



Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme

Volume 1

Summary, recommendations and background



Commissioner
The Honourable Terence RH Cole AO RFD QC

November 2006

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ISBN

Volume 1 0-9803082-0-8
Volume 2 0-9803082-1-6
Volume 3 0-9803082-2-4
Volume 4 0-9803082-3-2
Volume 5 0-9803082-4-0
CD-ROM 0-9803082-5-9

Special note

In quoted material—particularly in translated material and in correspondence—there is often variation in the spelling of the names of people, places and other things. The Inquiry accepted the spelling used in the original material.

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*Inquiry into certain Australian companies in relation to the
UN Oil-for-Food Programme*

24 November 2006

His Excellency Major General Michael Jeffery AC CVO MC
Governor-General of the Commonwealth of Australia
Government House
CANBERRA ACT 2600

Your Excellency

In accordance with the Letters Patent issued to me on 10 November 2005, as amended by Letters Patent dated 6 February 2006, 10 March 2006, 17 March 2006, 22 June 2006 and 21 September 2006, I have inquired into and prepared a report on certain Australian companies in relation to the UN Oil-for-Food Programme.

I have the honour to present to you my report. I return my Letters Patent.

Yours faithfully

A handwritten signature in black ink, appearing to read 'T. R. H. Cole'.

The Honourable TRH Cole AO RFD QC
Commissioner

Contents

Prologue	xi
Summary of events regarding AWB	xiii
Findings.....	lxxxi
Recommendations	lxxxiii
1 United Nations resolutions restricting trade with Iraq	1
Procedures adopted by the 661 Committee to approve contracts.....	11
The Office of the Iraq Programme	14
Variation to procedures: Security Council Resolution 1284.....	14
Revised procedures: Security Council Resolutions 1409 and 1454	16
Interpretation of Security Council resolutions.....	21
Construction of paragraph 3(c) of Resolution 661	24
UN Office of Legal Affairs advice.....	25
The practice of the 661 Committee and the Secretary-General.....	29
Conclusion: interpretation of Security Council resolutions	33
UN procedures related to notification and financing of contracts.....	35
Contractual review by the United Nations.....	51
2 Australian enforcement of United Nations resolutions	61
The status of United Nations resolutions under Australian law.....	61
Implementation of United Nations resolutions in Australian law.....	62
The Customs (Prohibited Exports) Regulations 1958.....	63
The Banking (Foreign Exchange) Regulations 1959	68
3 Imposition of inland transportation fees and after-sales-service fees: Iraq documentation	83
Inland transportation fees.....	84
The after-sales-service fee	85

4	United Nations knowledge of breaches of sanctions: 1999 to 2003.....	101
	The Secretariat’s state of knowledge	102
	The 661 Committee’s state of knowledge	112
	Conclusion	115
5	United Nations investigation into the Oil-for-Food Programme	121
	The expressions ‘illicit’ and ‘kickbacks’	124
	The manner of approval of purchasing contracts	126
	Direct financial transactions with the Government of Iraq or Iraqi companies	127
	The Government of Iraq’s purchasing structure	129
	Inland transportation costs	131
	Introduction of mandatory transportation charges	131
	Payment mechanisms for internal transportation fees	133
	Distribution of internal transportation fees.....	133
	The broadening of the kickback scheme.....	134
	Introduction of after-sales service fees.....	134
	Expansion of the transportation fee scheme	135
	Payment mechanisms for after-sales service fees.....	136
	Front companies.....	136
	Alia for Transportation and General Trade	137
	The final report’s findings in relation to AWB	138
	AWB’s response	148
	Alkaloids of Australia Pty Limited	148
	Rhine Ruhr Pty Limited	154
6	The Letters Patent	157
	Constitutional validity of the Letters Patent	158
	Interpretation of the Letters Patent	159
	A commissioner’s role: amendment of Letters Patent	163
7	Conduct of the Inquiry: principles and procedures	169
	Independence	169
	Investigations and hearings.....	171
	Assessment of evidence	182
	Legal professional privilege	183

Reform of the Royal Commissions Act 1902	189
Public interest immunity claims	190
Dissemination of public materials	192
The requirements of procedural fairness	192
Notification of adverse evidence.....	193
The nature of an adverse finding.....	195
Publication of Counsel Assisting’s submissions.....	196
Costs.....	197
Appreciation	198
8 AWB’s approach to investigation and disclosure	201
The Canadian complaint: January to March 2000	202
The US Wheat Associates complaint: June 2003	204
The UN Independent Inquiry Committee inquiry: 2004 and 2005	221
This Inquiry: 2005 and 2006.....	235
Glossary.....	249
Shortened forms	256

Volume 2 Negotiations and sales
July 1999 – December 2000

- 9 AWB Limited and the AWB group of companies
- 10 AWB's sales to Iraq before July 1999
- 11 AWB's participation in the Oil-for-Food Programme
- 12 The role of the Department of Foreign Affairs and Trade
- 13 July to December 1999: Iraq introduces an inland transportation fee
- 14 October 1999: further sales of wheat to Iraq
- 15 January 2000: a deletion to the AWB short-form contract
- 16 January to March 2000: the Canadian complaint
- 17 April to July 2000: delays and demurrage
- 18 April to July 2000: changes within International Sales and Marketing
- 19 October 2000: a visit to Iraq and subsequent events
- 20 October 2000: an 'eloquent solution'
- 21 November 2000: introduction of the 10 per cent after-sales-service fee
- 22 December 2000: the Arthur Andersen report

Volume 3 Sales, allegations and inquiries
January 2001 – December 2005

- 23 January 2001 to June 2002: more sales to Iraq
- 24 June 2002 to March 2003: contracts A1670 and A1680
- 25 March to September 2003: renegotiation of AWB contracts
- 26 August 2000 to March 2003: inland transportation fees
- 27 BHPP, the Iron Filings Claim, and Tigris
- 28 May 2003 to December 2005: allegations and inquiries

Volume 4 Findings

- 29 The Wheat Export Authority
- 30 The knowledge of the Commonwealth
- 31 Findings: AWB and associated persons
- 32 Findings: Alkaloids of Australia Pty Ltd
- 33 Findings: Rhine Ruhr Pty Ltd

Volume 5 Appendices

Prologue

AWB knew that paying inland transportation fees to Alia was a means of making payments to the Iraqi Government. This plan was concealed from the United Nations.

Justice Young, Federal Court of Australia, 18 September 2006

I have examined in detail the transactions between AWB Limited and Iraq and the relationship of those transactions to United Nations sanctions and the law in Australia. The facts are now not in doubt. It is not my function to make findings of breach of the law; my function is to indicate circumstances where it might be appropriate for authorities to consider whether criminal or civil proceedings should be commenced. I found such circumstances to exist. If proceedings are commenced, and are successful, the consequences for individuals might be great. However, for AWB, any monetary consequence of any proceedings prosecuting authorities might bring would be less significant.

The consequences of AWB's actions, however, have been immense. AWB has lost its reputation. The Federal Court has found that a 'transaction was deliberately and dishonestly structured by AWB so as to misrepresent the true nature and purpose of the trucking fees and to work a trickery on the United Nations'. Shareholders have lost half the value of their investment. Trade with Iraq worth more than A\$500 million per annum has been forfeited. Many senior executives have resigned, their positions being untenable. Some entities will not deal with the company. Some wheat farmers do so unwillingly but are, at present, compelled by law to do so. AWB is threatened by law suits both in Australia and overseas. There are potential further restrictions on AWB's trade overseas. And AWB has cast a shadow over Australia's reputation in international trade. That shadow has been removed by Australia's intolerance of inappropriate conduct in trade, demonstrated by shining the bright light of this independent public Inquiry on AWB's conduct.

How could AWB have conducted itself in such a way as to produce such consequences? I asked Mr Lindberg, without any objection from AWB or its directors, 'Are you able to give me any understanding as to how you think this came about? How it happened in a company like AWB?' Mr Lindberg gave no answer other than to say that it should not have happened. AWB submitted that the question I asked was 'obviously a question the directors must consider and answer'.

I consider the answer obvious.

The conduct of AWB and its officers was due to a failure in corporate culture. The question posed within AWB was:

What must be done to maintain sales to Iraq?

The answer given was:

Do whatever is necessary to retain the trade. Pay the money required by Iraq. It will cost AWB nothing because the extra costs will be added into the wheat price and recovered from the UN escrow account. But hide the making of those payments for they are in breach of sanctions.

No one asked, 'What is the right thing to do?' Instead, much time and money was spent trying to determine if arrangements could be formulated in such a way as to avoid breaching the law or sanctions, whether conduct could be protected, by various subterfuges, from discovery or scrutiny, and whether actions were legal or illegal. There was a lack of openness and frankness in AWB's dealing with the Australian Government and the United Nations. At no time did AWB tell the Australian Government or the United Nations of its true arrangements with Iraq. And when inquiries were mounted into its activities it took all available measures to restrict and minimise disclosure of what had occurred. Necessarily, one asks, 'Why?'

The answer is a closed culture of superiority and impregnability, of dominance and self-importance. Legislation cannot destroy such a culture or create a satisfactory one. That is the task of boards and the management of companies. The starting point is an ethical base. At AWB the Board and management failed to create, instil or maintain a culture of ethical dealing.

A government grant, by legislation, of a monopoly power confers on the recipient a great privilege. It carries with it a commensurate obligation. That obligation is to conduct itself in accordance with high ethical stands. The reason such an obligation is imposed is because, by law, persons are denied choice with whom they may deal.

