- 2836 ASIC submits that in September 2003, the WFP renegotiated the contract price for contract A1670. The reason for the amendments sought by the WFP was to remove the 10 per cent after sales service fee that had been included in the calculation of the original contract price.¹⁷⁹⁶ The reduction in 10 per cent was a blanket policy decision from Washington applying to all of the OFFP contracts. AWB and the CPA negotiated a further amendment to contract A1670, in particular an increase in the contract price to support the accelerated delivery of approximately 220,000 tonnes under the contract.
- 2837 ASIC says that Whitwell drafted a memorandum dated 22 September 2003, entitled, 'Iraq Update', in which relevantly, the text copied at paragraph 582 was included.
- 2838 ASIC says that on 24 September 2003, following a telephone conversation the previous day, Whitwell sent a facsimile to the WFP offering a revised price per tonne CIF Free on Trucks to silo all governorates Iraq shipped to the port of Umm Qasr or Aqaba sellers option, in respect of the balance of contract A1680.¹⁷⁹⁷
- 2839 In that facsimile, AWB also asked if it was possible to build in an option for sellers to deliver on a CIF free out Aqaba or Umm Qasr basis and if so, what would be the revised unit price and relevant authentication procedure.
- 2840 ASIC submits that on 25 September 2003, the WFP sent a fax to AWB, discussed at

¹⁷⁹⁴ CB 6/3683, Geary, FP [31].

¹⁷⁹⁵ CB 6/3685.

¹⁷⁹⁶ CB 11/8718.5.

¹⁷⁹⁷ CB 6/3696.1.

paragraph 585.

- 2841 The same day, a facsimile was sent by Whitwell to the WFP, enclosing 'signed format for amendment for onward presentation to OIP.'¹⁷⁹⁸ The amendment to the contract provided for a revised price CIF free on trucks to silo all governorates Iraq shipped to the Port of Umm Qasr. The effect of this amendment was to make contract A1680 again a CIF free in truck contract. The revised price departed from the earlier amendment which was a CIF free out price.
- 2842 ASIC says that this revised price was a decrease of €25.49 per tonne on the price under the original contract. ASIC submits that it represented a reduction in the 10 per cent after sales service component of the price. ASIC says that AWB was still, in effect, receiving as part of the proceeds of sale €25.84 per tonne of the original inland transportation fee that had also been included as part of the price under the original contract, although AWB now had to make arrangements for and pay for the discharge inland carriage of these cargoes.
- 2843 On 25 September 2003, further faxes were sent between the WFP and Whitwell attaching the signed contract amendments and indicating that contracts 1201376 (A1670) and 1300016 (A1680) were pending approval from the OIP.¹⁷⁹⁹
- 2844 AWB was eventually able to fulfil contract A1680 fully. This was after AWB had agreed to amendments to the price and terms of delivery of the wheat under contract A1680 in April and September 2003.
- 2845 Although these submissions are made, ASIC does not allege that Geary knew any more than the contents of the email of 12 September 2003.
- 2846 Geary says that there is no evidence that Geary read this email. Geary was on study leave. Further, Geary says that there is no reliable evidence to show the payment was

¹⁷⁹⁸ CB 6/3698.1, 3699.

¹⁷⁹⁹ CB 6/3703, 3704.1, 3705.

a sham or Geary knew of a sham regarding the trucking fees.

2847 Geary says that WFP re-negotiated all unexecuted contracts previously approved by OFFP. He says that all contracts were reduced by 10 per cent and that this email does not say why.

2848 Geary says that the contract terms remained the same. That is CIF free on trucks all governates. Further Geary says that this is post war and after UN sanctions had been lifted.

Resolution of paragraph 40(f)

2849 None of the documents referred to expressly indicated what had or had not been included in the contracts submitted to DFAT and the OIP for approval of payment from the UN escrow account. ASIC does not rely any further oral evidence or discussions about these emails.

2850 ASIC's case is therefore that Geary obtained the knowledge alleged by drawing the inference from those documents that the purported fees were not identified or referred to in AWB's contracts for the sale of wheat to the IGB submitted to DFAT and the OIP for approval as alleged.

2851 If Geary believed that DFAT and the UN had approved the payment of the inland transportation fees, then there is no reason why Geary would infer from any of the documents relied on by ASIC that the purported fees were not identified or referred to in AWB's contracts for the sale of wheat as alleged.

2852 As discussed above at paragraph 2787 and following, ASIC did not establish that Geary was not of the same view as that of the Chairman, the Chief executive officer and members of the Board and other officers of AWB that the UN and DFAT had approved of the payment of the inland transportation fees.

2853 If ASIC had established that Geary did not believe that the UN and DFAT had approved of the payment of an inland transportation fees or that he knew they were not a genuine fee for transport, then it may have been possible for ASIC to establish

that Geary would have inferred that the contracts submitted to DFAT and the OIP did not identify or refer to the purported fees. As it was, ASIC did not seek to establish that state of knowledge.

2854 ASIC does not allege that Geary sighted the relevant contracts.

2855 For these reasons, I am not satisfied that at all material times, Geary knew that the purported fees were not identified or referred to in AWB's contracts for the sale of wheat to the IGB that were submitted to DFAT and the OIP for approval of payment from the UN escrow account as pleaded in paragraph 40(f).

FASOC – paragraph 40(g)

2856 ASIC pleads that at all material times Geary knew that AWB had made and (until March 2003) was continuing to make payments of the purported fees in connection with its trade with the IGB.

2857 Geary denies sub-paragraph 40(g).

2858 ASIC alleges that Geary's knowledge is to be inferred from his authorisation of such payments as alleged at paragraph 42 below and the particulars thereto.

2859 ASIC relies on the following evidence relied on in paragraph 40(e) and the following.

2860 Geary authorised significant payments to Alia under contracts A0784, A0785, A1111, A1112 and A1441. In so doing ASIC alleges that he was obliged to ensure the fees were properly payable by AWB. ASIC says that he failed to do so. Geary personally authorised in writing payments of purported fees to Alia as alleged by ASIC.¹⁸⁰⁰

2861 On 16 September 2002, Long sent an email to Geary with copies to two others, subject 'Letter to Ronly' which is mentioned above at paragraph 2825.¹⁸⁰¹

¹⁸⁰⁰ CB 4/2249, 2295, 2633, 2635, 2637, 2697, 2995, 3143, 3191.

¹⁸⁰¹ FASOC particular 38.

- 2862 On 5 December 2002, Whitwell sent the email to Lindberg and many others including Geary entitled, 'SALE 1 MILLION TONNES TO IRAQ' referred to at paragraph 2432.¹⁸⁰²
- 2863 Geary submits that there is no evidence that he read this email particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email.
- 2864 Geary says that he is merely one of twenty of recipients. Geary says that the CEO, CFO and Stott are recipients as well.
- 2865 Geary says that the email does not provide reliable evidence to show the payment was a sham or Geary knew of a sham regarding the trucking fees.
- 2866 Geary says that there is no mention of after sales service fees, iron filings or Tigris.
- 2867 On 13 December 2002, Edmonds-Wilson sent an email to Geary and seven others detailing the new contracts, A1670 & A1680.¹⁸⁰³ The email is mentioned above at paragraph 845 where I set out Edmonds-Wilson's evidence.
- 2868 The email referred to the payment of inland transportation fees of €51.30 per tonne and an additional component of €8.40 per metric tonne incorporated into contracts A1670 and A1680 on account of the Tigris Debt. The email is referred to above at paragraph 2160.
- 2869 Edmonds-Wilson made a handwritten note showing that the price of contracts A1670 and A1680 included components for inland transportation fees and Tigris.¹⁸⁰⁴
- 2870 Geary says that on this date, he was sick on leave for eye surgery from 12 to 17 December 2002.

¹⁸⁰² CB 5/2957. Geary, sch [44].

¹⁸⁰³ CB 5/2977.

¹⁸⁰⁴ CB 5/2981; Transcript of hearing, *ASIC v Geary & Flugge*, (20 October 2015) T633, L26 – T634, L7.

- 2871 ASIC contends that the payments were a sham. Regard has also been had to ASIC's submissions set out at paragraph 2454 and following above.
- 2872 Geary submits that there is no reliable evidence to show the payment was a sham or Geary knew of a sham regarding the trucking fees.
- 2873 Geary submits that by this time, the payments were well established in the previous two year period. Geary says that AWB executives (including Laskie, Watson, Scales, Goodacre, Ingleby, Johnson, Stott and Long) had already previously authorized 90 separate payments of trucking fees.
- 2874 Geary says that there is no reliable evidence to show that the payment included the 10 per cent fee or that Geary knew of it.
- 2875 ASIC submits that it is to be inferred that Geary reviewed these documents prior to authorising the above payments. ASIC says that if he did not he ought to have.
- 2876 On 28 May 2003, Whitwell sent to Long and Hockey with copies to Lindberg and Geary amongst others, an email the material effect of which is discussed at 2231.¹⁸⁰⁵
- 2877 ASIC submits that the statements in the 28 May 2003 email show that the funds paid to Alia for the Pearl of Fujairah shipment had already been forwarded to the IGB and were no longer under Alia's control. 'DG' is likely a reference to the Director General of the IGB.
- 2878 Geary submits that there is no evidence he read this email, particularly having regard to the fact there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email. Geary says that this is post war and after UN sanctions have been lifted. Geary says that ASIC fail to disclose in the pleading that the email was addressed to Long and Hockey and all the other recipients were members of the IERT
- 2879 On 12 June 2003, Geary, as a member of the ELG, attended a meeting where two

¹⁸⁰⁵ Geary, sch A [52], CB 6/3391.

PowerPoint presentations were made by Quennell of BDW to discuss the content of a complaint made by the US Wheat Associates dated 6 June 2003. During those presentations, reference was made to:¹⁸⁰⁶

- (a) allegations that AWB contracts with the IGB were 'inflated by millions of dollars';
- (b) allegations that some of the funds from these contracts may have gone to Saddam Hussein's family;
- (c) the OFFP contract approval process;
- (d) the introduction into AWB's CIF contracts with Iraq of a 'free into truck all Governorates of Iraq' term from October 1999 onwards; and
- (e) the increase in the 'inland transport component' of AWB's contracts with Iraq from US\$12.00 per tonne in October 1999 to US\$47.75 per tonne in June 2002.

Further, one of the PowerPoint slides presented by Quennell contained text of the relevant sections of UN Resolutions 661 and 986.¹⁸⁰⁷

2880 On 17 June 2003, Kate Roberson sent an email on behalf of Whitwell emailed to the management group, including Geary, attaching an Iraq brief and trip report.¹⁸⁰⁸ The Iraq brief was an ELG report dated 15 June 2003. The ELG report noted, in respect of the 'Tigris Commission', that the issue had been put on hold in light of the need for possible further renegotiation of current contracts, and that Whitwell would meet Tigris officials in London on 22 June 2003.¹⁸⁰⁹

Resolution of paragraph 40(g)

2881 The emails relied on disclose that Geary knew that IGB was insisting that AWB pay a fee to Iraq described as an inland transportation fee. The particulars relied on confirm

¹⁸⁰⁶ CB 6/3445 - 3450.

¹⁸⁰⁷ FASOC; the particulars alleged [55].

¹⁸⁰⁸ CB 6/3489, 3491.

¹⁸⁰⁹ CB 6/3492; Geary, sch [57].

a steady stream of information to Geary that the inland transport fees had been and were being paid up to the time of the US invasion of Iraq in March 2003.

2882 For the reasons discussed above at paragraph 2796 and following, I am not satisfied that ASIC has established that Geary knew of the 'purported after sales service fee.'

2883 As indicated above, the definition of 'the purported inland transportation fee' includes that it was not a genuine fee for transport services provided to or by AWB or that 'the purported after sales service fee' includes that it was not a genuine fee for any service provided to or by AWB.

2884 As indicated above at paragraph 721 and following, I have found that the trucking fee was not a fee for any services provided to or by AWB and in that sense it was not a genuine fee. I am also satisfied that Geary knew that there was no obligation on AWB to provide transport services. I am not satisfied, however, that ASIC has established that at all material times Geary did not believe that the inland transportation fee was other than a genuine and proper payment.

2885 ASIC has not established that Geary did not believe, as other officers of AWB did, that the payment of the fee had been approved by the UN. ASIC has not established that Geary knew or believed that the payment of the fee was not permitted (with the approval of the UN) to be paid under the OFFP. ASIC has not established that Geary did not believe, as other officers of AWB and members of the Board of AWB did, that the fee was being used to transport AWB wheat within Iraq and that was a reasonable and proper payment for AWB to make.

2886 I am satisfied that Geary knew that there was no obligation on AWB to provide transport services for the transportation of AWB wheat within Iraq.

2887 I am satisfied that at all material times Geary knew that AWB had made and (until March 2003) was continuing to make payments of what ASIC describe as the inland transportation fees in connection with its trade with the IGB as alleged in paragraph 40(g). ASIC has not satisfied me that Geary did not believe that the inland

transportation fee was genuine or that he knew or believed it was a sham.

2888 I am not satisfied that at all material times, Geary knew that AWB had made and (until March 2003) was continuing to make payments of the purported fees (as defined in paragraph 24 of the FASOC) in connection with its trade with the IGB.

FASOC – paragraph 40(h)

2889 ASIC pleads that at all materials times, Geary knew that the purported fees were being paid or had been paid to Alia.

2890 Geary denies sub-paragraph 40(h), and says further that he knew Alia was being paid fees for inland transport from about 18 February 2002.

2891 ASIC alleges that Geary's knowledge is to be inferred from the following evidence.¹⁸¹⁰

2892 On 10 July 2000, Jones sent an email to Geary and Scales entitled 'Iraq' in which Jones listed a number of unresolved issues in relation to the Iraq market, including 'What is Ronly Holdings [sic] involvement in the process...'¹⁸¹¹ The email attached a document entitled 'Iraq Brief June 2000' which materially set out the background to the OFFP and the effect of Resolution 986 (including that the resolution permitted Iraq to purchase humanitarian goods). The Iraq Brief also stated as the last item on the fourth page in relation to the purported inland transportation fee:¹⁸¹²

Mechanism of payment for trucking fee. In existing contracts the fee is \$15.00 per tonne. IGB have indicated the fee will be reduced to \$14.00 for future business. Current mechanism of payment is via transport company/s in Jordan.

2893 The email does not mention the company was Alia.

2894 Geary personally authorised payments to Alia from 18 February 2002. I infer this is

¹⁸¹⁰ Being the matters particularised at paragraphs 14, 31, 38, 52, 57, 58 and 59 of the particulars alleged. ASIC alleges that Mr Geary's knowledge is cumulative and commenced no later than July 2000.

¹⁸¹¹ FASOC; the particulars alleged at [14].

¹⁸¹² CB 2/1148.

the basis for his admission that he knew from 18 February 2002 that Alia was being paid fees.

2895 The balance of the evidence, all relate to events that took place after the time at which Geary admits that he knew that the inland transportation fees were being paid to Alia.¹⁸¹³

2896 I am satisfied that Geary knew that fees described as an inland transportation or trucking fee were being paid to Alia after 18 February 2002. ASIC has not satisfied me that Geary knew of the 'purported after sales service fee' or that it was being paid to Alia.

2897 ASIC has not broken up the plea. As it stands, knowledge of all the elements pleaded must be made good for the plea to be satisfied.

2898 Accordingly, I am not satisfied that at all material times Geary knew that the 'purported fees' were being paid or had been paid to Alia.

FASOC – paragraph 40(i)

2899 ASIC pleads that at all material times Geary knew of the matters alleged at paragraphs 23 to 28 and 33(b) referred to above, and that the payment of the purported fees resulted or was likely to result:

- (i) either directly or indirectly, in the payment of internationally traded currency to the Government of Iraq or its instrumentalities, and
- (ii) in AWB receiving payment from the UN escrow account, other than on account of OFFP humanitarian goods supplied to Iraq.

2900 Geary denies sub-paragraph 40(i).

¹⁸¹³ FASOC; the subject of particulars 38, 52, 57, 58 and 59.

- 2901 ASIC alleges that Geary's knowledge is to be inferred from the following.¹⁸¹⁴
- 2902 ASIC relies on the evidence in support of 40(e).
- 2903 In addition ASIC relies on the following.
- 2904 On 24 October 2000, Scales sent an email to Geary (and others) entitled 'Iraq questions' that stated: '5. what is the agreement with IGB on no. of trucks available to AWB and has the cost been locked in?'¹⁸¹⁵
- 2905 ASIC submits that this email confirmed that Iraq was responsible for trucking, not Alia and was the recipient of the IGB fees.
- 2906 Geary submits that there is no evidence he read this email, particularly having regard to the fact there is no evidence of a reply email by him or a discussion with/by him about the contents of the email.
- 2907 Geary says that there is no reliable evidence to show the payment was a sham or that he knew of a sham regarding the trucking fees.
- 2908 On 7 November 2002, Whitwell sent an email to Geary (and others) entitled 'Recent Trip to Iraq.' The email listed 'key outcomes' in seven bullet points. Two of those were as follows:¹⁸¹⁶
- Iron powder rebate (USD 6 pmt) is separate from the other debt issues. The minister has asked for repayment though inland transport mechanism.
 - Tigris Debt has cabinet approval for repayment - final amount to be agreed during the next month by Tigris/Iraqis and then mechanism for repayment to be agreed during next visit.
- 2909 The trip report attached to the memo dealt with 'Tigris Debt recovery.' After setting

¹⁸¹⁴ FASOC; the subject of particulars 7, 8, 10, 12, 14 and 22, have been addressed in the consideration of paragraph [40(e)].

¹⁸¹⁵ CB 2/1487, Geary, sch [23].

¹⁸¹⁶ CB 5/2901.

out the amounts of interest on the Tigris Debt, the report noted the suggested proposals copied at paragraph 2117.¹⁸¹⁷

2910 Page 2 of the report included a section entitled 'Minister Medhi Saleh – 28th October 2002' with a subheading '1 Tigris Issue'. Within that section is referred to at paragraph 2111.¹⁸¹⁸

2911 As a recipient of Whitwell's email of 7 November 2002, ASIC submits that Geary must have known that the Tigris Debt had been approved by the Iraqi cabinet for repayment with the mechanism for repayment to be agreed during the next visit. ASIC submits that Geary must also have known the Minister had asked for payment of the iron filings compensation through the 'inland transport mechanism.' ASIC says that there is no evidence that Geary required any explanation of what was meant by the phrase 'inland transport mechanism.' ASIC submits that this is because he already knew what it was based on earlier emails he received.

2912 Geary was on EMBA study leave during the period from 13 October 2002 to 9 November 2002. Geary says that he had delegated authority in place with Long at the time. ASIC submits that there is no evidence that Geary did not have access to his emails during this period. ASIC says that there is no evidence that Geary did not review his emails upon his return. ASIC says that indeed, if he did not have access, then it ought be reasonably inferred that, like any responsible officer would do in any organisation, he read his emails upon his return from leave rather than deleting or ignoring them.

2913 Geary says that there is no evidence he read this email, particularly having regard to the fact there is no evidence of a reply email by him or a discussion with/by Geary about the contents of the email.

2914 Geary says that he is one of 17 recipients to the email. The CEO, CFO and Stott (the

¹⁸¹⁷ CB 5/2903.

¹⁸¹⁸ CB 5/2904.

Iraq expert) are also recipients.