It is not my function to comment on the grant of monopoly power to part of the AWB group, and I do not do so. Nor is it my function to classify or judge the conduct of AWB against some indeterminate standard, and I do not do so. In my report I describe the conduct of AWB in its dealings with Iraq. It is for others to determine whether, as a matter of public policy, it is appropriate for the law to require persons to deal with a group that behaved in the manner I describe.

Summary of events regarding AWB

This summary is prepared for the assistance of those who wish to gain a rapid understanding of the findings regarding AWB and the recommendations of the Inquiry. It does not explain the details of the findings or the reasoning behind the recommendations. That is contained in the balance of the report. A reading of this summary is not a substitute for a reading of the balance of the report.

United Nations sanctions

In 1990, following the invasion of Kuwait, the United Nations imposed sanctions on Iraq. By Resolution 661 the United Nations required that all states prevent their nationals making available funds to the Government of Iraq, or to persons or bodies within Iraq. The resolution also required that states prohibit their nationals from trading with Iraq, except for the provision of supplies for medical purposes or, in humanitarian circumstances, foodstuffs.

Deprived of hard currency, Iraq was unable to purchase foodstuffs. Hardship was occasioned to its people. In consequence, in 1995 the Security Council adopted Resolution 986, which established the Oil-for-Food Programme. That permitted Iraq to sell oil under UN-approved contracts, with the proceeds of sale being paid into an escrow account controlled by the United Nations. Iraq was permitted to purchase humanitarian goods, including foodstuffs. Contracts for such purposes, if approved by the United Nations, were to be funded from the escrow account. Otherwise, the restrictions on dealings with Iraq imposed by Resolution 661 remained. In 1996 Iraq commenced purchasing foodstuffs under the Oil-for-Food Programme, including significant quantities of wheat from AWB.

By 1999 AWB was selling to Iraq about 10 per cent of Australia's annual wheat exports. It was a large and profitable market. AWB dealt with the Iraqi Grain Board (IGB), an Iraqi Government instrumentality. Sales of wheat were made on 'CIF Free out Umm Qasr terms'. This meant that AWB's contractual obligations terminated on delivery of the wheat to the port of Umm Qasr. Iraq was responsible thereafter for unloading and transporting the grain to the ultimate usage or distribution points.

The introduction of an inland transportation fee

In June 1999, for phase VI of the Oil-for-Food Programme, Iraq, through the IGB, introduced as a condition of tender a requirement that sales of wheat be on terms 'CIF Free on Truck to the silo at all governorates. Cost of discharge at Umm Qasr and land transport will be USD12.00 per metric tonne. To be paid to the Land Transport Co. for more details contact Iraqi Maritin in Basrah'. This tender purported to impose on AWB for the first time an obligation to transport wheat to silos throughout Iraq and to pay a 'discharge and land transport' fee of US\$12.00 per metric tonne to an Iraqi entity, 'the Land Transport Co.'

Mr Emons, AWB's Regional Manager for Middle East and Africa, and Mr Hogan, from AWB's office in Cairo, went to Iraq in June 1999 to discuss the terms of tender with the IGB Director General, Mr Daoud. AWB learnt that the US\$12.00 per metric tonne was to be included in the price quoted by AWB and thus recouped from the UN escrow account. It also learnt that the money was to be paid to 'maritime agents' in Iraq but that the payment could be made to an Iraqi bank in Amman, Jordan. The IGB was to provide to AWB details of the bank account into which the 'discharge and land transport' fee could be paid in Jordan. AWB understood from the June meeting that the US\$12.00 fee was a payment going back to the Iraqi Government.

AWB also understood that payment of hard currency to Iraq was prohibited by UN sanctions. There was much internal discussion in AWB about how the payment of US\$12.00 per tonne could be made to Iraq through an Iraqi entity. AWB knew that if it declined to make the payment it would lose its Iraqi trade. Senior management decided to do what was necessary to retain that trade. Mr Officer spoke with Mr Flugge, the Chairman, about the new Iraqi requirement on the basis that:

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.

In summary, following AWB's receipt of the wheat tender for phase VI of the Oil-for-Food Programme and the visit of Mr Emons and Mr Hogan to Iraq in June 1999, there were widespread communications amongst Messrs Flugge, Officer, Lister, Emons, Owen, Watson, Geary, Snowball and Hogan and Ms Scales regarding the terms of the new tender and how they could be met. It was understood by those discussing these terms within AWB that:

- The inland transportation fee (or trucking fee) was fixed by Iraq.
- It was being paid to Iraq.
- It was being paid for the benefit of the Iraqis.

- Imposition of the inland transportation fee was a method of obtaining US dollars from the UN escrow account.
- AWB did not have to arrange or effect the discharge of the wheat at Umm Qasr.
- AWB did not have to arrange or effect the transportation of the wheat within Iraq.
- AWB was not required to enter into a contract with any transport company.
- The Iraqis would continue to organise the discharge, transportation and distribution of wheat in Iraq, as they had under the earlier phases of the Oil-for-Food Programme and under their earlier contracts with AWB.
- AWB's obligation was limited to payment of the fee set by the Iraqis.
- The Iraqis had said they either had obtained or would obtain UN approval for the payment of the inland transportation fee.
- The method of payment of that fee had not been approved.
- It was up to AWB to find a method of payment that was acceptable to the Iraqis.
- One method of payment suggested by Iraq was payment to an Iraqi bank in Amman, Jordan.
- AWB was not prepared to raise with the United Nations the issue of the transportation fee for fear it might be prohibited by the United Nations, thus costing AWB its Iraq market.

Thus, from mid-1999 AWB knew it was not required to discharge the wheat and effect delivery to all governorates of Iraq, despite any tender or contractual terms to that effect. The obligation to transport the wheat to all governorates was to remain with the Iraqis, as it always had. Suggestions in the tender or contracts to the contrary were a sham designed to deceive the United Nations and extract hard currency from the UN escrow account for payment to Iraq. AWB's obligation was to deliver the wheat to Umm Qasr and to pay a fee in US dollars into an account nominated by the IGB.

Contracts for the sale of wheat

Against this background AWB entered into three contracts in July 1999 and two in October 1999. For each, a short-form contract and a long-form contract were prepared, the short-form by AWB and the long-form by the IGB. The AWB short-form contract for each of contracts A4653, A4654 and A4655 contained the following clause:

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.

The long-form contract expressed the price as being 'CIF F.O.T. to silo at all governorate of Iraq via Umm Quser port'. It made no mention of any discharge cost.

To obtain UN approval to export to Iraq and to receive payment from the escrow account it was necessary for there to be submitted to the United Nations a document called a 'Notification or request to ship goods to Iraq'. Apart from the short-form contracts themselves, the documents submitted for those three contracts made no reference to any 'discharge' or transportation cost. That form and the short- and long-form contracts were forwarded through the Department of Foreign Affairs and Trade (DFAT) and the Australian mission to the United Nations to the Office of Iraq Programme for approval. Approval was obtained from the United Nations, its customs inspectors overlooking the reference in the short-form contract to the provision that the US\$12.00 'shall be paid by sellers to the nominated maritime agents in Iraq'. Under the UN procedures, the customs experts were to check all contracts for 'price and value' and to ensure the contracts did not offend the sanctions resolutions.

Subsequent to the granting of approvals by the United Nations, AWB sought and was granted permission to export wheat under these contracts in various shipments. The permission was granted by the delegate of the Minister for Foreign Affairs and Trade, pursuant to the Customs (Prohibited Exports) Regulations.

None of the documents submitted to DFAT or the United Nations, be they the short-form or long-form contracts, the notifications or request to ship goods to Iraq, or the application for export approval, stated the true contractual arrangements between AWB and the IGB. Shortly stated, the true contractual arrangements between AWB and IGB in relation to these contracts involved the supply of wheat on terms 'CIF Free Out Umm Qasr', with AWB to pay a fee of US\$12.00 per tonne to an Iraqi entity or account nominated by the IGB and, further, that the US\$12.00 fee was to be added to the CIF price and therefore effectively paid out of the escrow account. None of those provisions was disclosed in the documents submitted. Additionally, the short-form contract submitted stated AWB was obliged to pay nominated maritime agents in Iraq the cost of discharging the vessels, capped at US\$12.00 per tonne, with that agent performing those services on behalf of AWB. There was no such obligation. The true arrangement was that the IGB would advise AWB of the account into which the US\$12.00 fee was to be paid. Nor was AWB responsible for delivery 'Free into Truck to all silos within all Governorates of Iraq', as the short-form contract stated. AWB did not make any contractual arrangements for the discharge of the wheat at Umm Qasr or for its transportation within Iraq after discharge.

Thus AWB submitted to DFAT and the United Nations documents that AWB knew did not reflect the true contractual arrangements between it and the IGB in respect of the 3 July 1999 contracts.

In October 1999 two more contracts were signed on the same day. They were contracts A4821 and A4822. Contract A4822 was materially identical to the 3 July contracts, containing a clause in the short-form contract stating that ‘the discharge cost will be a maximum of USD12.00 and shall be paid by the Sellers to the nominated Maritime Agents in Iraq’. The long-form contract said nothing of any discharge cost. In contrast, contract A4821 was treated as a contract under phase IV, not phase VI, and the US\$12.00 fee was thus inapplicable. The price in A4821 was US\$12.00 less than that in A4822. Neither the short- nor long-form contracts for A4821 provided for payment of any discharge or transportation fee.

For the reasons given, the documents submitted to DFAT and the United Nations for contract A4822 did not disclose the true arrangements between AWB and the IGB for that contract.

Payment of the fee to Iraq

Following the discussions in June 1999, AWB knew that the IGB was to nominate the entity and the account into which the fee was to be paid. On 29 August 1999 the IGB faxed AWB, advising it to contact the Iraqi State Company for Water Transport (ISCWT) in Basrah regarding the ‘transport charges’ from Umm Qasr port to all governorates of Iraq. This confirmed AWB’s knowledge that the payments it was to make were to go to an Iraqi government entity. AWB did not contact the ISCWT, nor by October 1999 had the IGB provided details of the bank accounts into which the US dollar fees were to be paid. Mr Emons spoke to Mr Daoud to resolve ‘the payment of the trucking cost as per our contract back to the IGB’. This restated AWB’s knowledge that the monies were to be paid to Iraq. On 9 October 1999 Mr Hogan was told by Mr Daoud that there were two shipping companies in Jordan that could receive the funds—namely, ‘Alia Shipping Co.’ and ‘Water Transport Co.’ He was also told President Hussein had directed all ministries that suppliers to Iraq must pay the US\$12.00 per tonne before the ship carrying the cargo arrived otherwise the ship would not be unloaded. On 19 October 1999 AWB received a facsimile from ‘Alia for Transportation and General Trade’. It stated that Alia was ‘one of the Jordanian Establishment specialised 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’. Alia wrote it had been advised officially that AWB had won a contract to supply wheat to Iraq and offered its services in the field of transport from Umm Qasr in Basrah to other governorates in Iraq. AWB ignored that and a later similar facsimile from Alia as it

was awaiting from the IGB the name and number of the bank account into which it should pay the fees.

By early November 1999 the MV *Pretty Ruby*, a vessel carrying Australian grain under a July contract, was approaching Umm Qasr. AWB had made no arrangements for the grain's discharge, for the transportation of the grain to the governorates of Iraq, or for payment of the fee of US\$12.00. It knew it had no obligation to arrange discharge or transportation and made no efforts to do so. It was simply awaiting details of the account to which the fee should be paid. On 10 and 11 November 1999 Alia faxed to AWB its bank account details at the Arab Land Bank in Amman, Jordan.

There were ongoing discussions between AWB and the IGB regarding whether the US\$12.00 fee was payable on load weight or discharge weight. There was also discussion about amending the letters of credit to remove provisions that required AWB to provide proof of delivery of the grain to all governorates of Iraq (as the contracts stated was AWB's obligation) to obtain payment. AWB required removal of those provisions in the letter of credit because it knew it had no obligation to deliver to all governorates of Iraq and had no control over such delivery since it had made no arrangements for such delivery. Within AWB, executives had decided to seek to distance AWB from payment of the fee. It was agreed within AWB that the 'best means [by] which to arrange to refund the trucking fees to Iraq' was to use shipowners carrying the grain to Umm Qasr to make the fee payments. However, because those arrangements were not concluded and the MV *Pretty Ruby* was approaching Umm Qasr the payment had to be made by AWB direct to Alia. Mr Emons wrote to Mr Officer:

I know this is a little direct but he [Mr Daoud] assured me it is a one off and that the full details will be supplied when we meet him or the company that will be handling the matter in the future.

It was also agreed that AWB would pay 90 per cent of the fee on load weight tonnage, with the balance to be paid after discharge weight was determined.

On 24 November 1999 Alia faxed AWB, stating it had received a fax from the ISCWT noting that the *Pretty Ruby* was to berth that day but that 'remittance in respect of overland transport charges amount to US\$504,000 had not been received yet'. It urgently sought details of the remittance 'to enable us [to] follow up the matter with the appropriate bank here and the Grain Board of Iraq, Baghdad as well as aforesaid company accordingly and remit the subject funds to them'. This made clear that Alia was receiving the funds on behalf of the ISCWT and was to remit the funds so received to that Iraqi government entity. It made equally clear that Alia was not receiving the monies as a trucking fee for services to be provided by it. That confirmed the arrangements that AWB already knew. Mr Emons had confirmed with Mr Daoud that the monies should be paid to the Alia account, details of which Alia had faxed to AWB. The funds were remitted by AWB from its New York account on 26 November

1999. Thus AWB paid the fee to Alia knowing it would be remitted to the ISCWT. AWB made no arrangements for either discharge or transportation of the grain.

Contracts with grain traders

In December 1999 AWB sold grain to grain traders Commodities Specialists Company (CSC) of the United States and Savas Grain & Commodities Limited of the British Virgin Islands. Those companies, which apparently had arrangements with Russian-based trading companies, had contracts with the IGB for the supply of Australian wheat to Iraq. Contract A4908 with CSC and contract A4906 with Savas each contained a clause:

USD per tonne CIF FOT to silo at all governorates of Iraq via Umm Qasr port. This price includes a fee of US\$12.00 per tonne to be paid directly by seller to Grain Board of Iraq advised account, for each shipment at latest three days prior to arrival of each shipment.

In contrast, contract A4907 was treated as a phase V contract and thus, as Savas advised AWB, 'The payment of US\$12.00 per m tonne for inland transportation was not required'. In consequence, the price of the wheat in contract A4907 was US\$12.00 per tonne less than the price in contract A4906, signed the same day for wheat of the same quality.

The clause quoted accurately described the US\$12.00 fee as being a fee to be paid directly to the IGB-advised account. It was not described as a 'discharge' cost or a transportation cost. The clause in the two contracts is to be contrasted with the July and October contracts describing the fee as a 'discharge cost'.

UN approval to ship the grain under the contracts with CSC and Savas had been obtained by the Russian Federation. It was that approval that was submitted to DFAT when permissions to export under the Customs (Prohibited Exports) Regulations were sought. That meant the contracts between AWB and the Russian companies – which plainly stated AWB's obligation to pay a US\$12.00 per tonne fee 'directly to the Grain Board of Iraq advised account' – were not submitted to DFAT when export approval was sought. AWB did not tell DFAT of the clause in its contract with the two Russian companies requiring it to pay a fee to the IGB-nominated account.

Thus between June and December 1999 AWB entered into eight contracts for the sale of grain to Iraq. Four of the short-form contracts referred to 'the discharge cost which will be a maximum of US\$12.00 and shall be paid by the sellers to the nominated maritime agents in Iraq'. The four corresponding long-form contracts made no reference to any discharge cost or any payment of US dollars to any entity in Iraq. None of the short-form or long-form contracts in truth reflected the arrangements made between AWB and the IGB for the sale of grain under those contracts. Two contracts with the Russian grain traders accurately described one aspect of the true

arrangements—namely, the obligation on AWB to pay ‘a fee of US\$12.00 per tonne to be paid directly by seller to Grain Board of Iraq advised account for each shipment at least three days prior to arrival of each shipment’. However, those contracts were not shown to either DFAT or the United Nations. The remaining two contracts reflected sales under prior phases of the Oil-for-Food Programme and did not attract the US\$12.00 fee. The prices were, accordingly, US\$12.00 per tonne less than corresponding contracts entered into on the same day for grain of the same quality.

Attempts to hide the payments to Iraq

AWB decided to try to hide the payments it was making to Iraq. It had been forced to make some payments to Alia directly because alternative arrangements were not in place and ships would not be unloaded until the fee had been paid. Unavoidably, the payments to Alia were ‘a little direct’.

The reason AWB sought to hide the payments to Alia, knowing such payments were payments to Iraq, was it knew that payments to Iraq were contrary to UN sanctions and Australian government policy. That was made explicit in a 7 March 2000 email from Mr Emons to Mr Bali at Ronly Holdings Limited:

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 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 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 scarred of getting caught up in sanctions etc. and everything that could entail for their business. The other companies problems 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.

This email makes clear that AWB knew:

- A fee for ‘trucking in Iraq’ was to be included in the wheat price.
- The fee was to be recovered by AWB from the UN escrow account by its inclusion in the wheat price.
- AWB was to pay the US dollar fee to Iraq.
- Iraq would tell AWB how the fee was to be paid to it.
- AWB knew that payment of such a fee to Iraq was prohibited by UN sanctions and Australian government policy.
- Accordingly, it was necessary to hide or disguise the payment of the fee to Iraq.
- AWB and Iraq, through the IGB, had agreed to the fee being paid to a ‘third party’ as part of the hiding of the payment.

It necessarily follows that AWB cannot maintain that payment of the trucking fee was approved by either the UN or the Australian Government because AWB had deliberately hidden or disguised the payment of the fee to Iraq and knew that neither the UN or the Australian Government was aware of it making payments to Iraq.

AWB sought to hide the payments and to distance itself from them in three ways. First, it amended the charterparties with willing shipowners so that it paid to the shipowner the ocean freight plus the US\$12.00 fee, with the shipowner having the obligation to pay that fee to the ISCWT or Alia. In some instances AWB paid the shipowner a fee for so doing. In any event, the shipowner had the use of the money between sailing from Australia and arrival in Iraq. Thus AWB under that arrangement made no payment direct to Alia. Not all shipowners agreed to that arrangement. Some declined because they thought the payments were in breach of UN sanctions. Another declined when the transactions were investigated by Singaporean authorities as suspected money laundering. Others declined because there was no satisfactory reason forthcoming from AWB as to why it did not itself make the payments direct to Alia.