2915 ASIC also relies on the memorandum of 7 February 2003 set out at paragraph 2164 above.

2916 On 28 May 2003, Whitwell sent to Long and Hockey with copies to Lindberg and Geary amongst others, the email referred to at paragraph 2231.¹⁸¹⁹

2917 As discussed above, ASIC submits that the statements in the email show that the funds paid to Alia for the Pearl of Fujairah shipment had already been forwarded to the IGB and were no longer under Alia's control.

2918 Geary submits that there is no evidence he read this email, particularly having regard to the fact there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email. Geary says that this is post war and after UN sanctions have been lifted. Geary says that ASIC fail to disclose in the pleading that the email was addressed to Long and Hockey and all the other recipients were members of the IERT

2919 On 12 June 2003, Long sent an email to eleven senior officers including Geary that included the contents of a document titled 'Memorandum of Instruction' dated 10 June 2003 from Cpt Blake Puckett to Ministry Advisers. The memorandum requested the advisers to review outstanding contracts under the OFFP and identify which contracts included a kickback, surcharge or after sales service fee, which was described as 'often 10%.'¹⁸²⁰

2920 Geary says that there is no evidence that he read this email, particularly having regard to the fact there is no evidence of a reply email by him or a discussion with/by him about the contents of the email.

2921 Geary says that this email is post war and after UN sanctions have been lifted. Geary

¹⁸¹⁹ Geary, sch A [52], CB 6/3391.

¹⁸²⁰ Geary, sch A [54]; CB 6/3471-3472.

says that the email was addressed to all members of the IERT amongst others.

2922 On 17 June 2003, Kate Roberson on behalf of Whitwell emailed to the management group, including Geary, an Iraq brief and trip report.¹⁸²¹ The Iraq brief was an ELG report dated 15 June 2003. The ELG report noted, in respect of the 'Tigris Commission',¹⁸²² that the issue had been put on hold in light of the need for possible further renegotiation of current contracts, and that Whitwell would meet Tigris officials in London on 22 June 2003.¹⁸²³

2923 ASIC refers to other documents but these are after Geary admits he knew that the inland transportation fees were being paid to Alia.

2924 For ASIC to make out the allegation that at all material times Geary knew the matters alleged in paragraphs 23 to 28 and 33(b) ASIC is required to establish Geary knew all the elements alleged in each of those paragraphs.

2925 In my opinion, however, if ASIC has failed to establish one or more of the elements alleged in those paragraphs, ASIC may still be able to make out the allegation in paragraph 40(i).

2926 I will deal with each of the paragraphs in turn.

Paragraph 23

2927 ASIC alleges that at all material times Geary knew that in the period between June 1999 and March 2003 the IGB imposed a fee on AWB that was described as an inland transportation or trucking fee in relation to the supply of wheat by AWB to Iraq.

2928 Geary was informed of the fee by Hogan in June 2009. Geary personally sighted the IGB wheat tender that made the initial request for the fee. As the evidence discloses

¹⁸²¹ CB 6/3489, 3491.

¹⁸²² CB 6/3492.

¹⁸²³ Geary, sch [57].

he was continually informed of the fee thereafter.

2929 ASIC alleges that at all material times, Geary knew that in the period between June 1999 and March 2003 that the IGB imposed a fee on AWB in amounts that were denominated in US dollars, Euros or another internationally traded currency.

2930 Geary was informed by the email from Hogan of 24 June 1999 that the fee was in US dollars. Earlier Geary had seen in the IGB wheat tender that Iraq was requesting that the inland transport fee be paid in US dollars. Geary was informed by the email of 7 February 2001 from Borlase that AWB had agreed to pay the fee in a foreign currency other than US dollars.

2931 On 7 February 2001, Geary was informed in the email from Borlase that the trucking fee was now US\$25.00 per metric tonne. As discussed I am not satisfied that Geary read the trip report where Hogan and Borlase said that they believed that the increase in the trucking fee and the addition of a service charge was a mechanism of extracting more dollars from the escrow account.

2932 On 12 December 2002, Geary was informed in an email from Edmonds-Wilson that the fees had increased to Euro \$51.30.¹⁸²⁴

2933 ASIC alleges that at all material times, Geary knew that in the period between June 1999 and March 2003 that the IGB imposed a fee on AWB in amounts that were fixed by the IGB from time to time in steadily increasing amounts ranging from US\$12.00 to US\$51.15 per metric tonne of wheat.

2934 As there are several emails to Geary referring to the fees increasing, I am satisfied that Geary was aware that the fee was fixed by the IGB and was fixed in steadily increasing amounts.

2935 ASIC alleges that at all material times, Geary knew that in the period between June 1999 and March 2003 the IGB imposed a fee on AWB in amounts that were not

¹⁸²⁴ Geary Sch A [45].

negotiated with, or otherwise explained or justified to, AWB by reference to any costs actually incurred in transporting wheat within Iraq.

2936 None of the emails or other documents tendered suggested that the fees were or were not calculated by reference to the costs of inland transport. ASIC did not tender any direct evidence as to Geary's knowledge on this issue. ASIC seeks to infer his state of knowledge from the absence of any documentary evidence, that it tendered, to such a calculation. There is no evidence of Geary being informed of the detail of the negotiations between AWB and the IGB on the payment of the fee.

2937 ASIC alleges that at all material times, Geary knew that the IGB imposed a fee on AWB that was payable in cash in an internationally traded currency to an entity nominated by Iraq, and not to the IGB.

2938 It is alleged that Geary was aware that the fee imposed on AWB by the IGB was payable in cash in an internationally traded currency to an entity nominated by Iraq and not to the IGB. Geary had sighted the initial wheat tender that sought the inland transportation fee. The tender stated the fee was payable to the 'land transport co' in US dollars.

2939 The evidence discussed above, indicates that Geary was aware that the fee was paid in cash in an internationally traded currency. Geary became aware in February 2002 that the fee was payable to Alia in Jordan. Geary had become aware in June 2000, that the fee could not be paid to Iraq as 'all Iraqi funds frozen.' Geary was also informed on about 10 July 2000, that the mechanism of payment of the fee was via transport company/s in Jordan. The evidence discloses that Geary was informed that the fee was payable in US dollars and later in Euros.

2940 ASIC alleges that at all material times, Geary knew that the IGB imposed a fee on AWB that was not a genuine fee for transport services provided to or by AWB.

2941 From 1998 to June 2000, Geary was the Pool Manager of the AWB National Pool.

2942 Geary sighted the original wheat tender from the IGB. The tender did not suggest that

there was any obligation on AWB to transport wheat within Iraq. The only obligation relating to the inland transport fee was to pay it in US dollars to 'the land transport co.'

- 2943 On 24 June 1999, Geary was informed by Hogan (who was stationed in Cairo as an officer of the IS&M division for the Middle East) by email that the IGB was requesting that offers to supply wheat under the OFFP include the sum of US\$12.00 per tonne for discharge and distribution from Umm Qasr which the supplier was to add to their offer. Geary was informed that there was a problem in paying as all Iraq accounts had been frozen. Geary was informed that the IGB had stated that AWB was required to pay the Maritime Agents and that Hogan was of the view that one way of doing this would be to an Iraq bank in Amman.
- 2944 On 25 June 1999, Geary was informed that Watson would discuss with Emons upon Emons' return from Baghdad a suitable payment method of the inland transportation fees.
- 2945 There was no suggestion in any email or report that Geary received that AWB was to do anything more than pay the fee. There was no suggestion that AWB was to arrange inland transport or arrange for anyone else to provide inland transport. Hogan informed Geary that the payment of the fee would be 'no skin of our nose' as the fee was added to the CIF price. As indicated above, the only issue was the selection of a suitable payment method.
- 2946 In June 1999, Geary knew that the only issue concerning AWB was how the payment was to be made. If there was any suggestion that AWB had to arrange the inland transport of millions of tonnes of wheat or retain a trucking company to provide transport, for millions of tonnes of wheat that would have presented AWB with major issues. As it was, as was the fact, Geary was informed the only issue was the method of paying the fee.
- 2947 In July 2000, about a year later, Geary was informed by Watson of the inland transportation fees that were payable on about 15 contracts for the sale of wheat

between AWB and the IGB.

2948 Also in July 2000, Geary was informed that the fee was being paid via transport company/s in Jordan. The fees were not being paid to obtain some service for AWB from the trucking company. Thus Geary was aware that AWB was not paying for transport services to be provided to or by AWB.

2949 Geary knew that there was no obligation on AWB to provide transport services in Iraq. Geary also knew that there was no obligation on the transport company in Jordan or any other body to provide inland transport services to AWB in connection with the supply of wheat by AWB to Iraq.

2950 I am satisfied that at all material times, Geary knew that the inland transportation fee was not a fee for transport services provided to or by AWB.

2951 Returning to the allegation concerning paragraph 23, I am satisfied that at all material times Geary knew that in the in the period between June 1999 and March 2003 that:

- (a) the IGB imposed a fee on AWB that was described as an inland transportation or trucking fee in relation to the supply of wheat by AWB to Iraq; and
- (b) fixed by the IGB from time to time in steadily increasing amounts ranging from US\$12.00 to US\$51.15 per metric tonne of wheat.

2952 I am not satisfied that at all material times in the period between June 1999 and March 2003 that Geary knew that the fee was not negotiated with, or otherwise explained or justified to, AWB by reference to any costs actually incurred in transporting wheat within Iraq.

2953 For reasons given above, I am satisfied that at all material times Geary knew that in the period between June 1999 and March 2003, the IGB imposed a fee on AWB that was payable in an internationally traded currency to an entity nominated by Iraq and not to the IGB. I am not satisfied that AWB has established that Geary did not know or believe that the payment could not be made directly to the IGB due to USA banking

sanctions as discussed earlier.

2954 I am satisfied that Geary did know that the fee was not a fee for the transport services to be provided to or by AWB. I am not satisfied, however, that Geary knew that the fee was not a genuine fee for the inland transportation of wheat supplied by AWB to Iraq. As discussed earlier, ASIC has not established that Geary did not believe, as other officers of AWB did (as discussed above at paragraph 910 and following), that the payment of the fee had been authorised by the UN.

2955 I am satisfied that Geary knew that AWB was not engaged in the inland transportation of wheat but ASIC has not satisfied me that Geary did not believe that the fee was not a genuine fee to deliver wheat to all Governates as provided in the contracts.

Paragraph 24

2956 As to paragraph 24, that relates to the 'after sales service' fee. ASIC alleges that at all material times, as particularised, Geary knew the matters alleged in paragraph 24, being that in the period between November 2000 and March 2003, the IGB also imposed a fee on AWB:

- (a) that was described as a payment for 'after sales service' in relation to the supply of wheat by AWB to Iraq;
- (b) in an amount that was:
 - (i) fixed by the IGB at the rate of 10 per cent of the total price per tonne of all wheat shipped to Iraq by AWB (including the purported inland transportation fee);
 - (ii) expressed as an increase in the purported inland transportation fee; and
 - (iii) not negotiated with, or otherwise explained or justified to, AWB by reference to any costs actually incurred in the provision of 'after sales service' in relation to wheat supplied by AWB to Iraq; and
- (c) that was payable in cash in an internationally traded currency to an entity

nominated by Iraq, and not to the IGB;

(d) that was not a genuine fee for any service provided to or by AWB.

2957 As discussed above, in dealing with paragraph 40(e), I am not satisfied that Geary knew of the imposition of the after sales service fee.

Paragraph 25

2958 ASIC alleges that at all material times, Geary knew that the written terms of each of each contract for the sale of wheat entered into between AWB and the IGB in the period between June 1999 and March 2003 under Phases VI to XIII of the OFFP Contracts used expressions which suggested that AWB had an obligation to deliver or transport wheat to all silos within all Governorates of Iraq (the purported inland transport obligation).

2959 ASIC did not tender any evidence that suggested that Geary sighted the written terms of each or any contract for the sale of wheat entered into between AWB and the IGB in period between June 1999 and March 2003. On the other hand, Geary was informed of the detail of the proposed contracts and in particular that the price agreed would be CIF Free in truck, Iraq.

2960 Further, Geary was informed that the only new obligation on AWB under the new contract was to pay the inland transportation fee and that such a fee could be added to the CIF price to be recovered from the escrow account. Geary would have inferred that there was no obligation on AWB to transport or organise the transportation of wheat in Iraq.

2961 Geary, however, saw the initial wheat tender that included under the heading price 'CIF free on truck at all Governorate, cost of discharge at Umm Quser and land transport will be USD12 per metric ton. To be paid to the land transport co. for more details contact Iraqi maratin in Basrah.' The tender also said the fee was payable to the 'land transport co.'

2962 On 16 July 2009, Geary sent an email to Hogan saying that Lister had handed him a

copy. Geary had read the tender, as he told Hogan that there some things in the tender document that 'we cannot offer against.' He said that Lister would go through these matters with Hogan. It appears, therefore, that Geary had gone through them with Lister.

2963 Geary admits that from about July 1999 to December 2002, the price referred to in AWB's contracts (referred to in the particulars to paragraph 23) was on each occasion identified as 'CIF Free in Truck', which price included the inland transport or trucking fee. Geary does not admit that he knew that fact during the period June 1999 to March 2003.

2964 I am not satisfied that Geary knew the matters alleged as referred to in paragraph 25 of the FASOC although he was aware of the proposal that the contact price be expressed as 'CIF Free into truck, Iraq.'

Paragraph 26

2965 As to paragraph 26, ASIC alleges that at all material times as particularised Geary knew that the purported inland transport obligation was a sham, in that, contrary to the written terms of the OFFP Contracts, neither AWB nor the IGB intended that AWB would deliver or transport or arrange to deliver or transport wheat within Iraq.

2966 As referred to above, I am not satisfied that Geary knew of the terms of the contracts for the sale of wheat by IGB to Iraq during the period June 1999 to March 2003.

2967 I am satisfied that he knew that AWB was obliged to pay an inland transportation fee. I am also satisfied that Geary knew that AWB had not entered into any arrangements to deliver wheat within Iraq.

2968 I am satisfied that Geary knew that AWB's obligation was limited to making a payment of the fees. I am also satisfied that Geary knew that there were difficulties paying the fee and the fee was paid to Alia and on occasions to Ronly. As mentioned above when dealing with Hogan, he was aware of sanctions imposed by the USA on payments to Iraq and perceived these sanctions to be a the problem in paying the fee

to Iraq.

2969 As mentioned above, I am not satisfied that Geary knew that the contracts contained a purported transport obligation.

2970 Accordingly, I am not satisfied that Geary had the knowledge alleged in paragraph 26 of the FASOC.

Paragraph 27

2971 ASIC alleges that at all material times Geary knew that the price payable to AWB pursuant to each of the OFFP Contracts included the amount of the purported fees.

2972 As discussed above, there is no evidence that Geary saw any concluded contracts that included the transportation or service fees. On the other hand, Geary knew that inland transportation fees were being paid by AWB and that AWB was obtaining the moneys from the escrow account. For example on 9 June 2000, Geary was informed by Watson that on fifteen identified contracts between AWB and the IGB, inland transportation fees were included.¹⁸²⁵ Accordingly, I find that Geary must have inferred that the OFFP contracts included the amount of the inland transportation fees.

2973 As mentioned earlier, I am not satisfied that Geary knew of the payment of 'the purported after sales service fee.'

2974 Otherwise, I am satisfied that at all material times Geary knew that the price payable pursuant to each of the OFFP Contracts included the inland transport fee. I am not satisfied, however that at all material times Geary knew that the fee was not a genuine fee.

Paragraph 28

2975 As to paragraph 28, ASIC alleges that at all material times, as particularised, Geary knew that in respect of the OFFP Contracts:

- (a) AWB was paid out of the UN escrow account amounts that reflected the full contract price agreed between the IGB and AWB in respect of each such contract, inclusive of the purported fees;
- (b) AWB did not deliver or transport or arrange to deliver or transport any wheat to any silo within any Governorate of Iraq; and
- (c) neither AWB nor any person acting on its behalf provided any 'after sales service' to Iraq in consideration for AWB's receipt from the UN escrow account of the amount of the purported after sales service fees.

2976 Geary knew that the proposed contract was that the inland transportation fees would be obtained from the escrow account. He had been told that the new contracts were no skin of AWB's nose. Also as the Pool manager he would have known that the FOB price was not affected by the new arrangement. Geary knew that the inland transportation fees were being paid. Geary must have inferred that the AWB was paid out of the UN escrow account amounts that reflected the full contract price agreed between the IGB and AWB in respect of such contract, inclusive of the inland transportation fees.

2977 Geary knew that AWB did not deliver or transport or arrange to deliver or transport any wheat to any silo within any Governorate of Iraq. Geary knew that was the proposal was to pay the fee not provide the transport.

2978 Accordingly, I am satisfied that Geary knew at all material times that AWB did not deliver or transport or arrange to deliver or transport any wheat to any silo within any Governorate Iraq.

2979 For reasons given above, I am not satisfied that Geary knew that any money was paid out of the UN escrow account in respect of 'after sales service fees.'

2980 I am satisfied at all material times, Geary knew that AWB was paid out of the UN escrow account amounts that reflected the full contract price agreed between the IGB and AWB in respect of each such contract inclusive of the inland transportation fee.

2981 For reasons given above, I am not satisfied, however, that at all material times, or at all, that Geary knew that the inland transportation fee was not genuine and thus I am not satisfied that at all material times, or at all, that Geary knew that the payments included 'the purported fees' that were not genuine.

Particular 33(b)

2982 ASIC alleges, that at all material times, that Geary knew that prior to 21 October 2003, other than in the agency agreement alleged, that Alia's only role was to collect the purported fees on behalf of the ISCWT and remit such fees to the ISCWT an instrumentality of the government of Iraq.

2983 On 19 July 2000, Geary received an email from Jones raising some issues surrounding the delivery of wheat to Iraq. Jones asked 'What is Ronly Holdings involvement in the process.'¹⁸²⁶ Ronly had previously been referred to in a communication with Geary in the email of 10 July 2000 to Geary and Scales from Jones.¹⁸²⁷ On 7 October 2000, Geary was informed that US\$300,000.00 was paid to Ronly and that it related to a US\$0.20 cents per tonne fee that AWB agreed to pay for Ronly making Iraq freight and transport payments on behalf of AWB.

2984 I am satisfied that in July 2000, Geary knew that AWB had used Ronly to make payment of the inland transportation fees on behalf of the AWB. I am not satisfied that Geary knew that the fees were being paid to the Iraqi State Transport Company for Water Transport an instrumentality of Iraq. I am satisfied that Geary knew that the fees were being paid at the request of Iraq for the benefit of Iraq for the transportation of wheat sold by AWB to the IGB.

Resolution of paragraph 40(i)

2985 There are several elements that ASIC has not made out. ASIC has not satisfied me that Geary knew of the 'after sales service fee' and that the inland transportation fee

¹⁸²⁶ CB 2/1141.

¹⁸²⁷ Sch A [14].

was not genuine although he knew that the fee was not for transport services provided to or by AWB.

2986 ASIC alleges that at all material times as particularised, Geary knew of the matters alleged at paragraphs 23 to 28 and 33(b) above (which I have dealt with above) and that the payment of the purported fees resulted or was likely to result:

- (i) either directly or indirectly, in the payment of internationally traded currency to the Government of Iraq or its instrumentalities, and
- (ii) in AWB receiving payment from the UN escrow account, other than on account of OFFP humanitarian goods supplied to Iraq.