Second, AWB interposed an intermediary between itself and the shipowner. The intermediary was Ronly Holdings Limited, an English company, or its nominee. Ronly established a nominee company, called Tse Yu Hong Metal Limited in Liechtenstein. That company was used by AWB in two ways. First, Tse Yu Hong Metal Limited was interposed in charterparties AWB had entered into with shipping companies. AWB, Tse Yu Hong Metal Limited and the shipowner entered into back-to-back contracts of affreightment on voyage charterparty terms. AWB Chartering paid freight and inland transport fees to Tse Yu Hong Metal Limited under the terms

of the contract of affreightment between AWB and Tse Yu Hong Metal Limited; thereafter, under the back-to-back contracts with the shipowner, Tse Yu Hong Metal Limited paid the same freight and transport fee to the shipowner, which paid the inland transport fee to Alia. The second method was for AWB to pay the freight to the shipowner in the usual way but to pay the inland transport fee to Tse Yu Hong Metal Limited, which then paid it to Alia. Tse Yu Hong Metal Limited received a fee of US\$0.20 per tonne for providing either service.

These methods were established in March 2000.

There was no sensible basis for making the payments to Tse Yu Hong Metal Limited, at a cost to AWB, rather than paying the fee directly to Alia, except to seek to disguise AWB's making of the payments to Alia.

According to a letter written by a director of Ronly to AWB in July 2002:

I was present during the meetings and discussions which took place with Trevor Flugge, the then Chairman of AWB, Michael Watson, the then head of chartering and Nigel Officer and Mark Emons who, at that time were responsible for AWB's business with Iraq. Paul Ingleby head of AWB's finance department was also fully aware of and authorised these transactions ...

In early 2000 the AWB became concerned at whether payments which they were making for inland trucking in Iraq were in breach of sanctions against Iraq. The AWB approached us for assistance.

Third, AWB changed the wording of its short-form contract to remove any reference to the payment of a US dollar fee for 'discharge' cost. The short-form contract then read, 'USD pmt CIF FOT to silo all governorates of Iraq via Umm Qasr port'.

It was said this was to align the terms of the AWB short-form contract with the IGB long-form contract, which omitted any reference to a monetary sum for a discharge cost. If the objective was to make the short- and long-form contracts compatible, the proper approach would have been to ask the IGB to amend the long-form contract because the short-form contract at least made reference to the payment of a discharge cost. Aligning the short-form contract with the long-form contract effectively removed from scrutiny all reference to payment of a US dollar sum to an Iraqi entity.

The true reason was, as Mr Emons said, 'We didn't want to advertise the fact that we were paying a fee'.

This change occurred in all AWB contracts signed with the IGB after October 1999.

The Canadian complaint

In January 2000 the United Nations was advised by Canada of a requirement by the Iraqi Ministry of Trade that the Canadian Wheat Board deposit US\$700,000 in a Jordanian bank account allegedly to cover transport costs of US\$14.00 per tonne for wheat under a proposed contract. The Canadian Wheat Board refused to make the payment and did not get the contract. It was alleged that ‘similar arrangements had been made with the Australian Wheat Board’.

The United Nations raised the matter with the Australian mission to the United Nations, which referred it to DFAT. DFAT inquired of AWB about the accuracy of the report. AWB, through Mr McConville, its Government Relations Officer, without inquiry of AWB officers, emphatically denied the allegations, describing them as ‘bullshit’. DFAT so reported to the Australian mission, which advised the United Nations.

Ms Johnston, the Chief Customs Officer at the Office of Iraq Programme, in January and February 2000 checked AWB contracts to see if they disclosed any irregularity. In January she looked at contract A4821, which contained no reference to a ‘discharge fee’ or to US dollar payments, merely stating a CIF price per tonne. In February, she looked at contract A4822. It provided:

The cargo will be discharged Free Into Truck to all silos within all Governorates of Iraq ... The discharge cost will be a maximum of USD12.00 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.

Ms Johnston overlooked this clause. However, she noted that the contract referred to:

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.

Ms Johnston raised with Mr Nicholas, of Austrade in New York, the issues of any ‘irregularities in AWB contracts’ and the issue of a parallel contract with ‘standard terms and conditions’.

In March 2000 Mr Nicholas raised these matters at a meeting in Washington DC with AWB attended by Mr Flugge, the AWB Chairman, Mr McConville and Mr Snowball from AWB’s US office. AWB assured Austrade there were no irregularities in its dealings with Iraq. It said it would provide a full response to the United Nations. Mr Snowball knew the complaint related to payment of trucking fees. On 15 March he spoke by telephone with Mr Emons, who faxed to the IGB, under the heading ‘UN Enquiry concerning trucking fees’:

We wish to advise that the office of AWB Limited 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.

There could be no reason to keep confidential payments to a Jordanian trucking company if AWB believed the payment was for a genuine service. AWB knew it was not.

Also on 15 March 2000, Mr Snowball faxed Mr Emons:

Alistair (Nicholas) mentioned that someone at the UN was asking him quietly/informally 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 that we'd look at the UN request...

5. Bronte (Moules) 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 the standard terms and conditions in AWB contracts then I think we have nothing to worry about. We should ensure that we do provide something to DFAT when they contact you.

As Mr Snowball wrote, and Mr Emons said in evidence, if the UN inquiry was about the discharge or trucking fee, there was something to worry about; if it was about standard terms and conditions, there was not.

In April 2000 a copy of the 'standard terms and conditions' was provided to the United Nations. AWB advised that the standard terms and conditions did not apply where they were contrary to 'UN policy to trade with Iraq'. That was the case with the 'demurrage/despatch' clause. Nothing was said about discharge or trucking fees, although AWB knew this was the true cause of the United Nations' concern.

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

Contracts A4970, A4971 and A4972

Contracts A4970, A4971 and A4972 were entered into with the IGB in February 2000. The contracts were under phase VII of the Oil-for-Food Programme. The relevant Iraqi tender for this phase included, in relation to the price:

CIF Free on Truck to all silo to all governate of Iraq. Cost of discharge at Umm Qaser and land transport will be U.S.D. (14) per metric ton. To be paid to the Land Transport Co ...

Following negotiations between the IGB and AWB, an agreement was reached that AWB would pay the IGB a fee of US\$15.00 per tonne and that fee would be included in the price. AWB drafted short-form contracts that contained a clause in substance the same as the 'discharge costs' clause in the earlier contracts, except that the cost was specified as a maximum of US\$15.00. However, by the time the short-form contract came to be executed, the clause had been deleted from the contract. The IGB-prepared long-form contracts made no reference to the payment by AWB of a discharge cost, transport cost or fee. Both forms of contract expressed the terms to be 'CIF Free on Truck to all silos within all governorates of Iraq'. Neither form of contract revealed that the CIF Free on Truck price had included in it the fee payable by AWB to Iraq.

The consequence was that the contracts submitted to DFAT and the United Nations did not reveal in any way AWB's obligation to pay a fee, or that the fee had been included in the price, or that the fee was payable to an Iraqi entity. By referring to the terms as 'CIF Free on Truck to all silos within all governorates of Iraq' the contracts suggested that AWB's contractual obligations included discharge and delivery. In truth, however, as with prior contracts, AWB had no obligation to discharge or transport the wheat to all governorates: its obligation was to pay the specified fee to the entity nominated by the IGB. The reason the reference to a 'discharge cost' was removed from the draft short-form contracts was to conceal from DFAT and the United Nations AWB's obligation to make the fee payment. The contracts were finalised within weeks of the Canadian complaint having been raised with AWB. AWB knew that the United Nations, and DFAT, were looking into the very matter of payments of US\$14.00 per tonne of wheat 'outside the Oil-for-Food Programme' and to an account in Jordan. Any contract that contained a requirement to pay a US dollar sum would have been known to be likely to be subject to close scrutiny. As Mr Officer said, the removal of the clause was consistent with AWB's position of not highlighting the payment of the discharge or trucking fee.

The contracts submitted with the associated documents to DFAT and the United Nations did not record or reflect the true arrangements between AWB and the IGB. AWB was not responsible for delivering the wheat free in truck to all governorates, as the short-form contract provided; AWB was obliged to pay a fee of US\$15.00 per tonne to an Iraqi entity, a matter not revealed by the contracts; and the fee payable by AWB to the Iraqi entity was included in the contract price, another matter not disclosed. These matters were deliberately and dishonestly concealed from DFAT and

the United Nations. Contemporaneously with the Canadian complaint, which made apparent that the United Nations and DFAT were investigating payments outside the Oil-for-Food Programme, AWB removed from the short-form contract with Iraq reference to payment of that fee, although it had been included in the draft contracts. Further, AWB disguised the payments to the Iraqi entity by the interposition of Ronly, Tse Yu Hong Metal Limited and Alia.

More Russian contracts

In February, March and April 2000 AWB entered into three further Russian trade contracts, which became contracts A4993, A0662 and A0101. These contracts were negotiated contemporaneously with the documentation of contracts A4970, A4971 and A4972, from which there was removed in the short-form contract any reference to any payment of a 'discharge cost' or US dollar sum to any Iraqi entity. Yet the contracts AWB entered into with Savas Grain and CSC contained such a provision.

The formal contract for A4993 and A0662 with Savas provided for a price:

CIF FOT to silo at all governorates of Iraq via Umm Qasr Port.

This price includes a IGB nominated trucking fee to be paid directly by Sellers to trucking company advised account for each shipment at latest three days prior to arrival of each shipment.

This differed from the previous contract with Savas in that the fee was now described as 'a IGB nominated trucking fee', the amount of the fee was not disclosed, and the payment was now expressed to be to the 'trucking company advised account' rather than the 'Grain Board of Iraq advised account'. AWB paid a fee of US\$15.00 per tonne. It did not obtain approval from the United Nations, relying on that obtained by the Russian Federation. Accordingly, the contract between AWB and Savas was not submitted to DFAT or the United Nations. In applying for permission to export from Australia, AWB relied on the United Nations approval obtained by the Russian Federation. Thus it did not advise DFAT of its agreement or obligation to pay 'a IGB nominated trucking fee'.

Contract A0101 with CSC was in similar terms, except it provided 'this price includes a fee of USD15.00 per tonne to be paid directly by Sellers to Grain Board of Iraq advised account'. This contract was also not submitted to DFAT or the United Nations, reliance for permission to export being placed on the UN 661 Committee approvals obtained by the Russian Federation. The contracts submitted by the Russian Federation to the United Nations to obtain approval in respect of the Savas and CSC contracts made no mention of discharge costs, transport fees or US dollar payments.

Delays and demurrage

By April 2000 AWB was suffering significant costs in consequence of delays in discharging ships at Umm Qasr. As a result, AWB was obliged to make substantial payments of demurrage to shipowners. Under the terms of its contracts with Iraq, there was no provision for payment of demurrage and despatch, and thus the demurrage AWB was obliged to pay to shipowners was not recoverable by AWB from Iraq. The United Nations would not approve a demurrage and despatch clause in contracts because it had the potential to result in payments of US dollars to Iraq, which was prohibited by the sanctions.

A delegation from AWB wished to discuss these problems, and possible solutions, with the new Director General of the IGB, Dr Rahman, but could not make appropriate arrangements to do so since Dr Rahman was avoiding meetings. In addition, the IGB had advised that the future trucking fee would be US\$15.00 per tonne, rather than the US\$12.00 AWB had been paying.

Mr Emons discussed these problems with Mr Flugge in late March 2000 and emailed Mr Watson, AWB's Chartering Manager, on 4 April 2000:

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 USD15 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 Iraqis so that our business does not come under threat from our US or CWB friends.

On 5 April 2000, following his discussion with Mr Flugge the previous week, Mr Emons emailed Dr Rahman:

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 programme.

On the same day Mr Emons drafted a letter for signature by Mr Flugge. It restated the position agreed between Mr Flugge and Mr Emons in their discussion in late March – that AWB should accommodate Iraq's requirements to ensure preservation of the Iraq trade, even if that involved acting contrary to UN sanctions. Mr Emons' letter, signed by Mr Flugge, stated in part:

While in Baghdad I will ask AWB to discuss the recent communications 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.

The 'recent communications from United Nations concerning trucking fees' was the UN inquiry of AWB following the Canadian complaint regarding whether AWB was making any payment to Iraq outside the Oil-for-Food Programme. The passage quoted is an acknowledgment by AWB that it knew of that inquiry, that it knew the United Nations and the Canadian and American Governments had raised with the United Nations the issue of whether such payments were contrary to sanctions but that, notwithstanding this, AWB intended to continue making the trucking fee payments to Iraq in breach of sanctions, as it had previously agreed.

With the IGB prevaricating about a meeting, AWB decided to use the knowledge of both AWB and the IGB that payment of the trucking fee was contrary to UN sanctions as a 'direct threat' to force a meeting. The threat was effective only because both AWB and the IGB knew the trucking fee was a payment to Iraq. AWB knew Iraq would not want disclosure of the trucking fee arrangements to the United Nations because it would be likely to result in the whole transportation fee structure being disclosed and dismantled. Accordingly, AWB wrote to the IGB on 7 April 2000:

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 the sensitivity however if you would prefer we can discuss with the UN as to the appropriate method of paying for the trucking fee? Please respond by Monday 10th April so an alternative action can be undertaken that does not result in the delay of vessels.

Mr Emons addressed this issue in evidence:

Q: Quite directly, you were using the fact of the illegality as a threat.

A: Quite; correct.

Q: You knew at that time, from the evidence you've given to this point-I think we can infer that the Iraqi's were imposing similar conditions on other traders.

A: That's correct.

Q: And if you wanted to trade with Iraq-that is, export goods to Iraq-you had to pay such a fee. So what you were threatening was the reporting in effect of the whole system?

A: Correct. Mr Agius, to put it in context, I mean, AWB had two choices: we either complied with the IGB's requirements under their contracts; or we allowed the wheat market to disappear altogether to other companies. We wouldn't allow that to happen without taking some action against the Iraqi's, and this is where the suggestion would come through, that

we would make the UN aware completely of the trucking arrangements for everybody. Therefore, hopefully, we might be able to have a more reasonable response.

On the way to the resulting meetings to discuss discharge improvements at Umm Qasr, AWB met with Alia. Alia advised the appointment of a 'protective agent' at Umm Qasr to improve discharge. The cost was US\$9,000 per vessel. AWB entered into a written agreement with Alia for provision of that service. In contrast, there was no written agreement with Alia in relation to any provision of trucking services involving the payment of millions of dollars. This was because AWB knew it was not in fact responsible for providing trucking services under its contracts with the IGB and that Alia in fact did not provide trucking services to transport its wheat. At the meetings in April 2000 with Alia, at which the provision of a 'protective agent' was agreed, there was no discussion of trucking by Alia or the trucking fee.

In April and May 2000 there were meetings between AWB and Alia to discuss discharge problems. Messrs Emons and Watson stated, in an email describing the meetings:

13. IGB recognise current demurrage pain, however in Zuhair's words 'we have had a long term relationship with AWB whereby in past years AWB has earned dispatch and IGB has never asked for reduction'. IGB fully prepared to assist in some form of compensation in future contracts, either by reduction of trucking fee or increase in prices and have asked for supply of further 1 million tonnes.

And Mr Emons, in a file note on the meeting, wrote:

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 Russian, Thai and Algerian companies. Comment was made that the Minister had proposed to increase the trucking fee to USD18 per tonne for phase 8 contracts but at the time of the meeting no approval had been received from the President.

Both these reports recognise that the so-called trucking fee was known by AWB to be an impost imposed by the Iraq regime and to be paid to Iraq. Both documents spoke of compensation to AWB for future delays in discharge being met by 'reduction of trucking fees'. This 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 the supposed trucking company in Jordan, Alia. An Iraqi Minister of State would not be involved in determining the quantum of a genuine trucking fee between an Australian company and a Jordanian company.

In June 2000 the IGB rejected a part shipment alleging contamination. In July a further AWB delegation visited Iraq to discuss that rejection and matters related to improving

discharge rates. It was not suggested that insufficient trucks were a cause of discharge delays. In July Mr Stott had rejoined AWB. He was aware of the discharge problems and of the prohibition on paying US dollars to Iraq. On 31 July he wrote:

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 effect is, that the Iraqi's discharge our vessels at low rates and we get hit with massive demurrage bills. Solution, change contract to guarantee discharge rate with Iraq being obliged to pay Dem and earn dispatch. AWB to keep the Dem/dispatch account for Iraq and settle with owners on behalf of Iraq's surplus funds if and when available to be refunded in Iraq.

Thus Mr Stott knew of the UN sanctions prohibiting payment of monies to Iraq, and thus payment of despatch to Iraq, and suggested a means of circumventing those sanctions by maintaining a demurrage and dispatch account in Australia. As noted below, the proposal was put to DFAT, which rejected it as being a breach of the sanctions.

In August 2000 AWB wrote to DFAT asking if contractual terms with Iraq could be amended to impose a demurrage and despatch provision. AWB proposed it would operate a trust account into which any despatch earned by Iraq would be paid, such funds to be used to provide grain-handling equipment and technical training. This would avoid AWB paying money to Iraq contrary to sanctions. AWB did not spell out how Iraq would pay to AWB demurrage for slow unloading.

DFAT responded that such a trust account would breach the UN sanctions because 'money paid to Iraq must be paid into an escrow account established by SCR 707 and 712 or in accordance with SCR 986'. However, it advised:

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

AWB was thus told, in terms, that it could not pay monies to Iraq. The demurrage problem remained.

Restructuring

In April 2000, upon Mr Rogers' resignation, Mr Lindberg was appointed Managing Director of AWB. This resulted in management changes. Messrs Officer and Emons resigned in June. Mr Stott was appointed in July.

Before his resignation Mr Officer required a release in the following terms:

8. AWB acknowledges that it (by its Board and Chief Executive Officer) authorised agency payment during the period 15 December 1999 to 9 June 2000 to overseas agents for sales.

He required that release because of concern about the legality of the payment of agency fees in Pakistan and because he began to realise that the payments of inland transport fees in Iraq might be 'questionable as a matter of law' as being 'facilitation fees'.

Mr Lindberg agreed to the release after discussing it with Mr Flugge. In that discussion Mr Lindberg did not refer to the payment of the transportation fees to Alia.

Mr Emons required and received a similar release.

In July 2000 Mr Stott terminated the use of Ronly and Tse Yu Hong Metal Limited as a conduit for the payment of both shipping freight and inland transportation fees. Mr Stott said he was told the trucking fee had been approved by the United Nations but that AWB nonetheless wished to distance itself from the payment and so used Ronly as an intermediary. He said he accepted the first part of what he was told but not the latter part, believing that the use of Ronly was to benefit Ronly and to allow, in some unexplained way, AWB employees to steal from AWB. Although he ceased the use of Ronly and Tse Yu Hong Metal Limited, he paid the latter company the US\$0.20 per tonne for the whole 1.5 million tonnes referred to in AWB's contract with Ronly.