2987 As discussed above, I am satisfied that Geary knew that the inland transportation fees were being paid to the Government of Iraq or its instrumentalities. ASIC has not satisfied me, however, that Geary did not believe that the UN had approved of the payment of the inland transportation fees.

2988 I am not satisfied that Geary knew that in AWB receiving payment from the UN escrow account, AWB was receiving payment other than on account of OFFP humanitarian need or aid supplied to Iraq, in circumstances where I am not satisfied that Geary did not believe that the moneys were being passed onto Iraq for inland transportation of wheat with the approval of the UN.

2989 As discussed above, Geary knew that humanitarian goods went beyond food stuffs and included agricultural equipment. It is not a stretch to conceive that the OFFP may have made moneys available to distribute the wheat within Iraq.

2990 McClelland, a director of AWB, said that payments sounded reasonable when Lindberg informed the board of the payment of the inland transportation fees. McClelland said that he considered that it was sensible so that the Iraqis would not mess up the transport. I refer to the evidence of McClelland discussed above at paragraph 920 and following. I infer that it is how the payments were portrayed to the board of directors by Lindberg, the CEO.

FASOC – paragraph 40(j)

2991 ASIC pleads that at all material times Geary knew that revelation of any conduct by AWB that resulted in:

- (ii) the direct or indirect payment of internationally traded currency to the Government of Iraq or its instrumentalities; or
- (iii) the receipt by AWB of payment from the UN escrow account other than on account of OFFP humanitarian goods;

would cause, or would be likely to cause substantial and enduring harm to AWB of the kind alleged at paragraph 39 of the *FASOC*.

2992 Geary denies sub-paragraph 40(j).¹⁸²⁸

2993 Several officers of AWB who gave evidence said that they believed that the UN had approved the payment of the inland transportation fees (as discussed at paragraph 910 and following).

2994 There is no evidence of Geary's state of mind other than can be inferred from the documents relied on by ASIC. As discussed above on the issue of the knowledge of the AWB employees, the evidence supports the conclusion that the generally accepted view in AWB was that the UN and the Australian government had approved the payment of the inland transportation fees. The general view was the Iraqi had poor distribution facilities and that Iraq needed funds to properly distribute wheat it purchased from Australia. Despite this evidence being given by officers of AWB, ASIC did not establish that Geary was not of the same state of mind.

2995 With the benefit of hindsight there are many issues that could be raised to challenge such a view. Nevertheless, I am satisfied that knowledge of the payment of the inland transportation fees was widespread within AWB. The board of AWB knew about the

¹⁸²⁸ ASIC provides particulars alleging that Geary's knowledge is to be inferred from the matters alleged at subparagraphs 40(a) to 40(i) above and the particulars thereto. Geary's knowledge is said to be cumulative and commenced no later than June 1999.

payments. Director McClelland said that he thought the payments sounded reasonable.

2996 Accordingly, I am not satisfied that Geary had the knowledge alleged.

Duties of Geary relating to Purported Fees

FASOC – paragraph 41

2997 In paragraph 41, ASIC pleads that by reason of his position as Group General Manager Trading from March 2001 to November 2006, the matters alleged at paragraphs 4 to 9 (discussed at 2540 to 2549 above), the circumstances pertaining to AWB alleged at paragraphs 10 to 39 above, and his knowledge alleged at paragraph 40 of the FASOC, at all times from March 2001, Geary had duties:

- (a) to take reasonable steps to ensure that, when AWB was selling and exporting wheat to Iraq and obtaining payments from the UN escrow account, AWB was not engaging in conduct that the UN Resolutions had called on member states to prevent, and in particular, conduct that would, or would be likely to, result in:
 - (i) the direct or indirect payment of internationally traded currency to the Government of Iraq or its instrumentalities (which duty continued until AWB ceased to make payments of the purported fees in around March 2003); or
 - (ii) the receipt by AWB of payment from the UN escrow account other than on account of OFFP humanitarian goods (which duty continued until AWB ceased to receive such payments from the UN escrow account. AWB ceased to receive such payments in respect of the purported fees in or around March 2003 and in respect of the Tigris Debt, as defined at paragraph 3029 below, in around November 2004);
- (b) to take reasonable steps to ensure that the CRRC, the ELG and the Managing director of AWB were informed of each of the matters alleged at paragraphs

40(c) to (j) above (which duty continued until Geary ceased to be an officer of AWB) and to recommend against AWB's payment of the purported fees and its receipt of payments from the UN escrow account in respect of the purported fees (which duty continued until AWB ceased to make payments of the purported fees and receive payment from the UN escrow account in respect of such fees in around March 2003);

- (c) to take reasonable steps to prevent AWB from entering into or carrying out contracts for the sale of wheat with the IGB where the contract price included an amount in respect of the purported fees or the contract enabled AWB to obtain funds from the UN escrow account in respect of the purported fees (which duty continued until AWB ceased to enter into such contracts in or around December 2002 and ceased to pay the purported fees and obtain funds from the UN escrow account in respect of the purported fees in around March 2003);
- (d) not to authorise, and to take reasonable steps to prevent, AWB from making payments of the purported fees (which duty continued until AWB ceased to pay such fees in or around March 2003); and
- (e) to take reasonable steps to prevent AWB from obtaining payments from the UN escrow account in respect of the purported fees (which duty continued until AWB ceased to receive payments for such fees from the UN escrow account, in or around March 2003).

2998 Geary denies paragraph 41.

2999 Geary submits that the duties alleged are dependent on all the matters alleged being made out including all the allegations concerning Geary's knowledge alleged in paragraph 40. If that be the case, then no duty is alleged to arise as ASIC has not made out all the allegations. I do not accept, however, this submission. In my opinion, if sufficient facts are alleged to enliven the duty and those facts are established, then the duty arises.

- 3000 For the following reasons I find that Geary did not have the duties alleged.
- 3001 The source of these alleged duties are the statutory duties pleaded by ASIC in paragraph 8 of the FASOC arising under s 180 and 181 of the Act.
- 3002 Under s 180, Geary owed a duty to AWB to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they were an officer of a corporation in AWB's circumstances and occupied the office held by Geary and had the same responsibilities as Geary. Under s 181, Geary was obliged to exercise his powers and discharge his duties in good faith and in the best interests of AWB; and for a proper purpose.
- 3003 In March 2001, when Geary moved from the Pool to the position of Group General Manager Trading, AWB had been paying the inland transportation fees under its contracts with the IGB for some eighteen months. Lindberg had taken over as managing director of AWB a year before in mid-2000. In mid-2000, the AWB board had been informed by Lindberg of the payment by AWB of the inland transportation fees and that the UN and the Australian government had approved of the payments (see paragraph 910 and following).
- 3004 For the reasons discussed above, ASIC has not satisfied me that Geary knew, believed or suspected that the UN had not knowingly approved the payment of the inland transportation fees. Further, ASIC has not satisfied me that Geary knew of the payment of the service fee.
- 3005 ASIC called several AWB employees and directors who gave evidence that they believed that the UN and the Australian government had approved the payment of the inland transportation fees. That evidence infers that this was the widely held view within AWB and also infers that it was the likely view of Geary. As indicated above, I am not satisfied that ASIC established Geary did not believe otherwise.
- 3006 ASIC has not satisfied me that Geary did not believe that the UN had approved the payments in the circumstances alleged or that Geary knew, believed or suspected that

the UN was being misled by AWB in approving the contracts that provided for payment to Iraq by AWB.

3007 I accept that if Geary became aware of any wrong doing by AWB he would in the usual case be duty bound to inform the managing director or the relevant committee of what he had discovered and otherwise take the steps alleged in paragraph 41. I am not satisfied, however, that Geary did become aware of any wrong doing by AWB in relation to the inland transportation fees or the after sales service fee.

3008 I am not satisfied that a reasonable person if they were a director or officer of a corporation, in AWB's circumstances, who occupied the office held by Geary and had the same responsibilities within AWB as Geary had, would have known, believed or suspected any more than Geary did about the payment of the inland transportation fees, or have known of the after sales service fee. In those circumstances Geary did not have a duty to do any of the matters pleaded in paragraph 41.

3009 I am not satisfied that in the corporation's circumstances Geary would have had the duties alleged under s 180 of the Act to do any of the matters pleaded in paragraph 41.

3010 I am not satisfied that in relation to the payment of the inland transportation fees, Geary did not act other than in good faith in the best interests of AWB and for a proper purpose.

3011 Accordingly, I am not satisfied for similar reasons that Geary would have had the duties alleged under s 181 of the Act to do any of the matters alleged in paragraph 41.

Contraventions relating to Purported Fees

FASOC – paragraph 42

3012 ASIC pleads that in breach of the duties alleged at paragraph 41 (referred to at paragraph 2997 above):

(a) Geary took no or no reasonable steps, when AWB was selling and exporting

wheat to Iraq and obtaining payments from the UN escrow account pursuant to Contracts A1111, A1112 and A1441, to ensure that AWB did not engage in conduct that the UN Resolutions had called on member states to prevent, and in particular, conduct that resulted in:

- (i) the direct or indirect payment of internationally traded currency to the Government of Iraq or its instrumentalities; or
 - (ii) the receipt by AWB of payment from the UN escrow account other than on account of OFFP humanitarian goods;
- (b) Geary took no or no reasonable steps to ensure that the ELG, the CRRC or the Managing director of AWB were informed of each of the matters alleged at paragraphs 40(c) to 40(j) and to recommend against AWB's payment of the purported fees and its receipt of payments from the UN escrow account in respect of such fees;
- (c) Geary took no or no reasonable steps to prevent AWB from entering into, Contracts A1111, A1112, A1441, A1670 and A1680, and further took no or no reasonable steps to prevent AWB from carrying out Contracts A1111, A1112 and A1441, where those contracts included an amount in respect of the purported fees and enabled AWB to obtain funds from the UN escrow account in respect of the purported fees;
- (d) Geary took no or no reasonable steps to prevent AWB from making payments of the purported fees to Alia;
- (e) Geary personally authorised the following payments of purported fees to Alia pursuant to Contracts A1111, A1112 and A1441;

Date of payment request	Contract (s)	Amount
28.03.02	A1112	€2,665,097.88
30.08.02	A1111	€2,867,827.63
18.09.02	A1111	€5,539,629.63
18.12.02	A1441	€4,395,912.00
30.01.03	A1441	€2,037,840.00
24.02.03	A1441	€2,037,840.00

- (f) Geary took no or no reasonable steps to prevent AWB from obtaining payments from the UN escrow account in respect of the purported fees in relation to Contracts A1111, A1112, and A1441.

3013 Geary denies paragraph 42.

3014 As I have found there is no duty as alleged, then there is no breach.

FASOC – paragraph 43

3015 ASIC pleads that, alternatively, if Geary did not have knowledge of each of the matters alleged at paragraph 40 (referred to at paragraph 2633 and following above), then:

- (a) Geary had the means of knowledge of each of those matters; and
- (b) by reason of his position as Group General Manager Trading, the matters alleged at paragraphs 4 to 9 of the FASOC and the circumstances pertaining to AWB alleged at paragraphs 10 to 39 of the FASOC, Geary had duties to:
 - (i) inform himself of each of those matters using the means of knowledge alleged at paragraph (a) above;
 - (ii) thereafter do each of the things alleged at paragraph 41 (referred to at paragraph 2997 above).

3016 ASIC gives particulars of Geary's means of knowledge, referring to and repeating the

particulars to paragraph 40 as to Geary's knowledge.

3017 Geary denies paragraph 43.

3018 I find that ASIC has not established that Geary had a duty to inform himself as alleged. I find that ASIC has not established that Geary should have been put on inquiry to investigate whether in fact the UN and DFAT had approved the payment of the inland transportation fees, or whether the UN and DFAT had been misled and deceived by AWB in relation to the payment of inland transportation fees. Unlike Flugge, ASIC has not established that Geary was aware of the UN inquiry into complaints about AWB's payment of inland transportation fees.

3019 I am not satisfied that ASIC has made out the duties alleged in paragraph 43.

FASOC – paragraph 44

3020 ASIC pleads that in breach of the duties alleged at paragraph 43(b) above, Geary:

- (a) failed to inform himself of the matters alleged at paragraph 40 above; and
- (b) failed to do each of the things alleged at paragraph 41 above.

3021 Geary denies paragraph 44.

3022 As I have found that Geary did not have the duties alleged, then, I am not satisfied of the allegations of breach.

FASOC – paragraph 45

3023 ASIC pleads that by engaging in the conduct alleged at paragraph 42 (referred to at paragraph 3012 above), alternatively paragraph 44 above, Geary:

- (a) failed to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (i) were an officer of a corporation in AWB's circumstances; and
 - (ii) occupied the office held by Geary, and had the same responsibilities as

Geary; and

- (b) breached the duty alleged at paragraph 8 and thereby contravened s 180 of the Act.

3024 Geary denies paragraph 45.

3025 As I have found that Geary did not have the duties alleged, then, I am not satisfied of the alleged breaches.

FASOC – paragraph 46

3026 ASIC pleads that, further or alternatively, by engaging in the conduct alleged at paragraph 42 (referred to at paragraph 3012 above), alternatively paragraph 44, Geary:

- (a) failed to exercise his powers and discharge his duties in good faith in the best interests of AWB and for a proper purpose; and
- (b) breached the duty alleged at paragraph 9 and thereby contravened s 181 of the Act.

3027 Geary denies paragraph 46.

3028 For the reasons given above, I am not satisfied that ASIC has made out this allegation.

The Tigris Debt

FASOC – paragraph 47

3029 ASIC pleads that in around January 2001, AWB agreed to assist Tigris Petroleum Corporation Ltd (Tigris) to recover the sum of US\$8,052,550.00 said to be owed to Tigris by the IGB (Tigris Debt), in consideration of which Tigris agreed in October 2002 to pay AWB a commission of US\$500,000.00.

3030 Geary does not admit paragraph 47.

3031 ASIC provides particulars alleging that Tigris' request for AWB's assistance is set out in a letter from Davidson Kelly of Tigris to Stott. ASIC says that the letter is incorrectly

dated at '16 January 2000', and was received by Stott on or about 16 January 2001.

3032 AWB's agreement to assist Tigris is referred to in a memorandum from Long to the Corporate Risk Review Committee members and other AWB employees dated 16 September 2002.

3033 ASIC alleges that Tigris' offer to pay a fee of US\$500,000 for its assistance is recorded in an email from Davidson Kelly of Tigris to Long dated 15 October 2002. ASIC says AWB's acceptance of that offer is recorded in an email reply from Long to Davidson Kelly dated 16 October 2002.

3034 I am satisfied, on the basis of the evidence canvassed above, that ASIC has made out this allegation.

FASOC – paragraph 48

3035 ASIC pleads that in order to recover the Tigris Debt, AWB inflated the price of wheat by an amount incorporated into the per tonne price under Contracts A1670 and A1680, which inflation:

- (a) was calculated to recoup the entirety of the Tigris Debt from the UN escrow account once both contracts were paid in full; and
- (b) was not disclosed in the contracts.

3036 Geary admits paragraph 48.

FASOC – paragraph 49

3037 ASIC pleads that AWB received payments from the UN escrow account in respect of the Tigris Debt, on the basis of the inflated prices as alleged at paragraph 48 above.

3038 He does not admit paragraph 49.

3039 ASIC provides particulars of the payments in schedule B to the FASOC. ASIC alleges that payments from the UN escrow account were received in respect of Contracts A 1670 and A 1680 that included an amount applied to the recoupment of the Tigris Debt

that in the case of A 1670 commenced on 30 March 2004 and concluded on 22 November 2004 and in the case of A 1680 commenced on 2 May 2003 and concluded on 10 March 2004.

3040 I am satisfied on the evidence canvassed above that ASIC has made out the allegation in paragraph 49.

FASOC – paragraph 50

3041 ASIC alleges that on or about 9 December 2004, AWB paid to Tigris the sum of US\$7,087,202.24 purportedly as repayment of the Tigris Debt, after deducting a ‘recovery fee’ retained by AWB in the sum of US\$500,000.00.

3042 Save that Geary admits on about 9 December 2004, AWB paid to Tigris the sum of US\$7,087,202.24, he does not admit paragraph 50.

3043 On the basis of the evidence canvassed above, I am satisfied that ASIC has made out this allegation.

Geary’s knowledge in relation to the Tigris Debt

FASOC – paragraph 51

3044 ASIC pleads that at all material times, Geary knew the following matters.

FASOC – paragraph 51(a)

3045 ASIC pleads that at all material times, Geary knew that AWB had agreed to assist Tigris in recovering the Tigris Debt.

3046 Save that Geary admits that from about September 2002, he knew AWB had agreed to assist Tigris in recovering the Tigris Debt, he does not admit sub-paragraph 51(a).

3047 ASIC relies on the following evidence in support of this allegation.¹⁸²⁹

¹⁸²⁹ ASIC alleges that Geary’s knowledge is to be inferred from the matters particularised at [37], [39]-[42], [45], [51], [53], [56], [57] and [60] of the particulars alleged. ASIC alleges that Geary’s knowledge is cumulative and commenced no later than August 2002. ASIC also relies on further particulars 11, 29,

- 3048 On 7 August 2002, Stott sent an email to Long, Morison, Geary and Johnstone entitled 'Visit to Baghdad' which forwarded an email of the same date from Norman Davidson Kelly.¹⁸³⁰ The email from Davidson Kelly asked whether the forthcoming AWB delegation to Iraq would be prepared to carry with them a letter from Tigris to the Trade Minister of Iraq 'asking him to stimulate action re the loan repayment.'
- 3049 Geary says that there is no evidence that he read this email, particularly having regard to the fact there is no evidence of a reply email by him or a discussion with/by Geary about the contents of the email. Geary says that the email is addressed to Michael Long. He says that Stott refers to a 'letter.' Geary says that Davison Kelly refers to a letter merely to 'stimulate action re the loan repayment.' The letter is not attached. Further, Stott says it is quite possible the letter would not be tabled in any event.
- 3050 On 11 September 2002, Long sent an email to Davidson Kelly that was copied to Geary (and others including Stott) entitled 'Tigris/BHP/AWB/IGB'¹⁸³¹ (for the email see paragraph 2092).
- 3051 Geary submits that there is no evidence that he read this email, particularly having regard to the fact that there is no evidence of a reply email by him or a discussion with or by him about the contents of the email. Geary submits that ASIC fails to mention the document also states, 'The documentation will be scrutinized by our legal department and the authority for me to negotiate with you/IGB will need to be signed off by the Executive of the AWB.'
- 3052 On 16 September 2002, Long sent a memorandum to Geary entitled 'Iraq debt/BHP/Tigris Petroleum - MV Ikan Sepat Jan. 1996' (see paragraph 2096).
- 3053 Geary says that the memorandum was directed to the members of the CRRC (which included Lindberg) and Cooper (AWB Legal), Foran and Johnson. Geary was not a

30, 32, 33, 34 and 35.

¹⁸³⁰ CB 4/2571.

¹⁸³¹ CB 4/2651.

member of the CRRC and merely copied in.