Mr Stott decided that all payments to Alia were to be made directly by AWB. This also meant that payment of inland transport fees through shipowners ceased.

Contracts A0265, A0266 and A0267

In July 2000 AWB concluded contracts A0265, A0266 and A0267 with the IGB for the sale of 1 million tonnes of wheat. These contracts were under phase VIII of the Programme. The Iraqi tender was in essentially the same terms as the phase VII tender, in that it required the supplier to pay US\$14.00 per tonne to the ISCW. As with contracts A4970, A4971 and A4972, the short- and long-form contracts for A0265, A0266 and A0267 that AWB submitted to DFAT and the United Nations did not contain any reference to an obligation on the part of AWB to pay a 'discharge cost' or fee of any sort or that this fee was added to or included in the contract price. It is clear, however, that the arrangements between the IGB and AWB did include the payment of a fee: fees of US\$14.00 per tonne were paid in respect of each of the shipments made by AWB under these contracts. All the fees were paid by AWB Chartering, direct to Alia.

The October 2000 delegation to Iraq

In October 2000 Messrs Stott and Hogan met the IGB in Iraq. The objectives were to examine the continuing constraints on discharge rates and to endeavour to improve contractual performance, including the promptness of payment processing. Discharge rates and consequential demurrage claims remained an issue. Mr Hogan noted in his trip report, as a minor aspect of factors of delay, that the protective agent at Umm Qasr had reported that 'lack of transports' had reduced the rate of discharge. This was rejected by the IGB. AWB was to seek details from the protective agent, Alia, but it received no information before November 2000 that absence of trucks was a factor in the delays. The real reasons for discharge delays were new testing procedures introduced by Iraq, the time taken to obtain test results and to fumigate cargo if necessary, and the inability of available equipment to discharge grain at the contractual rate.

The IGB claimed that there remained outstanding unpaid trucking fees. It also advised that for the next phase of the Oil-for-Food Programme the trucking fee would be increased to US\$35.00.

The Iraqi Minister of Trade also discussed with Mr Stott and Mr Hogan Russian contracts with the IGB for provision of Australian wheat. Russian traders had concluded contracts with the IGB for delivery of Australian wheat. The traders did not have contracts with AWB to supply to them that wheat. Since the traders had concluded the contracts with the IGB the world price of wheat had risen. Thus the Russian traders faced severe losses. The Minister of Trade requested that AWB supply the Russian traders with wheat at a price that would provide them with a profit of US\$1.00 per tonne. The Minister said that if AWB was unable to do this, Iraq may only be able to buy 800,000 metric tonnes of wheat from AWB, rather than the 1.3 million tonnes planned. AWB rightly interpreted this as a threat: if AWB wished to remain the dominant supplier to Iraq it would need to accommodate the Russian trader's position, Russia being a favoured nation politically with Iraq.

The response of AWB was twofold. The first was to propose a reduction in the grade of Australian wheat delivered to Russian traders. The second was for Iraq to remove the trucking fee. This latter proposal would make sense only if AWB knew that the trucking fee was not in truth used for trucking but was a payment to Iraq. The proposal meant that, instead of the trucking fee being paid to Iraq, it would be retained by AWB. The increase in the world wheat price would be accommodated by the trucking fee being retained by the seller, rather than by the sum being paid to Iraq. The advancing of this proposal by AWB necessarily meant that Messrs Stott and Hogan knew the trucking fee was a payment to Iraq.

On returning to Australia, Mr Stott caused there to be investigated whether there were outstanding trucking fees, as IGB had alleged. This led to considerable email

correspondence between many AWB officers. AWB was satisfied that it had paid to Alia all trucking fees due. Accordingly, it was suggested that 'we simply advise IGB of the above and have them check with their trucking company'. AWB checked with Alia whether it had received all the trucking fees. Mr Watson noted, 'Trucking company has also confirmed they have received 100% trucking fees and have paid IGB'.

Thus AWB knew that Alia was a conduit for payments of US dollars to IGB. Having confirmed that AWB had paid all trucking fees, sometimes directly and sometimes through intermediaries, Mr Cowan of AWB wrote, 'The obvious one ... we can't confirm ... is whether the intermediate parties paid in full to Alia, or whether Alia has paid in full to IGB'.

An 'eloquent solution'

Both Mr Long and Mr Whitwell in March 2004, and Mr Long in late 2004, at a time when the payment of inland transportation fees was being investigated, sought to rely on the asserted fact that AWB had advised DFAT in 2000 of 'the arrangement with the Jordanian trucking company'. It was said, in relation to the payment of the 10 per cent surcharge, that there was 'a letter in existence from DFAT which gave approval for AWB's arrangements under OFF'.

In truth, AWB never advised DFAT of 'the arrangement with the Jordanian trucking company'. Nor was there a letter in existence from DFAT that gave approval to AWB's 'arrangements under OFF' in relation to payment of trucking fees to Alia or payment of the 10 per cent surcharge.

The letter to which they were referring was a letter dated 2 November 2000 from DFAT in reply to a letter from AWB dated 30 October 2000. The letter from AWB, signed by Mr Stott, stated:

Dear Jill,

The purpose of writing is to ensure that DFAT is comfortable with AWB proceeding with the approach outlined below. As previously discussed we are currently experiencing problems managing our Iraq business. The first problem concerns United Nations procedural issues, which we will document in a separate note.

The second issue is, vessels discharging at Umm Qasr suffer long delays and as a consequence AWB incurs substantial demurrage bills. Our recent mission identified that the slow discharge of vessels is caused by a lack of trucks at discharge port.

For your guidance, Jordan based trucking companies are responsible for arranging trucks at discharge port. To rectify the problem, we propose entering into discussions with the Jordan trucking companies with a view to agreeing a commercial arrangement in order to

ensure that there are enough trucks to enable the prompt discharge of Australian wheat cargoes.

We believe the proposed solution will eloquently solve our problem and look forward to receiving your response.

Thank you in anticipation.

Best regards,
Charles Stott
General Manager
International Marketing

The letter from DFAT, signed by Ms Drake-Brockman, stated:

Dear Mr Stott,

Thank you for your communication outlining the manner in which you propose to proceed to deal with problems you have encountered in discharging vessels of your wheat exports to Iraq at Umm Qasr port. As you have explained to us the delays in discharge were causing you to incur substantial demurrage costs and affecting the viability of your trade.

We understand that, on your recent visit to Baghdad, you identified the source of the problem as being a lack of trucks at the discharge point. These trucks are supplied by Jordan-based companies. You therefore propose to enter into discussions with the Jordan trucking companies with a view to agreeing to a commercial arrangement in order to ensure that there are enough trucks available to enable the prompt discharge of Australian wheat cargoes when they arrive.

We have examined, at your request, this proposed course of action and can see no reason from an international legal perspective why you should not proceed. That is, this would not contravene the current sanctions regime on Iraq.

International Legal Division has been consulted in the preparation of this response.

I trust this is of assistance to you.

The letter from AWB signed by Mr Stott was a charade, for a variety of reasons:

- The recent mission to Iraq had not identified that the slow discharge of vessels was caused by a lack of trucks at the discharge port.
- The AWB letter did not inform DFAT of the true arrangements known to AWB—namely, that AWB was not in fact responsible for arranging trucking but only for payment of a trucking fee, that AWB had made no commercial arrangements with any Jordanian trucking company, that AWB had been paying monies to Alia for approximately 12 months, or that Alia was a conduit for payment of monies to Iraq.
- After receipt of DFAT's reply, AWB made no inquiries of, or arrangements with, Jordanian trucking companies for the provision of trucks, let alone additional

trucks. Indeed, the only change in pre-existing arrangements made in November 2000 was that AWB agreed with the IGB to pay an increased trucking fee of US\$25.00 per tonne and to pay a further surcharge or 'after-sales-service fee' equivalent to 10 per cent of the agreed price for the wheat, which 10 per cent increment was incorporated in the so-called trucking fee and thus into the contract price received by AWB from the UN escrow account and returned to the IGB via Alia.

The real reason AWB, through its General Manager International Marketing, Mr Stott, wrote the letter of 30 October 2000 was an attempt by AWB to obtain correspondence from DFAT that would justify, or appear to justify, the establishment of a despatch and demurrage system operating through the trucking fee mechanism, it being known by AWB that neither DFAT nor the United Nations would approve a demurrage and despatch mechanism with Iraq. The letter of 30 October did not truly state AWB's intentions, nor did it inform DFAT of the absence of contractual relationships for trucking services with Alia or, indeed, any other trucking company.

An after-sales-service fee of 10 per cent

Between 1998 and 2000 AWB made various donations of equipment to Iraq. In 1998 it obtained UN approval to donate a bobcat. In 1999 it contemplated a donation of laboratory equipment and intended to send the equipment to the Iraqi Embassy 'as we have successfully done previously'. AWB advised Austrade of this intention; Austrade advised DFAT, which warned AWB against forwarding equipment to Iraq without UN approval. AWB agreed to notify DFAT of any future export of equipment and materials to Iraq.

In April and May 2000 the IGB approached AWB to provide 'after-sales-service'. AWB noted that it needed to 'determine' what 'after sales service required i.e. equipment/cash (Board approval may be required for this)'. In July, Mr Hogan noted, 'how do we get equipment in. I assume reagents are problem. Speak with IGB regarding this issue'. In the same month Mr Borlase wrote:

We are donating \$20k of laboratory equipment, however need UN approval. I haven't approached DFAT or UN for this to date as waiting to get approval for bobcats first before hammering them on lab.. equipment.

Following the visit to Iraq by Mr Stott and Mr Hogan in October 2000, a contract for the sale of wheat was agreed. It became contract A0430. On 1 November 2000, after the price for wheat had been agreed, including a 'trucking fee' of US\$25.00 (an increase from the previous US\$14.00), the IGB advised AWB that the price was to have added to it a 'handling fee' equivalent to 10 per cent of the price and such 10 per cent was to be included in the 'transportation fee'. The transportation fee thus became US\$44.50 per tonne. Mr Hogan agreed this contract, having been informed by the IGB

that the transport fee of US\$44.50 per tonne had been approved by the United Nations. He intended to get confirmation of that from the IGB in writing. He did not ever do so. He asked the IGB to 'forward the conditions especially regarding the UN approved Trucking fee and percentage increase'.

The IGB had confirmed the sale in an email to AWB stating the sale price in US dollars 'CIF Iraq via Umm Qasr all governorates including 44.5 inland transportation to be paid to the water transport co'. The inland transportation fee was thus not to be paid to a trucking company, but to the ISCWT, an Iraqi entity at Umm Qasr. In fact it was paid to Alia.

Mr Hogan cleared the agreement he had reached with Mr Stott. Mr Stott said he obtained approval for it from his superiors, Mr Goodacre and Mr Geary. However, Mr Stott gave evidence that he instructed Mr Hogan that he would accept the US\$44.50 'as a trucking fee—but you have to show me—the IGB has to present me with proof that this is indeed approved by the UN, and I need that in writing'. Mr Stott said he was shown the finalised version of the Iraqi contract with the seals of the IGB on it, which, on its face, showed separately identified the Iraqi transport component of US\$44.50 per tonne.

The Inquiry had both the short-form and long-form contracts signed by the parties. Neither so identifies the Iraqi transport component of US\$44.50. No contract documents signed by Iraq and produced to this Inquiry by AWB, DFAT, the United Nations or Mr Stott show that information. This evidence of Mr Stott was a fabrication designed to establish that he had a sensible reason for approving a transport fee inflated by 10 per cent of the contract value at the request of the IGB, for which there could be no proper explanation as a transport fee and which he knew was a payment to Iraq.

On 2 November 2000 Mr Hogan circulated an email widely within AWB, advising of the sale, showing how the price was broken down, and showing the trucking fee of US\$25.00 per tonne but noting:

10% will be added to PX and included into trucking fee—i.e. IGB will confirm US\$ and T/fee will be US\$44.50 ... this has been approved by UN (as per IGB—I will get this in writing.)

No one within AWB queried this information or questioned why the transportation fee had increased from US\$14 to US\$25 or why it was to be further inflated by a sum equivalent to 10 per cent of the contract price.

The 'inland transport fee' had to that time been paid prior to the arrival of the vessel in Iraq. AWB funded the fees between the time of payment to Alia and the receipt of payments from the UN escrow account. With the increase of such fees from US\$14.00 to US\$44.50 per tonne, this holding charge became significant. Accordingly, AWB reached agreement with the IGB that AWB would pay US\$14.00 per tonne prior to the

arrival of the vessel in Iraq and the remaining US\$30.50 per tonne within one week of payment by the United Nations from the escrow account.

A 'Notification or request to ship goods to Iraq' form was forwarded to DFAT in respect of contract A0430, accompanied by both the short- and long-form contracts for submission to the United Nations. Neither contract referred to a 'transport fee' or an 'after-sales-service fee' or any US dollar payment to any company. The United Nations received the documents on 8 November and an approval was issued on 5 January 2001. The checking officer on behalf of the UN customs office was Ms Johnston.

The Arthur Andersen report

In August 2000 Arthur Andersen was engaged because 'AWB has concerns about the integrity about international business transactions conducted by the International Marketing group. You are seeking independent assistance in determining the existence of any illegal or unethical behaviour and any failure of control systems'.

Arthur Andersen produced a report dated December 2000. Its overall conclusion was:

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.

In relation to inland transportation fees, Arthur Andersen wrote:

Iraq – Inland Trucking:

During our review we found a number of email records that related to Iraq. 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 Mr Officer wanted to find ways to avoid attracting the attention of the UN.

We were informed by Mr Aucher and Mr 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 Mr 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.

Those passages make clear at least the following:

- The culture of AWB, and its employees, required review and attention, so far as ethical dealing was concerned.
- Payment of inland trucking fees in Iraq was a concern. The concern arose because
 - There had been a UN inquiry about AWB's payment of trucking fees.
 - AWB had sought to hide or disguise the payment of the trucking fees.
 - There had been AWB management pressure to maintain sales to Iraq, and avoidance of UN scrutiny of trucking fees was necessary if such sales were to be maintained.
 - Entities requested by AWB to make payments of trucking 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.
 - Increases in trucking fees appeared excessive, with the risk that some portion of the fees may be diverted to purposes other than trucking.

Two meetings with AWB were held to discuss the Arthur Andersen report. The first, on 15 February 2001, was between the author of the report Mr Tuohy and Mr Goodacre and Mr Stott. The second, on 23 February 2001, was between Mr Tuohy and Messrs Lindberg, Goodacre and Stott and a lawyer from AWB. Each person had a copy of the report. Mr Tuohy gave a PowerPoint presentation. The important

components in each section of the report were discussed. Management was asked by Mr Lindberg to implement the recommendations.

The report was discussed at a meeting of the Executive Leadership Group on 23 February 2001 but in less detail.

It necessarily follows from the report and the meetings to discuss it that Messrs Lindberg, Goodacre and Stott knew that steps had been taken by AWB to disguise inland trucking payments and that there was the possibility, because of the increased trucking fees, that some of those fees were being paid to the Iraqi regime. There is nothing to suggest in the evidence that Mr Stott disclosed to Arthur Andersen or Mr Lindberg that he knew from 1 November 2000 that the increase in trucking fees to US\$44.50 was due in part to a 10 per cent surcharge imposed by Iraq.

Mr Stott was delegated the task of implementing the Arthur Andersen recommendations. At some later time he informed Mr Goodacre:

He had made inquiries with both the IGB and DFAT as part of his investigations into the issues relating to the trucking payments and was satisfied that the level of trucking fees was justified and that the trucking company (Alia) was legitimate.

He also told Mr Goodacre that the increase in the payments to Alia had been authorised by the United Nations. Neither statement was true.

On 27 February 2001 the Board of AWB noted from the Chief Executives Officer's report that:

Chartering is currently in the process of reviewing every component of its business. Integral to this review is a detailed process and procedure audit being conducted by Arthur Andersen and an internal staff capability audit.

A revised business plan, risk reporting framework and legal procedures are also being reviewed and re-developed.

On 30 May 2001 the Chief Executive Officer's report to the Board again advised that effort was being put into revising policies and procedures in the chartering department and addressing risks identified in the Arthur Andersen audit report. Apart from this, the Board was not given any summary of Arthur Andersen's findings.

The Arthur Andersen report was made available to those conducting Project Rose in June 2003.

Following the Arthur Andersen report there was no inquiry into the culture at AWB, why AWB 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 had agreed to pay such increased fees or trucking arrangements generally.

Sales to Iraq: January 2001 to June 2002

In January 2001 the Iraqi Ministry of Trade issued a wheat tender for phase IX of the Oil-for-Food Programme. It sought offers on a price:

CIF FOT to silo to all governorates of Iraq cost of discharge at Umm Qasr and land transport will be equivalent to US\$25.00 per metric tonne to be paid for each shipment in any exchangeable currency to the water transport company before arrival of the vessel to Umm Qasr Port. For more details contact Iraqi Maritime in Basrah (Iraqi State co. for water transport – Basrah).

The tender did not mention any obligation to pay an additional 10 per cent service or after-sales-service fee.

By 2 February 2001 a contract had been agreed for the sale of 1 million tonnes divided into two contracts, each of 500,000 tonnes. They became contracts A0552 and A0553. The export sales note was dated 2 February 2001, as were the long- and short-form contracts. Each specified a price of US\$217.80 per tonne. That price included a trucking fee component of US\$25.00 per tonne plus a 10 per cent surcharge of US\$19.80, representing 10 per cent of the contract price. The calculation sheet prepared by Mr Lister for each of these two contracts showed the breakdown of ingredient costs, including US\$25.00 for 'trucking' and a further '10% – 19.80'. On 2 February Mr Hogan confirmed the terms of sale to the IGB and noted:

AWB will pay US\$14.00 pmt in equivalent agreed currency for partial payment of transport fee prior to the vessel arriving in Umm Qasr. Balance of USD30.80 pmt will be paid as final payment of transport fee within one week of receipt of UN payment being received by sellers. Total transport fee payable is USD44.80 pmt in equivalent agreed currency.

Although the export sales note, the contracts and the telexes referred to the contract price of US\$217.80, none referred to the fact that that sum included the additional 10 per cent after-sales-service fee. Only the email to the IGB noted that that additional 10 per cent would be paid as part of the transport fee, through the transport fee payment mechanism by payment to Alia.