- 3054 Geary submits that there is no evidence he read this email, particularly having regard to the fact there is no evidence of a reply email by him or a discussion with or by him about the contents of the email.
- 3055 On 6 November 2002, Long sent an email to Geary forwarding an email from Whitwell the material effect of which was that AWB proposed to the IGB the 'loading up' of contracts by way of recovering part of the Tigris Debt and that the Iraqi Minister for Trade had advised that the repayment of the Tigris Debt had received cabinet approval and 'loading up' of the next phase of the OFFP contracts provided an opportunity to effect repayment.
- 3056 Geary submits that there is no evidence that he read this email, particularly having regard to the fact there is no evidence of a reply email by him or a discussion with or by him about the contents of the email.
- 3057 Geary says that ASIC alleges that he received this email but he was on EMBA Study leave. Geary says that he had delegated authority to Long at the time.
- 3058 On 7 November 2002, Whitwell sent an email to Lindberg and many others including Geary, reporting on the results of the delegation of Whitwell and Hogan to the IGB (see paragraph 2907).
- 3059 Geary contends that there is no direct evidence that he read this email. He did not reply to it. At the time the email was sent, Geary was absent from AWB attending the Executive MBA study leave in Carlton.
- 3060 On 12 December 2002, Geary was informed in an email from Edmonds-Wilson that the fees had increased to Euro \$51.30.¹⁸³²

¹⁸³² Geary, sch A, [45].

- 3061 On 7 February 2003, Geary received the 7 February memorandum.¹⁸³³
- 3062 On 6 May 2003, ASIC alleges that Geary attended an ELG meeting. Geary is listed as a member of that committee. ASIC seeks to infer that Geary was in attendance as he is not listed as an apology. The minutes of the meeting acknowledge that members could attend by phone hook-up.
- 3063 The members of the committee were stated to be Lindberg, Fuller, Ingleby, Gillingham, Marcus Kennedy, Geary, Scales, Stott and Sharpe. ASIC did not call any of those persons to establish that Geary was at the meeting, save Scales.
- 3064 Other AWB employees were listed as attending for various agenda items. Amongst the many persons listed was Whitwell.
- 3065 Whitwell gave evidence but could not recall whether Geary was at the meeting of 6 May 2003. Scales was not asked whether she recalled Geary being in attendance at the meeting. Scales deposed that this document was not a reliable indicator of who was present at the meeting.
- 3066 I am not satisfied that ASIC has established Geary was present or that he received the trip report.
- 3067 On 28 May 2003 Whitwell sent an email to Lyons and Cooper with copies to Geary and others entitled 'Tigris', the material effect of which was that Whitwell sought legal advice in relation to the draft agreement prepared by Tigris.
- 3068 The email also forwarded an email from Davidson Kelly to Whitwell of 7 May 2003 the material effect of which was that Tigris sought to enter into a written agreement with AWB whereby AWB would pay to Tigris the amount of the Tigris Debt recovered by AWB (US\$8,375,000.00) less AWB's fee of US\$500,000.00, being US\$7,875,000.00 or US\$7.875 per tonne for Contracts A1670 or A1680 (which contracts totalled 1 million

¹⁸³³ Geary sch A, [47].

tonnes).¹⁸³⁴

3069 On 28 May 2003 Whitwell sent an email to Geary¹⁸³⁵ that attached a draft agreement between AWB and Tigris¹⁸³⁶ which ASIC contends:

- (a) misrepresented the funds to be paid to Tigris on account of the Tigris Debt as 'compensation' owed to Tigris by AWB;
- (b) provided for the 'compensation' to be paid to Tigris by AWB at a rate of \$7.875 per metric tonne upon the execution of contracts A1670 and A1680 (referred to in the agreement as 'Contract'); and
- (c) provided for payments to be forward to Tigris in instalments, paid upon receipt by AWB of payments for wheat shipments.¹⁸³⁷

3070 On or around 12 June 2003, ASIC contends that Geary, as a member of the ELG, received a copy of a document entitled, 'ELG Report - 12th June 2003 - Iraq - Chris Whitwell'. Under the heading, 'Tigris Commission', the ELG report contained the same text as that extracted from 6 May 2003 ELG report in paragraph 2226 above.¹⁸³⁸

3071 Geary says that there is no evidence that he received this report, nor is there evidence he discussed its contents with others.

3072 On 17 June 2003, Kate Robinson sent an email to Geary attaching:

- (a) a document entitled 'ELG Report 15th June 2003 - IRAQ', the material substance of which was that the recovery of the Tigris Debt had been put 'on hold' in view of possible further renegotiation of contracts A1670 and A1680;

¹⁸³⁴ Geary, sch A [53].

¹⁸³⁵ Referred to at Geary, sch A [53].

¹⁸³⁶ CB 6/3397.

¹⁸³⁷ Geary, FP [29].

¹⁸³⁸ Geary, sch [56].

(b) a second document entitled 'Jordan/Iran Trip Report', the material effect of which was that Alia was seeking the return from Iraq of the inland transport payment made by AWB to Alia in respect of wheat shipped on the *Pearl of Fujairah* which payment was subsequently transferred by Alia to Iraq.¹⁸³⁹

3073 On 28 July 2003, Whitwell sent an email to Stott and sixteen others including Geary, which attached a Trip Report for a trip to London, Amman and Iraq between 23 and 30 June 2003.¹⁸⁴⁰ Geary, along with Long, Whitwell and Hockey, were listed as being in attendance at some/all of the meetings. In relation to Tigris, the trip report is discussed above at paragraph 2250.¹⁸⁴¹

3074 Geary says that Whitwell gave evidence that to the best of his recollection Long was at the meeting with Tigris at the meeting in London. Whitwell said he could not recall Geary being in attendance at the meeting.¹⁸⁴² Geary says that the multiple inferences sought to be made from this document cannot be readily established.

3075 On 22 September 2003, Whitwell sent an email to Geary (and others) entitled 'Iraq Update' attaching a memorandum which referred to the payment to AWB of a commission for its assistance in recovering the Tigris Debt.¹⁸⁴³

3076 Geary says that there is no evidence that he read this memorandum as he was overseas. Geary says that Scales was in charge of Iraq as per the ELG action list. Geary says that the memorandum was addressed to Scales and copied to IERT of which Geary was not a member.

3077 On 28 July 2004, Long sent an email to Scales, and copied to Geary and the reply from Scales to Long copied to Geary. The email from Long is copied above at

¹⁸³⁹ Geary, sch A, [57].

¹⁸⁴⁰ CB 6/3571-3574.

¹⁸⁴¹ Geary, FP [30].

¹⁸⁴² Transcript of hearing, *ASIC v Geary & Flugge*, (13 October 2015) T158, L16-23.

¹⁸⁴³ CB 3689, 3691 – email; CB 3693 – memorandum, Geary, sch [60].

paragraph 2254.¹⁸⁴⁴

3078 On 13 August 2004, Lyons sent an email to Geary, in which Lyons asked Geary for a copy of the memorandum referred to at particular 47 of the particulars alleged Geary forwarded the email to Moraitis, stating:¹⁸⁴⁵

This will be on the Iraq file or Tigres [sic]

3079 On 16 September 2004, Cooper sent an email to Lindberg and five others including Geary, which is discussed at paragraph 2293.¹⁸⁴⁶

3080 Geary submits that there is no evidence that he read this email, particularly having regard to the fact that there is no evidence of a reply email by him or a discussion with or by him about the contents of the email.

3081 Geary says that this email was sent after the war and after UN sanctions had been lifted. Geary says that the email is from the General Counsel of AWB to Scales and that he was merely copied in.

3082 On 21 October 2004, an email was sent to members of the ELG including Geary attaching the ELG monthly report for the month ending September 2004. The report is discussed above at paragraph 2297.¹⁸⁴⁷

3083 Geary says that this followed a review by the General Counsel of AWB. Geary says that the relevant AWB management did not include Geary. He says it did include, however, Lindberg and Stott the Iraq expert.

Resolution of paragraph 51(a)

3084 As indicated above, Geary admits that from September 2002 he knew that AWB had agreed to assist Tigris in the recovery of the Tigris Debt. I am not satisfied that the

¹⁸⁴⁴ CB 7/4385; Geary, FP [32].

¹⁸⁴⁵ Geary, FP [33].

¹⁸⁴⁶ Geary, FP [34].

¹⁸⁴⁷ Geary, FP [35].

evidence relied on by ASIC establishes that Geary acquired his knowledge before September 2002.

FASOC – paragraph 51(b)

3085 ASIC pleads that at all material times Geary knew that AWB was proposing, and had agreed with the IGB, to recover for Tigris the Tigris Debt by inflating the total price payable under AWB contracts with the IGB. Geary denies sub-paragraph 51(b).

3086 In addition to the evidence relied on in support of paragraph 51(a), ASIC relies on the following evidence.¹⁸⁴⁸

3087 On 23 December 2002, Whitwell received an email from Davidson Kelly that forwarded an email from Abdul-Rahman to Davidson Kelly¹⁸⁴⁹ entitled ‘Loan to supply grain/wheat – January 1996.’ Abdul-Rahman’s email is copied at paragraph 2167.

3088 Whitwell copied the email the same day to Geary and the other persons on the ‘private & confidential’ email of 13 December 2001.¹⁸⁵⁰

Resolution of paragraph 51(b)

3089 The 7 February 2003 memorandum does make clear that the Tigris Debt was to be recovered by inflating the price payable under AWB contracts with the IGB. Geary in his submissions, contends that it is reasonable to infer that Geary believed that AWB’s recovery of the Tigris Debt was scrutinised and approved by AWB legal and known by the Australian government. Geary does not dispute that he knew that AWB was proposing and had agreed with the IGB to recover for Tigris the Tigris Debt by inflating the total price payable under AWB contracts with the IGB.

¹⁸⁴⁸ ASIC alleges that Mr Geary’s knowledge is to be inferred from the matters particularised at [40], [42], [45] to [77] of the particulars alleged. ASIC also relies on further particulars 29, 30 and 33.

¹⁸⁴⁹ CB 5/3011.

¹⁸⁵⁰ CB 5/2977, CB 5/3011; Geary, sch [46].

3090 I am satisfied that Geary had the knowledge alleged in paragraph 51(b).

FASOC – paragraph 51(c)

3091 ASIC pleads that at all material times Geary knew the wheat price per tonne referred to in contracts A1670 and A1680 had been inflated by an amount that was calculated to recoup the entirety of the Tigris Debt from the UN escrow account once both contracts were paid in full.

3092 Geary does not admit sub-paragraph 51(c).

3093 For the reasons given in relation to paragraph 51(b), I am satisfied that Geary had the knowledge alleged in paragraph 51(c).

FASOC – paragraph 51(d)

3094 ASIC pleads that at all material times Geary knew that the inflation of the wheat price per tonne by an amount calculated to recover the Tigris Debt was not identified or referred to in Contracts A1670 and A1680 as submitted to DFAT and the OIP for approval of payment from the UN escrow account.

3095 Geary does not admit sub-paragraph 51(d).

3096 ASIC relies on the previous evidence in support of paragraph 51(a) and following evidence.¹⁸⁵¹

3097 Particular 40: see paragraph 3052.

3098 Particular 42: see paragraph 3012.

3099 Particular 45: see paragraph 3023.

3100 Further particular 29: see paragraph 3069.

¹⁸⁵¹ ASIC alleges that Geary's knowledge is to be inferred from the matters particularised at [40], [42], [45] and [61] of the particulars alleged. His knowledge is cumulative and commenced no later than December 2002. ASIC also relies on further particulars 29 and 31.

3101 Further particular 31: on 12 September 2003, Whitwell sent an email to Geary, regarding a fax received from the WFP.¹⁸⁵² The email is copied at 2834.

3102 Particular 61: on 9 September 2004, Cooper sent an email to Scales with a copy sent to Long and Geary, the material effect of which was that:

- (a) AWB had finished a factual review of the Tigris transaction, although the facts were patchy;
- (b) Cooper proposed having IS&M staff sign off on the written factual summary; and
- (c) there 'appeared to be a breach of the UN Resolution 661 because the increase in contract payments to repay the Tigris Debt and the processing of this higher amount through the OFF program was never disclosed and was not a payment for a humanitarian purpose.'¹⁸⁵³

3103 Geary says that there is no evidence that he read this email, particularly having regard to the fact there is no evidence of a reply email by him or a discussion with/by him about the contents of the email. Geary says that this email was sent post war and after UN sanctions had been lifted.

3104 Geary says that the email is from the General Counsel of AWB to Scales, he is merely copied in.

Resolution of paragraph 51(d)

3105 As indicated above, Geary knew that the Tigris Debt was to be recovered from inflating the contract price of wheat and recovering the inflated price from the UN escrow account.

3106 Geary was not advised of any concerns about the Tigris transaction in early 2003. The

¹⁸⁵² Geary FP [31].

¹⁸⁵³ Geary, sch A [61].

evidence relied on does not establish that Geary knew that the inflation of the wheat price per tonne by an amount calculated to recover the Tigris debt was not identified or referred to as alleged.

3107 On 9 September 2004, Geary received an email from Cooper that said, inter alia, that there appeared to be a breach of the UN Resolution 661, because the increase in contract payments to repay the Tigris Debt and the processing of the amount through the OFFP was never disclosed and was not a payment for humanitarian purposes. I am not satisfied that ASIC has established that Geary read that email.

3108 I am not satisfied that Geary knew that the loading up of the price was not disclosed to the UN and DFAT as alleged.

FASOC – paragraph 51(e)

3109 ASIC pleads that at all material times Geary knew that AWB proposed to obtain, and later had obtained, funds from the UN escrow account in respect of contracts A1670 and A1680 which included amounts in respect of the Tigris Debt.

3110 Geary does not admit sub-paragraph 51(e).

3111 ASIC relies on the evidence in support of paragraph 50(a) and (d) discussed above and the following evidence.¹⁸⁵⁴

3112 On 6 May 2003, ASIC alleges that Geary attended a meeting of the ELG, which discussed amongst other issues the contents of an ELG Report dated 6 May 2003 as set out paragraph 51 of the particulars alleged. The report is excerpted above at paragraph 2227.¹⁸⁵⁵

¹⁸⁵⁴ ASIC alleges that Mr Geary's knowledge is to be inferred from the matters particularised at [40], [42], [45], [47], [51], [53], [56], [60] and [61] of the particulars alleged. ASIC alleges that Mr Geary's knowledge is cumulative and commenced no later than December 2002. ASIC also relies on further particulars 28, 29, 30 and 33. I have considered particulars 40, 42, 45 and 61 above when dealing with paragraph 51(d), and particulars 47, 51, 53 and 60 of the particulars alleged and further particulars 29, 30 and 33 when dealing with paragraph 51(a).

¹⁸⁵⁵ Geary, FP [28].

3113 Geary submits that ASIC alleges that he attended the ELG meeting, when this report was tabled and discussed by regard to the agenda. Geary says that there is no reliable evidence to show that this document was presented at the meeting or whether he attended the meeting. Geary says that Scales deposed that this sort of document is not a reliable indicator of who was present. ASIC did not call any of those who did attend the meeting to give evidence that it was presented at the meeting and that Geary was in attendance.

3114 In my opinion, from the evidence led I infer that Geary attended the meeting. I am more readily able to draw that inference as Geary did not seek to rebut the inference by giving evidence.

3115 Geary says that the ELG action list stated that Lindberg, Ingleby, Stott and Scales were responsible for Iraq on an ongoing basis. Geary says that the action list also shows that he was concerned with other issues or aspects unrelated to Iraq.

Resolution paragraph 51(e)

3116 I am satisfied from the documents referred to by ASIC that Geary knew that AWB proposed to obtain funds from the UN escrow account in respect of contracts A1670 and A1680 which included amounts in respect of the Tigris Debt.

3117 ASIC also seeks to prove that Geary knew that AWB had obtained funds from the UN escrow account in respect of contracts A1670 and A1680.

3118 ASIC alleges that payments were received by AWB from the UN escrow account, which payments were calculated by reference to the full per tonne price of the wheat, inclusive of the amount applied to the recoupment of the Tigris Debt, were received pursuant to contract A16790, from 30 March 2004 through to 22 November 2004 totalling €134,433,260.95 and were received pursuant to contract A1680, from 2 May 2003 through to 10 March 2004 totalling €133,778,833,78.00.

3119 I am satisfied that Geary would have assumed and expected that payments were received from the UN escrow account pursuant to contracts A1670 and A1680.

3120 ASIC, in its submissions, refers to several communications sent to Geary that informed him that payments were received from the UN escrow account pursuant to contracts A1670 and A1680. See paragraphs 2206 and following.

3121 I am satisfied that Geary knew that AWB had obtained funds from the UN escrow account in respect of the contracts as alleged.

3122 Accordingly, I am satisfied that Geary knew the matters alleged in paragraph 51(e).

FASOC – paragraph 51(f)

3123 ASIC pleads that at all material times Geary knew that payments in respect of the Tigris Debt obtained from the UN escrow account were not obtained on account of OFFP humanitarian goods. Geary does not admit sub-paragraph 51(f).

3124 ASIC relies on the evidence in support of paragraph 51(a) and (d).¹⁸⁵⁶

3125 On 17 September 2002, Long sent to Geary an email which forwarded an email from Foran to Long regarding a debt allegedly owed by Iraq to Australia for sales of wheat from 1987 to 1990.¹⁸⁵⁷ See paragraph 2098 for the email.

Further particular 21

3126 On 7 September 2002, ASIC alleges that Geary forwarded, or caused Moraitis to forward, the email referred to in paragraph 3125 from Long, with a message from Geary referred to above at paragraph 2100.¹⁸⁵⁸ Also discussed above, ASIC contends that it can be inferred that Geary sent, (or caused Moraitis to send) the email.¹⁸⁵⁹

¹⁸⁵⁶ ASIC pleads Geary's knowledge is to be inferred from the matters particularised at [40], [42], [45], [47], [51], [53], [56] and [61] of the particulars alleged. ASIC alleges Geary's knowledge is cumulative and commenced no later than March 2003. ASIC also relies on further particulars 11, 20, 21, 29, 30 and 33. I have considered particulars 40, 42, 45, 47, 51, 53 and 56 and further particulars 11, 29, 30 and 33 when dealing with paragraph 51(a) and (61) when dealing with paragraph 51(d).

¹⁸⁵⁷ CB 4/2691.

¹⁸⁵⁸ CB 4/2693.

¹⁸⁵⁹ Geary, FP [21].

Resolution of paragraph 51(f)

- 3127 Did Geary at all material times know that payments in respect of the Tigris Debt obtained from the UN escrow account were not obtained on account of OFFP humanitarian goods?
- 3128 Geary knew that the contracts that inflated the price in order to recover the Tigris Debt had been entered into when he approved the memorandum of 7 February 2003. ASIC alleges that Geary would have known the contracts were entered into by reason of the email of 12 December 2002. I am not prepared to make that finding as Geary was absent from AWB undergoing eye surgery on 12 December 2002.
- 3129 ASIC alleges that the first payment was received from the UN escrow account on 21 May 2003 in respect of contract A1680 which included the uplift to recover the Tigris Debt.
- 3130 Geary knew the details of when the wheat was to be shipped to Iraq as indicated in the memorandum of 7 February 2003. There is no evidence that Geary knew that the first payment from the UN escrow account was received on 21 May 2003.
- 3131 ASIC alleges that Geary knew that the payments were not obtained on account of OFFP humanitarian goods. Geary knew that the payments proposed were to satisfy a debt that IGB accepted it owed Tigris for the supply of wheat to the IGB. I am not satisfied that ASIC has established that Geary knew or believed that the payment was not permitted or allowed under the UN Resolutions.
- 3132 I am not satisfied that ASIC has made out the allegation in paragraph 51(f).

FASOC – paragraph 51(g)

- 3133 ASIC pleads that at all material times Geary knew that AWB proposed to pay, and later had paid, funds obtained from the UN escrow account in respect of the Tigris Debt to Tigris after deducting AWB's commission of \$500,000.00.
- 3134 Geary does not admit sub-paragraph 51(g).

3135 ASIC relies on the evidence in support of 51(a).

*Resolution of paragraph 51(g).*¹⁸⁶⁰

3136 I am satisfied that the evidence relied on by ASIC establishes that Geary knew that AWB proposed to pay funds obtained from the UN escrow account in respect of the Tigris Debt as alleged in paragraph 51(g).

3137 I am also satisfied that Geary knew that AWB had paid funds obtained from the UN escrow account in respect of the Tigris Debt to Tigris after deducting AWB's commission of \$500,000.

3138 By the memorandum of 7 February 2003, Geary put Lindberg on notice and inquiry about the propriety of the proposal to recover the Tigris Debt by inflating the price of wheat sold to the IGB. Although his note of 10 February 2003 related to the Iron Filings Claim, it does show that Geary was concerned to ensure that AWB complied with the OFFP. As discussed above at paragraph 2099, Geary had instructed Long to prepare a memorandum for the ELG raising the proprieties of the Tigris transaction. This evidence tends to show that Geary was not remiss in carrying out his duties to ensure that AWB acted properly.

3139 ASIC alleges that Geary attended an ELG meeting on 6 May 2003.¹⁸⁶¹ Geary is listed as a member of that committee. ASIC seeks to infer that Geary was in attendance as he is not listed as an apology. The minutes of the meeting acknowledge that members could attend by phone hook-up.

3140 Scales attended the meeting and gave evidence. Scales was not asked whether she recalled Geary being in attendance at the meeting.

¹⁸⁶⁰ ASIC alleges that Mr Geary's knowledge is to be inferred from the matters particularise at [45], [47], [51], [53], [56] and [60] of the particulars alleged. ASIC alleges that his knowledge is cumulative and commenced no later than February 2003. ASIC also relies on further particulars 29, 30, 33 34 and 35. I have addressed particulars 45, 47, 51, 53, 56 and 60 and further particulars 29, 30, 33, 34 and 35 when dealing with paragraph 51(a).

¹⁸⁶¹ Geary, sch, [51].

3141 Lindberg, Fuller, Ingleby, Gillingham, Kennedy, Geary, Scales, Stott and Sharpe were recorded as attending the meeting. ASIC did not call any of those persons (other than Scales) to establish that Geary was at the meeting.

3142 Other AWB employees were listed as attending for various agenda items. Amongst the many persons listed was Whitwell. Whitwell did give evidence but could not recall whether Geary was at the meeting of 6 May 2003.

3143 Geary attended meetings in London with Long, Whitwell and Hockey concerning Tigris in late July 2003. He was emailed a copy of a trip report recording these meetings on 28 July 2003.¹⁸⁶² That report stated:

NKD had just been into Baghdad and had had meetings with IGB. He confirmed that IGB wanted to honour the contracts.

...

Actions

Keep in contact over progress of contracts and look at possibly ring-fencing commissions received.

Offer from Tigris to tap into Rifkend network if appropriate and also Sabah Jumah to gauge Iraqi

3144 ASIC submits that the 22 September 2003 email from Whitwell sent to Geary (and others), entitled, 'Iraq Update' attaching a memorandum which referred to the payment to AWB of a commission for its assistance in recovering the Tigris Debt and stated, 'Commission has been ring-fenced in AWB accounts pending final execution of contract,'¹⁸⁶³ shows that funds had been recovered by AWB from the escrow account for repayment of the Tigris Debt. I accept that submission.

3145 On 13 July 2004, Scales made handwritten file notes in relation to the Tigris matter.

¹⁸⁶² CB 6/3571, 3573.

¹⁸⁶³ CB 6/3689, 3691 – email; CB 6/3693 – memorandum.

Having regard to Scales' evidence,¹⁸⁶⁴ the notes read as follows:¹⁸⁶⁵

Donated- The cargo of wheat to IGB with assumption payment in full

- they paid AWB for cargo.

The arrangement = agreement, transfer of funds from 1670/1680 \$7 to Tigris at request IGB (Tigris equals company set up by BHP to receive or recover future payment).

IGB instructed to inflate sales contract 1670/1680 by US\$7

to repay cargo to Tigris out of which commission negotiating for providing service to facilitate gathering money

→ internal debate US\$2 million, who gets it?

→ The counterparties in agreement, -I/ Tigris.

The issue is can this be seen as AWB taking money or facilitating dollars from IGB outside OFP?

*AWBI has received dollars, IGB/UN Oil-for-Food Program that inflated by US\$7 a tonne. Does I/IGB 1670/1680 contract reference Tigris? No

Now AWBI needs to pay Tigris US\$7 per metric tonne

- >agreement

Need to set up meeting with AL, ML, PAG, DKJ and JC.

Need briefing note,

Time line for decision.

3146 On 28 July 2004, Scales sent an email to Long, copied to Geary, titled '*Re: Tigris Agreement*' regarding how to respond to Davidson Kelly making weekly contact regarding the status of the agreement.¹⁸⁶⁶ In the email Scales suggests telling Davidson Kelly to wait due to the 'environment' [sic].

3147 On 9 September 2004, Scales sent an email to Cooper, copied to Geary and Long, stating, 'Jim, What is the status re: Tigris agreement? What is the timeline on a

¹⁸⁶⁴ Transcript of hearing, *ASIC v Geary & Flugge*, (18 November 2015) T2008, L17 - T2009, L15.

¹⁸⁶⁵ CB 7/4375.

¹⁸⁶⁶ CB 7/4385.

decision? rgds ss.’¹⁸⁶⁷

3148 On 9 September 2004, Geary, Long and Scales received an email from Cooper entitled, ‘Re: tigris’, advising:¹⁸⁶⁸

There appears to be a breach of UN resolution 661 because the increase in contract payments to repay the Tigris debt and the processing of this higher amount through the OFF program was never disclosed and was not a payment for a humanitarian purpose.

3149 ASIC says that it is clear from Cooper’s email that, in his opinion, the contracts Geary approved in the memo dated 7 February 2003 had breached of UN Sanctions. He cites the wrong resolution (it should have been Resolution 986), but apart from this his analysis is completely correct, and confirmed by external counsel.¹⁸⁶⁹ See paragraph 2290 for Dr Stephen Donaghue’s draft advice of 13 October 2004.

3150 On 10 September 2004, Geary sent the email to Lyons, copied to Moraitis, titled ‘Re: Fw: Iraq Memo’ responding to Lyons’ request for a copy of Geary’s covering memo from 21 February 2003.¹⁸⁷⁰ Lyons said to Geary, ‘Pete you gave me a copy of your covering memo.’

3151 Based on the above evidence, I am satisfied that Geary knew of the proposal and that AWB had paid funds obtained from the UN escrow account as alleged.

3152 Accordingly, I am satisfied that ASIC has made out paragraph 51(g).

FASOC – paragraph 51(h)

3153 ASIC pleads that at all material times Geary knew that the revelation that AWB intended to obtain, or did obtain, payments in respect of the Tigris Debt from the UN

¹⁸⁶⁷ CB 7/4409.

¹⁸⁶⁸ CB 7/4411.

¹⁸⁶⁹ Donaghue draft advice of 13 October 2004, CB 7/4589, 4599; Richter QC and Donaghue advice of 22 December 2004, CB 7/4720-1, 4720-11-12.

¹⁸⁷⁰ CB 7/4413.

escrow account, which payments were not on account of OFFP humanitarian goods, would cause, or was likely to cause, substantial and enduring harm to AWB of the kind alleged at paragraph 39 (referred to at paragraph 2630 above).¹⁸⁷¹

3154 Geary does not admit sub-paragraph 51(h).

3155 I am not satisfied that Geary would have known that the conduct referred to would cause or was likely to cause substantial and enduring harm to AWB of the kind alleged at paragraph 39.

3156 ASIC did not lead any direct evidence on the damage that would be caused or likely to be caused by the revelation of the Tigris transaction by itself. In my opinion, there is no basis for suggesting that the revelation of the Tigris transaction, which involved the recovery from moneys held on behalf of Iraq of a debt that Iraq conceded it owed Tigris with Iraq's approval, would have led to a Royal Commission, major litigation against AWB, loss of the Single Desk or any damage of the kind referred to in paragraph 39. The money was not going to the regime of Saddam Hussein. At the time of the payments, the USA and its allies controlled the government of Iraq.

3157 I accept that revelation may have may have led to some criticism of AWB, but I do not accept that it would have led to the kind of damage referred to in paragraph 39 or anything close to it and that Geary knew that.

3158 I am not satisfied that Geary was aware of the matters alleged in paragraph 51(h).

Duties of Geary in relation to the Tigris Debt

FASOC – paragraph 52

3159 ASIC pleads that by reason of his position as Group General Manager Trading, the matters alleged at paragraphs 4 to 9 (referred to at 2540 to 2549 above), the

¹⁸⁷¹ ASIC alleges that Geary's knowledge is to be inferred from the matters alleged at sub-paragraphs 40(a) to 40(d) above and the particulars thereto, and from the matters alleged at sub-paragraphs 51 (a) to (g) above and the particulars thereto. Geary's knowledge is alleged to be cumulative and commenced no later than December 2002.

circumstances pertaining to AWB alleged at paragraphs 10 to 39, and his knowledge alleged at 40(a) to (d) and paragraph 51, at all times from March 2001 Geary had the following duties:

- (a) to take reasonable steps when AWB was selling and exporting wheat to Iraq and obtaining payments from the UN escrow account in respect of the Tigris Debt to ensure that AWB was not engaging in conduct that the UN Resolutions had called on member states to prevent, and in particular conduct that would, or would be likely to, result in the receipt by AWB of payment from the UN escrow account other than on account of OFFP humanitarian goods (which duty continued until AWB ceased to receive such payments from the UN escrow account. AWB ceased to receive such payments in respect of the Tigris Debt in November 2004);
- (b) to take reasonable steps to ensure that the ELG, the CRRC and the managing director of AWB were informed of each of the matters alleged at paragraphs 51(a) to 51(h) and thereafter to recommend against AWB's inflation of the contract price for contracts A1670 and A1680 to recover the Tigris Debt and AWB's obtaining of payments in respect of the Tigris Debt from the UN escrow account (which duty continued until Geary ceased to be an officer of AWB);
- (c) to take reasonable steps to prevent AWB from entering into or carrying out contracts for the sale of wheat with the IGB where the contract price had been inflated by an amount calculated to recoup the entirety of the Tigris Debt once both contracts were paid in full (which duty continued until AWB ceased to enter into contracts A1670 and A1680 – including amended versions thereof – in around December 2003, and ceased to carry out contracts A1670 and A1680 in around November 2004); and
- (d) to take reasonable steps to prevent AWB from obtaining payments in respect of the Tigris Debt from the UN escrow account (which duty continued until AWB ceased to receive payments from the UN escrow account in respect of

contracts A1670 and A1680 in November 2004).

3160 Geary denies paragraph 52.

3161 Geary accepts that on 7 February 2003, Whitwell hand delivered to him the memorandum with the Subject: Iron filing rebate and Tigris Petroleum Fee, dated 7 February 2003.

3162 Geary says that whilst there can be no doubt he received the 7 February 2003 memorandum, there can be no sensible basis to find that this meant he knew or ought to have known:

- (a) contracts A1670 & A1680 sent to DFAT/UN did not disclose that the price included a sum for the recovery of the Tigris Debt; or that
- (b) the recovery of the Tigris Debt in the manner set out in the 7 February 2003 memorandum might be contrary to UN Resolutions.

3163 Geary submits that to find that he had such knowledge would be to ignore the following critical matters:

- (a) it is reasonable to infer that by reason of Geary receiving the email of 7 August 2002,¹⁸⁷² Geary was aware that Lindberg (the CEO and Managing Director, ELG member and member of the CRRC), Flugge (the former Chairman) and Johnstone (the Chief Risk Officer and member of the CRRC) were aware the AWB Delegation were requested to stimulate repayment of the Tigris Debt with the IGB.
- (b) it is reasonable to infer that Geary believed AWB's recovery of the Tigris Debt was scrutinised and approved by AWB Legal (and known by the Australian government) as:
 - (i) he was a recipient of the email of 11 September 2002 from Long to

¹⁸⁷² CB 4/2571.

Davidson Kelly;¹⁸⁷³

- (ii) he was copied into the memorandum of 16 September 2002, from Long to the CRRC, AWB Legal, Government Relations, and the Pool Manager.¹⁸⁷⁴
- (c) Lyons deposed she had no reason not to believe AWB Legal did not provide the advice requested in the 16 September 2002 memorandum about the proposed Tigris transaction.¹⁸⁷⁵
- (d) The ELG brief of 1 October 2002 suggested there was a possibility the pre-Gulf war debt (which arose before the UN sanctions and therefore not ‘humanitarian supplies’ under the OFFP) might be paid by the UN.¹⁸⁷⁶
- (e) The ELG (including Lindberg and Ingleby) were informed AWB were suggesting to the IGB that the Iron Filings Claim be offset against the Tigris Debt, with the balance of the Tigris Debt to be recovered against new business (load up contracts).¹⁸⁷⁷
- (f) Lyons deposed that by January 2003, Tigris was a ‘done deal’ and had been approved by AWB legal.¹⁸⁷⁸
- (g) The Tigris matter was discussed within AWB during 2003 in Iraq crisis meetings attended by members of the Executive, including Lindberg, Scales and Mr Johnstone.¹⁸⁷⁹

¹⁸⁷³ CB 4/2651.

¹⁸⁷⁴ CB 4/2679.

¹⁸⁷⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1416, L15, Lyons – XXN Tragardh.

¹⁸⁷⁶ CB 5/2863.

¹⁸⁷⁷ CB 5/2871.

¹⁸⁷⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1418, L5–20, Lyons – XXN Tragardh.

¹⁸⁷⁹ CB 7/4711, [44].

- (h) The 7 February Memorandum does not mention contracts A1670 & A1680 sent to DFAT/UN did not disclose the price included a sum for the recovery of the Tigris Debt.
- (i) Analysis of the 7 February Memorandum clearly shows:
- (i) the 'possible implications for AWB on a corporate governance basis', the legal opinion, the advice from DFAT, and the interpretation of UN sanctions is all focused on the repayment of the iron filings compensation. None of the matters concern recovery of the Tigris Debt;
 - (ii) in relation to Tigris, the heading of the memorandum refers to 'Tigris Petroleum Fee' – this suggests Geary was asked to approve AWB receiving the \$500,000 recovery fee on a pro rata basis as tonnage is shipped (as referred to in the first paragraph);
 - (iii) Geary was also asked to approve the final/third bullet point under the heading 'Actions' namely: '(ISM) to finalise as soon as possible a written agreement with regard to the settlement of the debt.'

3164 The file note of 10 February 2003 from Geary to Lindberg attached the 7 February memorandum does not mention Tigris.¹⁸⁸⁰ Geary submits that this is further evidence that Geary had no requisite knowledge of the alleged Tigris wrongdoing.

3165 Geary says that Lyons deposed that she does not recall ever having the view that the UN might not have signed off on the payment for the contracts which included the Tigris Debt built into the price.¹⁸⁸¹

3166 Geary submits that Lyons deposed that she does not know whether anyone in AWB had a view at any time that the UN might not have signed off on the payment for the

¹⁸⁸⁰ CB 5/3169 when read with 5/3189.

¹⁸⁸¹ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1400, L23–7, Lyons – XN.

contracts which included the Tigris Debt built into the price.¹⁸⁸²

3167 On 29 May 2003, AWB were informed by DFAT that sanctions had ended.¹⁸⁸³

3168 Geary was not a member of the Pool or the IERT in 2003 and had no participation in any of the matters concerning Tigris after the war commenced.

3169 Geary submits that ASIC has not established to the requisite standard of proof that he either knew (or ought to have known) the Tigris Debt wrongdoing and/or had a duty to stop it.

Resolution of paragraph 52

3170 As to the allegations in paragraph 52(a), in the light of my findings as to the knowledge of Geary as alleged by ASIC, I am not satisfied that ASIC has established that Geary owed the duty to take the steps alleged, or alternatively, if he had the duty to take the steps alleged that ASIC has established that he had not discharged that duty.

3171 Geary reported to Lindberg the managing director and had a duty to do so as his immediate superior.

3172 In forwarding the memorandum of 7 February 2003 to Lindberg, Geary informed the managing director of the actions proposed in relation to the Tigris Debt to load up the contract price to recover moneys from the UN escrow account. His covering note of 10 February 2003 to the memorandum of 7 February 2003 discloses that Geary believed that the UN and DFAT would have major problems with the proposed action in respect of the Iron Filings payments.

3173 ASIC submits that the note does not address the repayment of the Tigris Debt. In my opinion, however, the memorandum of 7 February 2003 coupled with Geary's note of 10 February 2003, would have alerted Lindberg to possible problems with the mechanism used to recover the Tigris Debt as well as the mechanism being used to

¹⁸⁸² Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1400, L31 - T1401, L2 (Lyons - XN).

¹⁸⁸³ Exhibit G20.

meet the Iron Filings Claim.

3174 It must be remembered that it was Lindberg who negotiated with the IGB in Baghdad the agreement to use the inland transpiration fee as the payment mechanism to meet the Iron Filings Claim by the IGB. Thus, Lindberg knew that the money for the Iron Filings Claim would be recovered by AWB from the UN escrow account. Lindberg was the author of the loading up procedure. It would not have escaped his attention, that it was also proposed to use the same mechanism of inflating the price of the wheat sold to the IGB to recover the moneys from the UN escrow account in order for AWB to pay Tigris the Tigris Debt.

3175 Lyons agreed she wrote the file note of 20 February 2003. The file note records two conversations. The first was with Long and Whitwell. Lyons noted:¹⁸⁸⁴

- Just wanted to clarify that there is certainly a risk involved in making any pymt

- AWB in making any pymt, is taking a 'view' about the interpret[ation] of the UN Security ... Resolutions - & we must notify the Aust Govt

3176 Lyons recorded her question: 'Have we cleared with Andrew Lindberg.'

3177 Lyons' second note of 20 February 2003 is of a conversation with Geary as follows:¹⁸⁸⁵

- have we cleared this with AL - yes

Memo presented to him about the sensitive/political this is & we will be informing Downer

3178 Lyons did not recall meeting with Geary as recorded in the note.¹⁸⁸⁶ Lyons did not recall whether she or Geary said 'and we will be informing Downer.' The note prepared by Geary the next day suggests that as at 20 February 2003, Geary had not as yet met with Lindberg.

3179 The next day (21 February 2003), Geary wrote to Long with a copy to Lyons informing

¹⁸⁸⁴ CB 3185.

¹⁸⁸⁵ CB 5/3185.

¹⁸⁸⁶ Transcript of hearing, *ASIC v Geary & Flugge*, (5 November 2015) T1362, L25-7.

them that he had signed the memorandum of 7 February 2003 and sent it to Lindberg with a covering note to Lindberg. Geary said, 'We need to sit down face to face with Andrew and tell him of the implications before we move forward. Jess also needs to be involved. I will try to find some time for him next week.'

3180 There are several aspects of the note that regard should be had to. The note must be read in the context of the 10 February 2003 note by Geary. The reference to 'face to face' and 'all the implications before we move forward' and 'Jess needs to be involved,' all infers that Geary wished to raise with Lindberg implications of inflating the price of the wheat to meet from the escrow account the Iron Filings claim negotiated by Lindberg and the recovery of the Tigris debt. Importantly, Geary wanted Lyons from the legal department of AWB to be present in the meeting with Lindberg. This again indicates that Geary wished to ensure the legalities were observed. The note is inconsistent with Geary not seeking to prevent any wrongdoing being engaged in by AWB.

3181 In the context where the legal opinions brought to Lindberg's attention suggested that the transactions may not comply with the UN Resolutions, it is clearly implicit that this is what Geary wished to discuss with Lindberg.

3182 No evidence was led on whether or not Geary did meet with Lindberg soon after the memorandum of 21 February 2003. Although there is evidence that he and Whitwell met Lindberg on the 13 June 2003. Whitwell could not recall whether the 7 February 2003 memorandum was discussed at that meeting. The diary note he made refers to 7 February and suggests it was.

3183 In my opinion, the inference is open that Geary intended to meet with Lindberg.. Lindberg was his immediate superior and there would have been no difficulties in meeting with Lindberg. I am not satisfied that ASIC has established that Geary did not meet with Lindberg. I am not satisfied that ASIC has established that Geary did not inform Lindberg of the need to obtain Australian Government approval for the Iron Filings transaction. The memorandum of 7 February 2003, noted that AWBI had

insisted that Lindberg be apprised of the situation concerning the Iron Filings Claim.

3184 The memorandum of 21 February 2003 written by Geary also infers that Geary wished to ensure that AWB was acting properly. It does not suggest Geary was prepared for AWB to act improperly. The note is consistent with Geary properly performing his duties as an officer of AWB.

3185 The memorandum of 7 February 2003 discloses that the means by which it was proposed to satisfy the Tigris Debt was by an uplift of the price of wheat. The memorandum deals at length with the legal issues surrounding the payment of the Iron Filings claim. The memorandum does not touch on the legalities of the Tigris transaction. The memorandum concludes by saying 'IS&M were to finalise as soon as possible a written agreement with Tigris with regard to the settlement of the debt.'

3186 The memorandum did not draw Geary's attention to any legal concerns regarding the Tigris transaction.

3187 I infer that by reason of Geary receiving the email of 7 August 2002,¹⁸⁸⁷ Geary was aware that Lindberg (the CEO and Managing Director, ELG member and member of the CRRC), Flugge (the former Chairman) and Mr Johnstone (the Chief Risk Officer and member of the CRRC) had been informed the AWB Delegation were requested to stimulate repayment of the Tigris Debt with the IGB.

3188 I also infer that Geary believed AWB's recovery of the Tigris Debt was scrutinised and approved by AWB Legal (and known by the Australian government) as:

(i) he was a recipient of the email of 11 September 2002 from Long to Davidson Kelly (that said that 'the documentation will be scrutinised by our legal department');¹⁸⁸⁸

(ii) he was copied into the memorandum of 16 September 2002, from Long to

¹⁸⁸⁷ CB 4/2571.

¹⁸⁸⁸ CB 4/2651.

the CRRC, AWB Legal, Government Relations, and the Pool Manager (that requested AWB Legal to review the file).¹⁸⁸⁹

3189 ASIC have not established that Geary knew or believed that the Tigris transaction was not examined and approved by AWB Legal.

3190 The concern that Geary displayed with regard to the Iron Filings transaction should be contrasted with the lack of concern he displayed about the Tigris transaction. It is reasonable to infer that Geary did not know, believe or suspect that there were any legal issues concerning the Tigris transaction, particularly where none were conveyed to him by the legal department, or by any one.

3191 I am not satisfied that ASIC has established that Geary was even aware that there was some issue or concern about the Tigris transaction either with the UN or the Australian Government. When one compares the concerns he displayed about the Iron Filings transaction with the lack of concern displayed about the Tigris transaction, there is little to suggest that he owed the duty alleged in paragraph 52(a).

3192 As discussed above, the evidence suggests that Geary was concerned to ensure that AWB acted properly and that the Australian Government's approval was required for the Iron Filings transaction that he had been informed raised issues around complying with UN sanctions.

3193 ASIC has not satisfied me that Geary was advised of or aware of any concerns about the Tigris transaction and whether or not it complied with UN sanctions. The evidence also does not satisfy me that Geary should have been alerted to make inquiries about the propriety of the Tigris transaction.

3194 ASIC's case concerning the Tigris transaction is not based on any specific evidence of Geary's actual knowledge that there were concerns about the propriety of the Tigris transaction. Rather, ASIC seeks to establish his knowledge by a path of reasoning that involves alleging Geary's knowledge of certain matters that when added to together

¹⁸⁸⁹ CB 4/2679.

suggests that Geary did know or should have caused him to inquire as to concerns about the propriety of the Tigris transaction. ASIC's approach, however, ignores or fails to properly take into account the evidence, in particular, the lengthy memorandum Geary did receive on the legality of the payment of the Iron Filings claim, that was silent as to any concern about the legality of the Tigris transaction, and the inference that he believed that the Tigris transaction had been scrutinized by the AWB legal department and approved by the Australian Government.

3195 Geary was not a lawyer. As mentioned earlier, ASIC has not established that Geary knew or believed that AWB was not acting properly in regard to the payment of the inland transportation fees.

3196 AWB had a legal department, AWB Legal. The fact that AWB Legal had examined the Iron Filings transaction and that Geary believed on reasonable grounds that AWB Legal was also to review the Tigris transaction would have suggested to Geary, and a reasonable officer in his position, that if there was any concern about the Tigris transaction that concern would have been conveyed to him. ASIC have not established that any such concern was conveyed to Geary, or that he had any concerns about the legality of the Tigris transaction.

3197 All these elements are relevant in considering whether Geary (or a reasonable person in Geary's position) did not exercise reasonable care and diligence in respect of the Tigris transaction as alleged by ASIC.

3198 As mentioned, ASIC's case does not properly take into account the evidence of Geary's concerns to ensure that AWB acted legally and his intention to inform the managing director of those concerns. As discussed above, ASIC has not established that Geary failed to do so.

3199 ASIC has not established that Lindberg was not informed by Geary of the concerns about the legality of the Iron Filings claim and for that matter any concern Geary may have had (of which there is no evidence) about the legality of the Tigris transaction. ASIC has not established that Geary did not inform the ELG and the CRRC of these

matters or that he knew or believed that they had not been informed of these matters. ASIC's failure should be seen in the light of Geary's previous conduct where he informed Long to report to the ELG on the Tigris transaction as discussed at paragraph 2099. Long was not called by ASIC.

3200 Only Whitwell was called by ASIC and he did not recall whether or not Geary had informed either of those bodies of any concerns. Whitwell was shown his note of a meeting with Lindberg and Geary at which it appeared the 7 February 2003 memorandum was discussed. Whitwell could not recall the meeting.

3201 The evidence of Lindberg would have been central to establishing what Geary did or did not do in advising Lindberg. Lindberg was not called by ASIC. I am not prepared to draw any *Jones v Dunkel* inferences from ASIC's failure to call Lindberg. ASIC has already obtained a civil penalty order against Lindberg relating to the payment of the inland transportation fees by AWB. Nevertheless, ASIC bears the onus of establishing that Geary failed to inform or advise Lindberg about the Tigris transaction as alleged. ASIC has not satisfied that onus; either by calling Lindberg or adducing some other evidence that establishes that fact.

3202 ASIC has not satisfied me that Geary failed to carry out any duty he had to inform Lindberg of the implications of the transactions or that he did not advise him to inform the UN and DFAT, or inform Downer of the Tigris transaction.

3203 On 16 September 2004, Cooper (AWB General Counsel) recommended payment to Tigris. AWB obtained advice from counsel before paying the Tigris Debt. The agreement between AWBI and Tigris was drafted by AWB Legal with the assistance of Quennell – who had been engaged by AWB to conduct a thorough review of the proposed arrangement with Tigris – such review was named Project Water and commenced in August 2004. There is no evidence that Geary was involved in this decision or in any of these actions.

3204 The Project Water summary was signed off by Stott, Long and Whitwell. Approval for the final payment to Tigris was sought and obtained from Scales and Lindberg.

- 3205 Geary submits that knowledge aside, the evidence is overwhelming that AWB's proposal and agreement to recover the Tigris Debt were matters not within Geary's responsibilities or duties. I find that ASIC has not established otherwise.
- 3206 I find that ASIC has not satisfied me that in the circumstances referred to above, that Geary had the duties alleged in paragraph 52(a).
- 3207 As to 52 (b), for the reasons already given, I am not satisfied that Geary owed the duty to inform as alleged, or alternatively, if he had such a duty that ASIC has established that he failed to carry it out.
- 3208 As to the members of the committees, the evidence does establish that the proposed course of action in relation to the Tigris Debt was widely known within AWB. It is reasonable to infer that members of those committees would have known of the proposed transaction.
- 3209 ASIC has not established that any member of those committees did not know the matters known by Geary in relation to the Tigris Debt or that Geary did not inform them of the matters he knew.
- 3210 I am not satisfied that ASIC has established that Geary did not take reasonable steps to ensure that the ELG, the CRRC and the managing director were informed of each of the matters he knew as alleged at paragraphs 51(a) to 51(h).
- 3211 I am not satisfied that it was in the circumstances, Geary's duty to recommend against AWB's inflation of the contract prices for contracts A1670 and A1680 to recover the Tigris Debt and AWB's obtaining of payments in respect of the Tigris Debt from the UN escrow account, or alternatively if it was his duty to do so, that ASIC has established that he did not recommend against AWB's inflation of the contract prices for contracts A1670 and A1680 to recover the Tigris Debt.
- 3212 I am not satisfied that Geary did owe the duty alleged in the terms in which it is expressed, or alternatively, that if Geary did owe the duty alleged that he failed to carry out the duty alleged.

3213 As to paragraph 52(c), in the light of Geary's knowledge, I am not satisfied that Geary owed the duty alleged, or alternatively, if he did owe such a duty that he failed to carry out the duty alleged. As discussed above, ASIC has not satisfied me that Geary knew of or had drawn to his attention any concerns concerning the propriety of the Tigris transaction and that in those circumstances he had any duty to take reasonable steps to prevent AWB from engaging in the Tigris transaction.

3214 As to paragraph (d), for the reasons already given, I am not satisfied that Geary owed the duty alleged.

Contraventions in relation to the Tigris Debt

FASOC – paragraph 53

3215 ASIC pleads that in breach of the duties alleged at paragraph 52:

- (a) Geary took no or no reasonable steps, when selling and exporting wheat to Iraq and obtaining payments from the UN escrow account pursuant to contracts A1670 and A1680, to ensure that AWB did not engage in conduct that the UN Resolutions had called on member states to prevent, and in particular, conduct that resulted in the receipt by AWB of payment from the UN escrow account other than on account of OFFP humanitarian goods
- (b) Geary took no or no reasonable steps to recommend against AWB's inflation of the contract price for contracts A1670 and A1680 to recover the Tigris Debt and AWB's obtaining of payments in respect of the Tigris Debt from the UN escrow account;
- (c) Geary took no or no reasonable steps to prevent AWB from entering into or carrying out contracts A1670 and A1680 when each contract enabled AWB to obtain funds from the UN escrow account in respect of the Tigris Debt; and
- (d) Geary took no or no reasonable steps to prevent AWB from obtaining payments from the UN escrow account in respect of the Tigris Debt.

3216 Geary does not admit paragraph 53. For the reasons given in relation to the allegations in paragraph 52, if Geary did have the duties alleged (contrary to my findings) then I am not satisfied Geary breached them as alleged.

3217 I am not satisfied that ASIC has established that Geary did not discharge his powers and duties with the degree of care and skill that a reasonable person would exercise if they were an officer of a corporation in AWB's circumstances and occupied the office held by Geary and had the same responsibilities within AWB as Geary. Further, I am not satisfied that ASIC has established that Geary did not exercise his powers and discharge his duties in good faith and in the best interests of AWB and for a proper purpose.

FASOC – paragraph 54

3218 ASIC pleads, alternatively, if Geary did not have knowledge of each of the matters alleged at subparagraphs 40(a) to (d) and paragraph 51, then:

- (a) Geary had the means of knowledge of each of those matters; and
- (b) by reason of his position as Group General Manager Trading, the matters alleged at paragraphs 4 to 9, and the circumstances pertaining to AWB alleged at paragraphs 10 to 39, Geary had duties to:
 - (i) inform himself of each of those matters using the means of knowledge alleged at (a) above;
 - (ii) thereafter do each of the things alleged at paragraph 52 above.

3219 Geary does not admit paragraph 54.

3220 For the reasons expressed above, I am satisfied that Geary had the knowledge alleged in paragraphs 40(a) to 40(d).

3221 As to paragraph 51, I am satisfied that Geary had knowledge of the matters alleged in paragraphs 51(a), (b), (c), (d), (e) and (g) but ASIC has not satisfied me that Geary knew the matters alleged in paragraph 51(f) and (h).

3222 I am not satisfied in the circumstances I have found above that by reason of his position as Group General Manager Trading, the matters alleged at paragraphs 4 to 9, and the circumstances pertaining to AWB alleged at paragraphs 10 to 39, Geary had duties to:

- (i) inform himself of each of those matters using the means of knowledge alleged at (a) above;
- (ii) thereafter do each of the things alleged at paragraph 52 above.

FASOC – paragraph 55

3223 ASIC pleads that in breach of the duties alleged at paragraph 54(b) above, Geary:

- (a) failed to inform himself of the matters alleged at subparagraphs 40(a) to 40(d) and paragraph 51; and
- (b) failed to do each of the things alleged at paragraph 52 above.

3224 Geary denies paragraph 55.

3225 For the reasons given above in response to the plea in paragraph 54, I am not satisfied that Geary had the duties alleged and thus was not in breach of the alleged duties.

FASOC – paragraph 56

3226 ASIC pleads that by engaging in the conduct alleged at paragraph 53, alternatively paragraph 55 above, Geary:

- (a) failed to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (i) were an officer of a corporation in AWB's circumstances; and
 - (ii) occupied the office held by Geary and had the same responsibilities as Geary; and
- (b) breached the duty alleged at paragraph 8 and thereby contravened s 180 of the

Act.

3227 Geary denies paragraph 56.

3228 For the reasons given in response to the plea in paragraph 53 and 55, I am not satisfied that Geary breached his duties as alleged.

FASOC – paragraph 57

3229 ASIC pleads that further or alternatively, by engaging in the conduct alleged at paragraph 53, alternatively paragraph 55 above, Geary:

- (a) failed to exercise his powers and discharge his duties in good faith in the best interests of AWB and for a proper purpose; and
- (b) breached the duty alleged at paragraph 9 above and thereby contravened s 181 of the Act.

3230 Geary denies paragraph 57.

3231 For the reasons given in response to the plea in paragraph 53 and 55, I am not satisfied that Geary breached his duties as alleged.

Iron Filings Claim

FASOC – paragraph 58

3232 ASIC alleges that in or about late July 2002, the IGB asserted that certain wheat shipments delivered by AWB to Iraq had been contaminated with iron filings and sought compensation from AWB in relation to those shipments (Iron Filings Claim).

3233 Geary admits paragraph 58.

FASOC – paragraph 59

3234 ASIC pleads that by an agreement made in or about August 2002, AWB agreed to pay to the IGB the sum of US\$6.00 per tonne of wheat that was the subject of the Iron Filings Claim by using the same payment mechanism used to pay the purported fees.

3235 Save that Geary admits that AWB agreed to pay the IGB the sum of US\$6.00 per tonne of wheat that was the subject of the Iron Filings Claim and says further that such agreement was entered on behalf of AWB by its Managing Director, Andrew Lindberg, when he visited Iraq in August 2002, he denies paragraph 59.

3236 ASIC says that the agreement was made orally in a face to face meeting in August 2002 between Lindberg and the Iraq Minister of Trade in Baghdad, Iraq. ASIC says that this agreement was recorded in the memorandum dated 7 February 2003 which Geary provided to Lindberg under cover of a file note dated 10 February 2003.

3237 The memorandum says:

However, in discussions with the Minister of Trade he has continually insisted on repayment directly as an addition to the inland transport and said that this was his understanding of the agreement with Andrew Lindberg - Michael Long was present and confirms that this was discussed. Now that the new contract has been concluded IS&M need a sign off to organize this payment when shipments start.

3238 There are a couple of points to note. First, the Minister of Trade merely referred to his understanding. Secondly, Long only confirmed that 'this was discussed' not agreed. Further, in the email of 7 November 2002 where Whitwell records his visit to Iraq on 28 and 29 October 2002, he says that the Minister of Trade had asked for repayment through the transport mechanism. Whitwell does not say that the Minister asserted that AWB had agreed to use the transport mechanism.

3239 Further, Whitwell visited Iraq again on 21 November 2002 and says in his email of 2 December 2002, that the AWB delegation asked for further clarification on the process of paying the Iron Filings Claim. Whitwell does not refer to any contention that the method of payment had been agreed on.

3240 On 22 August 2002, Lindberg and Stewart met with Foreign Minister Downer and with the Prime Minister Mr Howard (for part of the meeting) and informed Mr Downer of the Iron Filings Claim. Lindberg informed the meeting that AWB had accepted a price reduction for the shipments. The memorandum of the meeting

prepared by DFAT makes no reference to the payment mechanism being agreed.¹⁸⁹⁰

3241 ASIC refers to a list of documents in support of the allegation.¹⁸⁹¹ None of those documents refer to a concluded agreement to meet the agreed rebate using the same mechanism for the payment of inland transportation.

3242 The fact that the memorandum of 7 February 2003 sent to Geary and Long was forwarded by them to Lindberg for his approval of the payment mechanism is not consistent with Lindberg having made an agreement on the payment mechanism in August 2002, at which Long was present.

3243 ASIC did not call Lindberg to seek to establish the agreement. Lindberg was the person alleged to have made it.

3244 I am not satisfied that in or about late July 2002, AWB has made out the allegation that had AWB agreed to pay the IGB the sum of US\$6.00 per tonne of wheat by using the same mechanism used to pay the purported fees.

FASOC – paragraph 60

3245 ASIC alleges that on or about 26 November 2002, DFAT notified AWB that the Iron Filings Compensation would have to be paid by either:

- (a) AWB granting a price reduction on future shipments of wheat to the IGB under contracts A1111/A1112; or
- (b) AWB paying the Iron Filings Compensation back into the UN escrow account (the DFAT Advice).

3246 Geary denies paragraph 60.

3247 ASIC alleges that the advice was in writing by email from Cuddihy of DFAT to Hockey on or about 26 November 2002. ASIC alleges that the material effect of

¹⁸⁹⁰ CB 4/2617.

¹⁸⁹¹ Particulars (A) to (O) to [59] of FASOC.

Cuddihy's email is stated in an email from Hockey to Whitwell, Hogan and Long dated 27 November 2002.

3248 The advice from Cuddihy does not identify or refer to any contract. Stephen's email refers to 'the contract in question.' Hockey's email to Whitwell, Hogan and Long refers to 'additional shipments of wheat to go to Iraq under the contract in question.' There is no reference to contracts A1111 and A1112 in any of the correspondence.

3249 I am not satisfied that ASIC has out this allegation insofar as the allegation relates the advice to contracts A1111 and A1112.

FASOC – paragraph 61

3250 ASIC pleads that at the time AWB received the DFAT Advice, AWB's execution of contracts A1111 and A1112 was complete or almost complete, such that the option of AWB providing a price reduction on future shipments of wheat under contracts A1111/A1112 was not available to AWB.

3251 Geary does not admit paragraph 61.

3252 Whitwell, Hogan and Long received the advice in an email dated 27 November 2002.

3253 The details of contracts A1111 and A1112 discloses that they were entered into in 2001 and that the last payments from the UN escrow account on A1111 was on 19 December 2002 and in respect of contract A1112 was on 20 December 2002.

3254 Accordingly, I accept that a price reduction was not available on contracts A1111 and A1112.

3255 I am satisfied that ASIC has made out this allegation.

Knowledge and involvement of Geary in relation to the Iron Filings Claim

FASOC – paragraph 62

3256 ASIC pleads that at all material times as particularised below, Geary knew each of the matters alleged at paragraph 40.

3257 I have already, made my findings on Geary's knowledge as to the matters pleaded in paragraph 40 at paragraphs 2633 to 2995 above.

3258 Geary denies paragraph 62.

FASOC – paragraph 62(a)

3259 ASIC further pleads in paragraph 62 that at all material times, as particularised, Geary knew that:

- (a) AWB was proposing and had agreed to pay the Iron Filings Compensation by using the same mechanism used to make payments of the purported fees – namely, by payments in internationally traded currency from AWB to Alia which would thereafter be paid by Alia to the Government of Iraq or its instrumentalities.

3260 ASIC gives particulars and alleges that Geary's knowledge is cumulative and commenced no later than November 2002.

3261 ASIC relies on the following evidence.¹⁸⁹²

3262 On 2 August 2002 Johnston sent an email to Lindberg, Ingleby, Stott, Geary, Scales, Gillingham, Morison, Johnstone, Goodacre, Long, Whitwell, Laidlaw, Gibbons, CC to Gomersall.¹⁸⁹³

3263 The email said that 'Iron Powder' had been found in the hatches of two vessels. Assuming that Geary read the email, it does not establish the allegation.

3264 On 2 August 2002, Long sent an email to Oga Venkat and Whitwell with copies to a host of people including Geary. The email refers to the proposed delegation from

¹⁸⁹² ASIC gives particulars of Mr Geary's knowledge. ASIC alleges that Mr Geary's knowledge is to be inferred from the matters particularised at [33], [34], [35], [36], [41], [42], [43], and [47] to [50] of the particulars alleged. ASIC alleges that Mr Geary's knowledge is cumulative and commenced no later than November 2002. ASIC relies on further particulars 9, 10, 12, 13, 15, 16, 17, 18, 19, 22, 23, 24 and 27.

¹⁸⁹³ Geary, FP 9.

AWB to Iraq to discuss the alleged contamination.¹⁸⁹⁴

- 3265 On 5 August 2002, Johnson sent to Lindberg, Geary and others an email which stated that two vessels had been moved off berth until the delegation arrives for discussions.¹⁸⁹⁵
- 3266 On 7 August 2002, Johnson sent to Lindberg, Ingleby, Stott, Scales, Geary and others an email that advised that Iraq had agreed to unload three vessels rejected for iron filings contamination, if the wheat was sieved at a cost of US\$7.00 per tonne.¹⁸⁹⁶
- 3267 On 12 August 2002, Mitchell Morison sent to Sharpe with a copy to Moraitis and Geary an email that stated that IGB was looking for \$7.00 per metric tonne discount on vessels and referred to a delegation going to Iraq.¹⁸⁹⁷
- 3268 On 12 August 2002, McBride sent to Lindberg and 39 others including Geary an email that referred to the publicity surrounding the contamination issue.¹⁸⁹⁸
- 3269 On 12 August 2002, Rasalingam sent to Moraitis, with an attached report, an email that stated that the IGB had sought a \$7.00 per metric tonne discount in light of their quality claim.¹⁸⁹⁹ The report is discussed at paragraph 2071.
- 3270 On 23 August 2002, Edmonds-Wilson sent to Lindberg and many others including Geary an email that said that AWB had successfully negotiated a settlement of the Iron Filings Claim.¹⁹⁰⁰

¹⁸⁹⁴ CB 4/2555.

¹⁸⁹⁵ Geary, FP 10, CB 4/2557.

¹⁸⁹⁶ CB 4/2567, Geary, FP 12.

¹⁸⁹⁷ CB 4/2587, Geary, FP 13.

¹⁸⁹⁸ CB 4/2593, Geary, FP 14.

¹⁸⁹⁹ Geary, FP 15.

¹⁹⁰⁰ CB 4/2621.

3271 On 10 September 2002, Geary was sent an email attaching a CEO report. The report referred to the contamination of two more vessels and that US\$6.00 per metric tonne would be payable.¹⁹⁰¹

3272 ASIC alleges that Geary received a management report dated 12 September 2002 from the AWB Corporate Risk Review Committee.¹⁹⁰² On 12 September 2002, Jane Stegall sent an email to Moraitis, Geary's assistant, attaching the management report.¹⁹⁰³ The report referred to Iraq's claim of contamination of two more vessels and stated that US\$6.00 per tonne would be payable.¹⁹⁰⁴ Geary says that he was not a member of the CRRC at this time.

3273 On 25 September 2002, ASIC alleges that Geary attended a meeting of the board of AWBI where a corporate risk report for the period ending 9 September 2002 was discussed.¹⁹⁰⁵ The report stated that the vessels in respect of which iron powder was allegedly found would be discharged and that US\$6.00 per metric tonne would be payable.

3274 An ELG brief dated 1 October 2002 contained a proposal that the rebates for the Iron Filings Claim be deducted from the Tigris Debt owed by the IGB.¹⁹⁰⁶ ISM required ELG's direction on the proposal. The report said that AWB had received a positive response from the IGB.¹⁹⁰⁷ ASIC alleges that Geary received the document.

3275 The agenda showed that Geary was an apology at that meeting.¹⁹⁰⁸ Lindberg, Ingleby

¹⁹⁰¹ CB 4/2713, Geary, FP [17].

¹⁹⁰² Geary, FP [18].

¹⁹⁰³ Geary, FP [19].

¹⁹⁰⁴ CB 4/2653.

¹⁹⁰⁵ Geary, FP [22].

¹⁹⁰⁶ CB 5/2831, Geary, FP [23].

¹⁹⁰⁷ CB 5/2831.

¹⁹⁰⁸ Exhibit G42, 30.

and Long were recorded as being present among others.

3276 On 7 November 2002, Whitwell sent an email to Lindberg and many others including Geary, that reported on the results of the delegation of Whitwell and Hogan to the IGB.¹⁹⁰⁹ Whitwell reported, inter alia, that they discussed with the Minister both the repayment of the Tigris Debt and the payment for the Iron filings Claim. Whitwell reported that the Minister said that the iron powder rebate of US\$6.00 per metric tonne was separate from other debt issues and that the Minister asked for repayment through the inland transport mechanism.

3277 Whitwell said that the Tigris Debt had cabinet approval for repayment and the final amount would be agreed during the next month and then the mechanism was to be agreed during the next visit.

3278 Geary says that there is no direct evidence that he read this email. He did not reply to it. At the time the email was sent, he was absent from AWB attending the EMBA study leave in Carlton.

3279 As discussed previously, ASIC led no evidence on whether in 2002, Geary was able to access remotely emails sent to his AWB email address. Whitwell was asked by Mr Hill whether he could access his emails away from work. Whitwell said that he knew that later they had that ability but could not recall whether they had that ability around August 2002.¹⁹¹⁰

3280 On 7 November 2002, Whitwell sent Geary an email that attached a trip report. The report disclosed that AWB proposed setting off the Iron Filings Claims against the Tigris Debt. The report noted in relation to the meeting with the Minister on 28 October that:

Vessel rejection claim as per original agreement to be paid through the inland transport payment system against next contract – Phase 13 (this contract, if executed will not commence loading until April 2003 – inland payment will be

¹⁹⁰⁹ Geary, sch A, [41].

¹⁹¹⁰ Transcript of hearing, *ASIC v Geary & Flugge*, (10 November 2015) T1524.

due at end of April 2003 – so we will be holding these funds until such time – good insurance against redirection of vessels in war situation.

- 3281 The 7 February 2003 memorandum from Whitwell to Geary and Long suggests that the original agreement was between the Minister of Trade and Lindberg.¹⁹¹¹ Long was said to be present and confirmed that this was discussed.
- 3282 Geary says that the trip report, attached to the email of 7 November 2002, shows that Lindberg had already made the agreement to pay the Iron Filings Claim through the inland transportation fee mechanism.
- 3283 Geary says that there is no evidence that he (Geary) read this report. As indicated above, he was on study leave from AWB at the time the report was circulated.
- 3284 On 2 December 2002, Whitwell sent an email to Lindberg and others including Geary.¹⁹¹² Whitwell reported on a further trip he made to Iraq on 29 -21 November 2002. Whitwell said that they (AWB) asked for further clarification on the process of payment the Iron Filing rebates.
- 3285 Attached to the email of 2 December 2002 from Whitwell to Geary was a trip report relating to Whitwell's visit to Iraq.¹⁹¹³ The report indicated that the AWB asked whether for corporate governance reasons the issue of the repayment of the Iron Filings debt could be passed through Tigris or through further equipment to be provided rather than through Alia.
- 3286 Geary says that there is no evidence that he read the email and the attached trip report, particularly having regard to the fact that there is no evidence of a reply email by Geary or a discussion with/by Geary about the contents of the email. Geary says that he is one of six recipients of the email, including the CEO, who negotiated the agreement with the IGB to resolve the Iron Filings Claim, the CFO and Stott, an Iraq

¹⁹¹¹ CB 5/3161.

¹⁹¹² Details of the email are at paragraph 2145, Geary, sch A, [43].

¹⁹¹³ Details of the trip report are discussed at paragraph 3/2145, Geary, FP [24].

expert.

3287 Thus, as at the 2 December 2002, there was still no agreement as to how the Iron Filing rebate would be paid.

3288 On 7 February 2003, Whitwell sent a memorandum to Geary and Long.¹⁹¹⁴ The memorandum stated that it was in respect to refunding the IGB the quality rebate through the inland transport payments for the new contracts as requested by the Minister of Trade. The memorandum referred to the methods of payment suggested during the last two visits to Iraq, being, offsetting the debt against the outstanding debt to Tigris, reducing any new contract price by the amount of the rebate on a per metric tonne basis and repaying through the provision of some form of aid.

3289 The memorandum of 7 February 2003 recommended that AWB should use the inland transport fees method as requested by the Minister of Trade but on condition that the Managing director was to convey AWB's intentions to the Australian government. The memorandum recommended that:¹⁹¹⁵

IS&M is to repay debt as per method outlined in AWB's legal opinion (and requested by the Minister of Trade) directly to Alia Transport in Jordan by instalments. IS&M will also look to obtain written agreement from IGB to the payment in the format agreed by legal however it is not guaranteed.

Managing director ONLY to convey our intentions to the Australian Government at the appropriate time prior to shipment. The timing of such a disclosure is important and we would recommend that nothing be done until at least letters of credit are in place for these contracts. Given that this is unlikely to happen until after a war with Iraq it may allow us further chance of renegotiation with a new regime.

IS&M to finalise as soon as possible a written agreement with Tigris with regard to the settlement of their debt.

3290 The memorandum also recorded that Lindberg had agreed to the repayment of the Iron Filings rebate as an addition to the inland transport fee. The memorandum that was signed by Long recorded that Long was present when Lindberg made that

¹⁹¹⁴ The memorandum is set out at paragraph 2184, Geary, sch A, [47].

¹⁹¹⁵ CB 5/3163.

agreement and confirmed that was discussed.

3291 The memorandum also recorded that IS&M insisted that the Managing director be apprised of the situation.

3292 Geary does not dispute that he received this memorandum. His note of 10 February 2003 accompanied the memorandum when it was sent to Lindberg.¹⁹¹⁶

3293 The memorandum disclosed that at that stage AWB was proposing that the Iron Filings Compensation should be paid using the same mechanism used to make payments of the inland transportation fees subject to the Australian government being informed.

3294 Further particular 27 says that around 7 February 2003, Geary had a discussion with Whitwell regarding the Iron Filings Claim, and the possible strategies for managing the claim.¹⁹¹⁷ Whitwell in his evidence when asked about this issue, said that he recalled having one informal discussion about the timing, that war was imminent and that it was highly unlikely that AWB was going to face this issue in a pre-war scenario. He said he did not recall anything else about the discussion.¹⁹¹⁸

3295 ASIC relies on a conversation on or about 20 February 2003 between Geary and Lyons during which they discussed Lindberg approving the payment mechanism proposal referred to in the 7 February 2003 memorandum. The conversation is recorded in a file note.¹⁹¹⁹ I do not construe the note as Geary saying that Lindberg had in fact approved the payment mechanism. The note records 'yes' but the next email of Geary on 20 February 2003 disclosed that Geary still needed to discuss all the implications with Lindberg, suggesting that Lindberg had not made a final decision.

¹⁹¹⁶ The file note is discussed at 2194, Geary, sch A, [48].

¹⁹¹⁷ Geary, FP [27].

¹⁹¹⁸ Transcript of hearing, *ASIC v Geary & Flugge*, (9 November 2015) T1577.

¹⁹¹⁹ The memorandum is discussed at 2215, Geary, sch A, [49].

3296 ASIC refers to the exchange of emails from Long to Geary and Geary's response as to whether Geary had signed the memorandum of 7 February 2003¹⁹²⁰ and that Geary still needed to sit down face to face with Lindberg and tell him of all the implications before 'we move forward.'¹⁹²¹

Resolution of 62(a)

3297 I am satisfied that at or about 7 February 2003, Geary knew that AWB was proposing to pay the Iron Filings Compensation by using the same mechanism used to make payments of the inland transportation fees. I am not satisfied that Geary had this knowledge no later than November 2002 as alleged by ASIC.

3298 The evidence shows that after 10 February 2003 Geary wished to speak to Lindberg about the proposal. As discussed above, ASIC has not established whether Geary did or did not discuss with Lindberg the proposal to pay the Iron Filings claim payment by inflating the price of wheat as referred to in the memorandum of 7 February 2003.

3299 The evidence does not disclose whether or not Geary was informed of Lindberg's decision regarding the recommendations contained in the memorandum of 7 February 2003 and in particular with respect to the Iron Filings claim.

3300 Accordingly, I am not satisfied that at all material times as alleged, that Geary knew that AWB had agreed to pay the Iron Filings claim by using the same mechanism used to make payments of the purported fees, namely in internationally traded currency from AWB to Alia which would thereafter be paid to Alia to the Government of Iraq or its instrumentalities as alleged in paragraph 62(a).

FASOC – paragraph 62(b)

3301 ASIC alleges that at all material times, as particularised below, Geary knew that:

¹⁹²⁰ Emails are discussed at paragraph 3179.

¹⁹²¹ CB 5/3187, Geary, sch A, [50].

(b) the UN Resolutions did not permit the direct or indirect payment of compensation in internationally traded currency by AWB to the Government of Iraq or its instrumentalities.¹⁹²²

3302 As it is, Geary has admitted in his plea to paragraph 40(c) that the UN had called on Australia, as a member state, to ensure that Australia nationals (including corporations registered in Australia) acted in accordance with UN Resolutions, including by preventing the direct or indirect payment by Australian nationals of internationally traded currency to the Government of Iraq or its instrumentalities.

3303 Technically the UN Resolutions did not have the effect of not permitting the conduct alleged. Rather, it called on Australia to prevent such conduct. The Australian Government did not prevent such payments by Australian nationals. The government did prevent the export of wheat to Iraq without approval.

3304 Thus, Geary could not have known the matter alleged.

FASOC – paragraph 62(c)

3305 ASIC alleges that at all material times, as particularised below, Geary knew that:

(a) DFAT and the UN required that the Iron Filings Claim be satisfied (if at all) by AWB refunding the Iron Filings Compensation back into the UN escrow account, or by reducing the price of future shipments of wheat from AWB to the IGB.¹⁹²³

¹⁹²² ASIC provides particulars alleging that Geary's knowledge is to be inferred from the matters alleged at subparagraph 40(c) above and the particulars thereto. The particulars to paragraph 40(c) allege that Geary's knowledge is to be inferred from the matters alleged as to his positions and responsibilities at AWB as paragraphs 4 and 6 above, from the matters alleged as to his knowledge and experience in the grain market in Iraq at paragraph 5 above, and the matters particularised at [2], [4], [14], [21], [39], [47], [48], [49] and [55] of the particulars alleged. Geary's knowledge is cumulative and commenced no later than August 2002. ASIC relies on further particulars 24, 27 and 33.

¹⁹²³ ASIC alleges that Geary's knowledge is to be inferred from the matters alleged as to his responsibilities at AWB at paragraph 4 and 6 above, from the matters alleged as to his knowledge and experience in the grain market of Iraq as alleged at paragraph 5 above, and from the matters particularised at paragraphs 47 and 48 of the particulars alleged. ASIC alleges that Geary's knowledge is cumulative and commenced no later than February 2003. ASIC also relies on further particulars 24, 27 and 33.

3306 The memorandum of 7 February 2003, that Geary signed and forwarded to Lindberg as discussed previously, did canvass whether such a payment would be seen as a breach of the UN Resolutions. On the other hand, the memorandum did repeat legal advice that the payment, if structured in a certain way with an agreement with the IGB, might be able to be made in a form which would comply with the terms of the UN Resolutions.

3307 The memorandum did refer to an informal discussion with DFAT that any repayment of a quality rebate should be either repaid through the UN escrow account or as a contract price reduction. The memorandum said, however, that DFAT had not had a full legal argument put in front of them or been told officially.

3308 The memorandum said that:

In Public affairs opinion as long as the repayment is legal and could not be seen as breaking UN Sanctions then we should proceed (with the proviso that we have an independent legal opinion to that effect – see above legal opinion).

3309 I am not satisfied that ASIC has established that Geary ‘knew’ that DFAT and the UN required the Iron Filings Claim to be satisfied as alleged. As referred to above, the memorandum said that the opinion of DFAT was informal and had not been made in the light of the full legal argument. Geary raised the possibility that the payment mechanism might breach UN sanctions. This is one of the reasons he required Lindberg to take responsibility for the decision after he had been fully informed of the all relevant matters by AWB’s legal counsel, Lyons.

FASOC – paragraph 62(d)

3310 ASIC alleges that at all material times as particularised below, Geary knew that:

(d) the revelation that AWB intended to pay the Iron Filings Compensation in internationally traded currency to the Government of Iraq or its instrumentalities by the same mechanism used to pay the purported fees would cause, or was likely to cause, substantial and enduring harm to AWB of the

kind alleged at paragraph 39.¹⁹²⁴

3311 As discussed above, AWB expected that any payment on the Iron Filings Claim would be made after the Iraq regime had been removed. Whitwell gave evidence that that was the strategy and that he discussed that strategy with Geary before Geary signed his note to Lindberg on 10 February 2003.¹⁹²⁵ Whitwell advised Geary that payments on the Iron Filings claim would not be made until after the war.

3312 ASIC has not satisfied me that if the public became aware that AWB used the UN escrow account to pay the Iron Filings Claim that the reputation of AWB would be damaged to the extent of causing substantial harm to AWB.

3313 On the contrary, the Australian public could have seen the Iron Filings Claim payments as improper conduct by the Iraqi's to obtain additional funds in a situation where AWB had little negotiating power. AWB had informed the Prime Minister and the Foreign Minister Mr Downer about the problem. They were aware that AWB had agreed to pay compensation. Finally, it was likely that the compensation would be paid after the Hussein regime fell which would have lessened public disquiet, if any. ASIC led no evidence as to the likely damage AWB would suffer if the Iron Filings claim was made known to the public.

3314 I am not satisfied that Geary 'knew' the matters alleged.

Geary's responsibilities and duties in relation to the Iron Filings Claim

FASOC – paragraph 63

3315 ASIC pleads that by reason of his position as Group General Manager Trading, the matters alleged at paragraphs 4 to 9, the circumstances pertaining to AWB alleged at paragraphs 10 to 39, and his knowledge as alleged at paragraphs 40 and 62, at all times

¹⁹²⁴ ASIC alleges that Geary's knowledge is to be inferred from the matters alleged at subparagraph 40(j) and the particulars thereto, and from the matters alleged at sub-paragraphs (a) to (c) above and the particulars thereto. ASIC alleges that Geary's knowledge is cumulative and commenced no later than November 2002. ASIC also relies on further particular 24.

¹⁹²⁵ Transcript of hearing, *ASIC v Geary & Flugge*, (11 November 2015) T1659, L4-8, T1677, L1-26.

from March 2001, Geary had the following duties:

- (a) to take reasonable steps to ensure that any payment or arrangement to pay the Iron Filings Claim by AWB would not, or would not be likely to, constitute conduct that the UN had called on member states to prevent, and in particular would not result in the direct or indirect payment of internationally traded currency to the Government of Iraq or its instrumentalities; and/or
- (b) to recommend against the proposed payment of the Iron Filings Compensation by using the same mechanism as used to make payments of the purported fees.

(The above duties continued until the fall of the Government of Iraq on or about 31 March 2003, at which time AWB ceased its attempts to make payments to the Government of Iraq of the Iron Filings Compensation).

3316 Geary denies paragraph 63.

3317 I am not satisfied that Geary did have a duty to take reasonable steps to ensure that any payment would not be made as alleged, or alternatively, that if he did have such a duty that he failed to carry it out.

3318 Further, I am not satisfied that Geary did have a duty to recommend against the proposed payment as alleged, or alternatively, that if he did have such a duty that he failed to carry it out.

3319 Geary put all the relevant facts before the Managing Director. It must be remembered that Lindberg was the author of the Iron Filings payment method. Geary's recommendation was qualified by his recommendation that the approval of the Minister for Foreign Affairs be obtained.

3320 Within AWB, Geary reported to the Managing Director. Geary's department had obtained legal advice from AWB Legal. That advice was included in the memorandum to Lindberg. That advice canvassed the possibility that the payment mechanism proposed would not have been in contravention of the conduct that the

UN had called on member states to prevent. Geary intended to personally meet with Lindberg to explain to him the problems with the proposed payment method.

3321 As indicated above, ASIC did not establish whether such a meeting did or did not take place, or if it did what advice Geary did or did not profer to Lindberg.

3322 What is clear is that the Iron Filings Claim payment method did proceed and was not stopped by the managing director.

3323 In my opinion, ASIC has not satisfied me that Geary should have unilaterally taken steps to ensure that any payment was not made in the manner alleged in circumstances where he had informed the managing director of all the relevant facts by passing onto him the memorandum of 7 February 2003 with his note of 10 February 2003, and, in circumstances where the evidence establishes that Geary intended to speak to Lindberg about the legalities of the payment method proposed and to ensure the Australian Government was informed of what AWB proposed to do in relation to the Iron Filings claim, and there is no evidence that he did not do so or what advice if any he gave Lindberg.

3324 In circumstances where Lindberg was given all the information that Geary had received in the memorandum, I do not consider that Geary was duty bound to seek to overturn the Managing Director's decision

3325 Geary's covering note makes it clear that Geary believed that DFAT and the UN would be informed of the payment method as Geary expected that DFAT and the UN may not approve of the method. Implicit in Geary's covering note is his recommendation that DFAT and the UN be properly informed of what was proposed. Geary says that if DFAT and the UN did not approve of the payment method proposed, another method would need to be found.

3326 Thus, the evidence establishes that Geary always intended to proceed in relation to the Iron Filings claim in accordance with the requirements of DFAT and the UN. The evidence shows that Geary acted honourably and with honesty.

3327 I reject the allegations made in paragraph 63.

Contraventions in relation to the Iron Filings Claim

FASOC – paragraph 64

3328 ASIC pleads that in breach of the duties alleged at paragraph 63:

- (a) Geary took no or no reasonable steps to ensure that AWB's proposed payment of the Iron Filings Claim would not constitute conduct that the UN had called on member states to prevent, and in particular would not result in the direct or indirect payment of internationally traded currency to the Government of Iraq or its instrumentalities;
- (b) Geary recommended the payment by AWB of the sum of US\$6.00 per metric tonne of wheat the subject of the Iron Filings Claim through the same payment mechanism used to pay the purported fees; and
- (c) further, or alternatively to paragraph (b) above, Geary failed to recommend against the proposed payment in relation to the Iron Filings Claim using the same mechanism for paying the purported fees.

3329 Geary denies paragraph 64.

3330 I have found that Geary did not, in the circumstances, owe the duties alleged.

3331 If I am wrong in my findings as to the duties, I find that ASIC has not satisfied me that Geary failed to take the reasonable steps alleged. I refer to the reasons I have already given and add or repeat the following.

3332 I am not satisfied that ASIC has established that Geary did not discharge his powers and duties with the degree of care and skill that a reasonable person would exercise if they were an officer of a corporation in AWB's circumstances and occupied the office held by Geary and had the same responsibilities within AWB as Geary. Further, I am not satisfied that ASIC has established that Geary did not exercise his powers and discharge his duties in good faith and in the best interests of AWB and for a proper

purpose.

3333 As mentioned earlier, ASIC did not establish that Geary did not meet with Lindberg and counsel him about the problems with the payment method proposed. ASIC did not call Lindberg to deny any such meeting took place or that if it did take place, no such advice was given by Geary to Lindberg

3334 Geary's conversation with Lyons from the legal department indicates that he believed that Foreign Minister Downer's approval to the payment method was to be sought.

3335 Further, ASIC did not call Downer to establish that AWB did not inform Downer as Geary recommended to Lindberg.

3336 ASIC's case is virtually silent as to what took place with Lindberg after he was sent the memorandum of 7 February 2003 with Geary's covering note. It was incumbent on ASIC to prove that Geary failed in his duty to counsel Lindberg about the risks involved in the proposed payment of the Iron Filings claim. ASIC have not done so.

3337 Even without that evidence, in my opinion, the fact that Geary made the recommendations that he did with the intentions and beliefs that he had was sufficient to deny ASIC the findings it seeks in respect of the alleged breaches of duty.

FASOC – paragraph 65

3338 ASIC pleads that, alternatively, if Geary did not have knowledge of each of the matters alleged at paragraphs 40 and 62, then:

- (a) Geary had the means of knowledge of each of those matters;
- (b) by reason of his position as Group General Manager Trading, the matters alleged at paragraphs 4 to 9, and the circumstances pertaining to AWB alleged at paragraphs 10 to 39, Geary had duties to:
 - (i) inform himself of each of those matters using the means of knowledge alleged at sub-paragraph (a) above; and

(ii) thereafter do each of the things alleged at paragraph 63 above.

3339 Geary denies paragraph 65.

3340 The first issue is whether Geary knew each of the matters alleged at paragraphs 40 and 62 above. As mentioned when dealing with those matters, in many cases I found that Geary knew of those matters but subject to qualifications.

Knowledge of paragraph 40(a)

3341 ASIC alleges that at all material times Geary knew each of the matters alleged at paragraphs 36 to 38 inclusive.

3342 For the reasons previously given, I am satisfied that at all material times Geary did know each of the matters alleged at paragraphs 36 to 38. Accordingly, paragraph 65 is not engaged, as it is premised on Geary not having the relevant knowledge.

Knowledge of paragraph 40(b)

3343 ASIC alleges that at all material times Geary knew that AWB's wheat sales to Iraq constituted a substantial part of AWB's overall annual wheat sales and were highly profitable for AWB and therefore, commercially, Iraq was a crucial market for AWB.

3344 For the reasons previously given, I am satisfied that at all material times Geary knew the matters alleged. Accordingly, he had no duty to inform himself as alleged.

3345 As I have found that Geary otherwise knew of the facts alleged, paragraph 65 is not engaged.

Knowledge of paragraph 40(c)

3346 ASIC alleges that at all material times Geary knew that the UN had called on Australia, as a member state, to ensure that Australian nationals (including corporations registered in Australia) acted in accordance with the UN Resolutions including by:

(i) preventing the direct or indirect payment by Australian nationals of internationally traded currency to the Government of Iraq or its

instrumentalities; and

- (ii) ensuring that Australian nationals obtained payment from the UN escrow account only on account of OFFP humanitarian goods.

3347 Geary admitted (i) and denied (ii).

3348 As Geary admitted (i), paragraph 65 is not engaged.

3349 As to (ii), for the reasons previously given, I am satisfied that at all material times Geary knew that the UN had called on Australia, as a member state, to ensure that Australian nationals (including corporations registered in Australia) acted in accordance with the UN Resolutions including by ensuring that Australian nationals obtained payment from the UN escrow account only on account of OFFP humanitarian needs or aid.

3350 Accordingly, paragraph 65 is not engaged.

Knowledge of paragraph 40(d)

3351 ASIC alleges that at all material times Geary knew that AWB's sales of wheat to Iraq under the OFFP were subject to scrutiny and authorisation by the UN.

3352 Geary admitted that allegation and accordingly paragraph 65 is not engaged.

Knowledge of paragraph 40(e)

3353 ASIC alleges that at all material times Geary knew that the IGB imposed the purported fees on AWB and that those fees were included in the contract prices in AWB's contracts for the sale of wheat to the IGB.

3354 For the reasons previously given, I am satisfied that Geary knew of the matters alleged and accordingly paragraph 65 is not engaged.

Knowledge of paragraph 40(f)

3355 ASIC alleges that at all material times Geary knew that the purported fees were not

identified or referred to in AWB's contracts for the sale of wheat to the IGB that were submitted to DFAT and the OIP for approval of payment from the UN escrow account.

3356 For the reasons given previously, I am not satisfied Geary knew the fees were not identified or referred to as alleged.

3357 Accordingly, paragraph 65 is engaged.

3358 I am satisfied that Geary had the means of inspecting the contracts for the sale of wheat that were submitted to DFAT and the OIP for approval of payment from the UN escrow account.

3359 Did Geary have a duty to inspect the contracts for the sale of wheat? ASIC alleges that the duty arose by reason of Geary's position as General Manager of Trading, the matters alleged at paragraph 4 to 9 and the circumstances pertaining to AWB alleged at paragraphs 10 to 39 above.

3360 The issue arises whether Geary should have informed himself as alleged in exercising his powers and duties with the degree of care and skill that a reasonable person would exercise if they were an officer of AWB occupying the office that Geary held in AWB with the same responsibilities within AWB in the corporation's circumstances.

3361 In substance, ASIC alleges that such a reasonable person referred would have sought to inform himself about the terms of the contracts.

3362 ASIC does not allege that Geary was aware of any matter that should have alerted him to the need to inform himself about the contracts. ASIC led no evidence to establish that Geary did not believe or suspect that the UN had not approved of the payment of the inland transportation fees. I have already dealt with at length the view held by other AWB officers including the Managing Director, the Chairman of the Board and the Board of Directors that the UN and DFAT had approved the payment of the inland transportation fees.

3363 Unless there was some reason for the reasonable person (referred to in s 180(1) of the

Act) to prompt him to inform himself then there seems to be no basis to contend that Geary should have inquired. Geary's position can be contrasted with that of Flugge, where Flugge was made aware of the inquiries by the UN about the propriety of payments being allegedly made to Iraq. No such allegation has been made in respect of Geary.

3364 AWB's circumstances are also relevant. According to the evidence, it was widely believed in AWB that the UN and DFAT had approved the payment of the inland transportation fees. As indicated above, that is the advice that the managing director gave to the board. Thus the circumstances of AWB include the fact that AWB was operating under the widely held belief that the UN and DFAT had approved the payment of the inland transportation fees.

3365 Accordingly, I find that I am not satisfied that there was a duty on Geary in the circumstances established by ASIC as alleged in paragraph 65.

Knowledge of paragraph 40(g)

3366 ASIC alleges that at all material times Geary knew that AWB had made and (until March 2003) was continuing to make payments of the purported fees in connection with its trade with the IGB.

3367 For the reasons given previously, I am satisfied that Geary did know of the matter alleged.

3368 Accordingly, paragraph 65 is not engaged.

Knowledge of paragraph 40(h)

3369 ASIC alleges that at all material times Geary knew that the fees and purported fees were being paid or had been paid to Alia.

3370 For the reasons given previously, I am not satisfied that Geary knew that inland transport fees were being paid to Alia before 18 February 2002.

3371 I am satisfied that he was aware from and after 18 February 2002.

3372 Accordingly, paragraph 65 is engaged.

3373 ASIC does not plead the facts by which it is alleged Geary had duty to inquire whether the transportation fees were being paid to Alia. Geary knew they were being paid. ASIC does not plead why it was necessary for him to know to whom the fees were being paid.

3374 I am not satisfied Geary did have the duty alleged.

Knowledge of paragraph 40(i)

3375 ASIC alleges that at all material times Geary knew of the matters alleged at paragraphs 23 to 28 and 33(b) and that the payment of the purported fees resulted or was likely to result.

3376 Paragraph 23: ASIC alleges that in the period from June 1999 and March 2003, the IGB imposed a fee on AWB described as the purported inland transportation fee.

3377 For the reasons given previously, I am satisfied that Geary did know of the matters alleged.

3378 Accordingly, paragraph 65 is not engaged.

3379 Paragraph 24: ASIC alleges that in the period November 2000 and March 2003, the IGB also imposed a fee on AWB described as the purported after sales service fee.

3380 For the reasons given previously, I am satisfied that Geary did know of the matters alleged.

3381 Accordingly, paragraph 65 is not engaged.

3382 Paragraph 25: ASIC alleges that the written terms of each contract for the sale of wheat entered into between AWB and the IGB in the period between June 1999 and March 2003 under the OFFP used expressions which suggested AWB had an obligation to deliver or transport wheat to all silos within all Governates of Iraq.

3383 For the reasons previously given, I am not satisfied that Geary did know of the matters

alleged.

3384 Accordingly paragraph 65 is engaged.

3385 For the reasons given in respect of 40(f), I am not satisfied Geary had a duty to inquire into the terms of the contracts as alleged.

3386 As to paragraph 26, ASIC alleges that the purported inland transport obligations was a sham, in that, contrary to the written terms of the OFFP contracts, neither AWB nor the IGB intended that AWB would deliver or transport or arrange to deliver or transport wheat within Iraq.

3387 For the reasons given previously, I am not satisfied that Geary knew of the matters alleged.

3388 Accordingly paragraph 65 is engaged.

3389 For the reasons given in respect of 40(f), I am not satisfied Geary had a duty to inquire into the terms of the contracts as alleged.

3390 As to paragraph 27: ASIC alleges that the price payable to AWB pursuant to each of the OFFP contracts included the amount of the purported fees.

3391 For the reasons given previously, I am satisfied that Geary knew the matters alleged.

3392 Accordingly, paragraph 65 is not engaged.

3393 As to paragraph 28, ASIC alleges that in respect of the OFFP contracts:

- (a) AWB was paid out of the UN escrow account amounts that reflected the full contract price agreed between the IGB and AWB in respect of each such contract, inclusive of the purported fees;
- (b) AWB did not deliver or transport, or arrange to deliver or transport, any wheat to any silo within any Governorate of Iraq; and
- (c) neither AWB nor any person acting on its behalf provided any 'after sales

service' to Iraq in consideration for AWB's receipt from the UN escrow account of the amount of the purported after sales service fees.

3394 For the reasons given previously, I am satisfied that Geary did know the facts alleged.

3395 Accordingly, paragraph 65 is not engaged.

3396 As to paragraph 33(b), ASIC alleges that prior to 21 October 2003, other than as specified in the agency appointment referred to below, Alia's only role was to collect the purported fees on behalf of the ISCWT and remit such fees to the ISCWT, an instrumentality of the government of Iraq.

3397 For the reasons previously given, I found that Geary did not know the fact alleged.

3398 Accordingly paragraph 65 is engaged.

3399 Geary did have the means of knowledge. Several members of AWB were aware of the facts alleged.

3400 Did Geary have a duty to inform himself of this matter?

3401 ASIC alleges that the duty arose by reason of Geary's position as General Manager of Trading, the matters alleged at paragraphs 4 to 9 and the circumstances pertaining to AWB as alleged at paragraphs 10 to 39.

3402 For the reasons given in respect of 40(f), I am not satisfied Geary had the duty alleged in paragraph 65.

Knowledge of paragraph 40(j)

3403 As mentioned above, I am not satisfied that Geary had the knowledge alleged thus paragraph 65 is enlivened.

3404 For the reasons given in relation to paragraph 40(f), I am not satisfied that Geary had the duty alleged in paragraph 65.

Knowledge of paragraph 62

3405 As mentioned above, I am not satisfied Geary did have the knowledge of the matters alleged in paragraphs 62(b), (c) and (d). I am also not satisfied that Geary knew part of the knowledge alleged in paragraph 62(a). In particular, I am not satisfied that Geary knew that AWB had agreed to pay the Iron Filings Compensation by the mechanism alleged in 62(a). Accordingly, paragraph 65 is engaged in relation to these allegations.

3406 For the reasons given in relation to paragraph 40(f), I am not satisfied that Geary had the duty alleged in paragraph 65.

FASOC – paragraph 66

3407 ASIC pleads that in breach of the duties alleged at paragraph 65(b) above, Geary:

- (a) failed to inform himself of the matters alleged at paragraphs 40 and 62 above; and
- (b) failed to do each of the things alleged at paragraph 63 above.

3408 Geary denies paragraph 66.

3409 As I have found that Geary had no duty to inform himself as alleged, I find that ASIC has not made out paragraph 66.

FASOC – paragraph 67

3410 ASIC pleads that by engaging in the conduct alleged at paragraph 64, or alternatively paragraph 66 above, Geary:

- (a) failed to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (i) were an officer of a corporation in AWB's circumstances; and
 - (ii) occupied the offices held by Geary and had the same responsibilities as Geary; and

(c) breached the duty alleged at paragraph 8 and thereby contravened s 180 of the Act.

3411 Geary denies paragraph 67.

3412 As I have found that Geary did not owe the duties alleged, ASIC has not made out paragraph 67.

FASOC – paragraph 68

3413 ASIC pleads that, further or alternatively, by engaging in the conduct alleged at paragraph 64, alternatively paragraph 66, Geary:

(a) failed to exercise his powers and discharge his duties in good faith in the best interests of AWB and for a proper purpose; and

(d) breached the duty alleged at paragraph 9 above and thereby contravened s 181 of the Act.

3414 Geary denies paragraph 68.

3415 As ASIC has not made out paragraph 64 or 66, I find that ASIC has not made out the allegation in paragraph 68.

3416 It is unnecessary to set out the relief sought.

3417 For the reasons set out above, ASIC's claim against Geary is dismissed.

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