Notwithstanding that, on 5 February 2001 Mr Borlase circulated an email confirming the sale and providing a benchmark analysis of the price. The price he analysed in the email was not \$217.80: it was \$198.00. The benchmarking noted the freight cost, the trucking fee of US\$25.00 and other costs. It made no reference to the 10 per cent surcharge and excluded it from the commencing price from which the benchmark FOB price was derived.

The same day Mr Stott sent an email to Mr Goodacre and Mr Lindberg, advising them of the sale and providing them with the same information in Mr Borlase's email. Again, Mr Stott showed the price as US\$198.00 when in truth it was US\$217.80.

The additional 10 per cent figure was not included in the trucking price in the analysis because AWB knew it was unrelated to the trucking price. It was, as Mr Borlase indicated in his trip report, 'a mechanism for extracting more dollars from the escrow account'. His trip report stated:

Trucking fee/services fee—the trucking fee is now US\$25.00 pmt all governorates 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.

As Mr Hogan said in relation to a note he took in May 2001:

Q: This would then have confirmed to you your earlier suspicions that the money that was being paid albeit the 10% or the US\$25.00 transport trucking fee, was finding its way to the Iraqis.

A: I never had a doubt—well, the money was always going into Iraq whether it was \$12.00, \$14.00 or \$15.00.'

Mr Borlase's trip report was widely circulated within AWB. By February 2001 it was widely known within AWB that those dealing with the Iraqi trade believed payments that AWB was making by way of transport fees or 10 per cent surcharge fees were payments being made to Iraq via Alia and that they were not going to Alia for trucking services.

On 5 February 2001 the IGB asked AWB to increase the price for these contracts by US\$1.00 per tonne. AWB agreed to that on 12 February, noting:

Iraq have requested transport fee to be altered to US\$26.00 pmt. As this does not effect AWB costings, as the contract price will be increased, I have agreed to do this with IGB.

This agreement is consistent only with a recognition that the additional dollar per tonne was to be extracted from the escrow account in payment of the wheat contract and paid not to Alia for transport but to the IGB via Alia.

On 27 February 2001 AWB forwarded both the short-form and the long-form contracts to DFAT for forwarding to the United Nations. Neither of those contracts referred to the trucking fee of \$25.00 per tonne or the additional 10 per cent surcharge. As the contracts submitted had been, by agreement, converted into Deutschmarks, the increase of US\$1.00 per tonne was not apparent. On 15 March 2001 the United Nations issued approvals dated 13 March 2001 for each contract.

In March 2001 the ISCWT sought to impose a fee of US\$0.50 per tonne to cover 'agencies expenses and services for vessels calling Umm Qasr'. Mr Hogan was 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'. He asked for AWB's US office to raise the issue and 'confirm this is correct and that this charge is in effect illegal under the current sanctions'. The AWB's US office contacted the Australian mission to the United Nations, advising that AWB had been told by the 'Iraq state port agents' that it could not discharge its vessels until a port fee of US\$0.50 per tonne was paid in cash to the port agents. The Australian mission consulted the Chief Customs Officer from the Office of the Iraq Programme (Ms Johnston) and the Norwegian mission to the UN in its capacity as Chairman of the Iraq Sanctions Committee (the 661 Committee). The advice the Australian mission received was that the Office of the Iraq Programme could not give a proper answer. The best available answer was that such fees were not inconsistent with the sanctions regime provided they were reasonable in amount and paid in Iraqi dinars, not US dollars. The United Nations recognised this presented practical difficulties because Iraqi dinars could not be purchased outside Iraq and if they were purchased inside Iraq they would normally be bought with US dollars, thus effectively transferring US dollars to Iraq in breach of sanctions. The Office of the Iraq Programme also advised that if the cost was factored into the price and was not obvious it would likely pass UN scrutiny. If the payment was apparent on the face of the contract, it would likely be put on hold. This information was conveyed to AWB by the Australian mission. It confirmed its advice that, pending further advice from the 661 Committee, the only course, if the fee was to be paid, was to pay it in dinars. As Mr Snowball's note recorded, 'Any USD to Iraq gov't is a definite No'.

Throughout March and April 2001 AWB refused to pay the fee on the basis that it was illegal. Mr Borlase, in an email to the Australian Embassy in Amman, said, 'We assume it is another method of claiming more dollars from escrow account'. There was correspondence with the ISCWT, Alia and the IGB. AWB maintained its position that such a US dollar payment would 'fall outside the United Nations terms and conditions for the shipment of wheat to Iraq'. In the meantime AWB advised the Australian mission to the United Nations that two ships had not been allowed to berth and discharge cargo because the port fees had not been paid. Ultimately it was agreed between the IGB and AWB that the 50 cents per tonne would not be required to be paid to the ISCWT.

The reason AWB refused to pay the US\$0.50 per tonne in respect of the shipment was that it had not been factored into the price and would have been a cost to AWB.

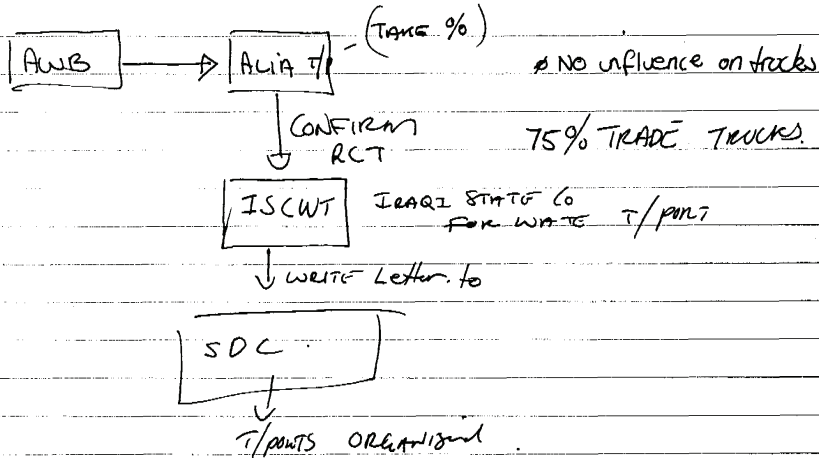
In May 2001 Messrs Hogan, Jones and Roland travelled to the Middle East, including Iraq. They met with the Chairman of Alia in Amman and representatives of the IGB in Baghdad. They travelled to Umm Qasr and met with Alia's representative and the UN inspection agents. During that trip the operation of the transportation of grain was explained to the group. Mr Hogan made a diagram of that explanation.

⊗ State Overland Company:

Dr. Mohammed

EL MOUSARY

D.G. Land Transport Company



Explaining that diagram Mr Hogan said:

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

Mr Hogan said in evidence it became apparent to him that Alia played no role in transportation of grain other than to receive a commission for receiving the funds for inland transportation. He said:

A: I never had a doubt—well, the money was always going into Iraq, whether it was \$12, \$14 or \$15.

Q: But here we have a note with your evidence that Alia was simply taking a commission?

A: Correct—acting as the conduit for the mechanism to get the payments into Iraq because of frozen accounts, et cetera, as we raised right from the start. So that confirms that system. My issue was with the 10 per cent—the loading. I always was of the belief that there was a true transport cost in Iraq. You have to move grain somehow, and this is the mechanism of how this was working.

Q: But now what was confirmed to you was that all of the money was going to the ISCWT?

A: It was all going through, apart from taking the commission off the top there.

And later:

... it was my, I think, interpretation that the 10 per cent, after the—what they call this after sales service fee was introduced, it seemed to be my thinking well, that service fee is being used—what we called the siphoning of the escrow account, was what they were using for this.

From May 2001 at the latest there is no doubt that AWB was aware that Alia was not engaged in the transport of grain; was aware that Alia was used as a conduit to pass funds to either the IGB or the ISCWT, both being Iraqi entities; was aware that the 10 per cent surcharge was a method of extracting funds from the UN escrow account; and was aware that the payment of US dollars to Iraq or Iraqi entities was contrary to the UN sanctions.

In June 2001 AWB and the IGB agreed the sale of a further 1 million tonnes of wheat. This sale became contracts A0784 and A0785, each of 500,000 tonnes. The agreed inland transportation fees were US\$46.70 and US\$46.90 per tonne, each of which included the 10 per cent after-sales-service fee and an allowance of US\$0.50 for port fees. The inland transportation fees were payable before vessel discharge. Any necessary crane hire for unloading was included in the transportation fee. Thus the payment of port fees in US dollars, which AWB had argued and knew could not be paid because it was contrary to the sanctions, was made by including such fees in the 'transportation fee'. In that way AWB knowingly breached the sanctions.

Each of the short- and long-form contracts provided for a CIF Free in Truck price to all silos within all governorates of Iraq. Neither contained a reference to the obligation to pay inland transportation fees, the additional 10 per cent after-sales-service fee or the amount of either of those fees. Nor did they contain a notification that the price included US\$0.50 in port fees that AWB was to pay to Iraq through the transportation fee system. Those fees were, however, recorded on Mr Lister's cover sheet for the files for each contract. The contracts were submitted to the United Nations for approval. The approval for A0784 was issued by the United Nations on 31 July 2001 and that for A0785 on 30 August 2001.

The three types of impost imposed by Iraq were well known amongst the shipping trade. In November 2001 AWB received an email from ship brokers conveying a message the shipowners had received from their agent in Iraq:

re: inland transport/ass/agency fee.

...

Kindly noted that our office in Basrah informed us day that m/s, ISCWT informed them that the inland transport charges as well as the A.S.S. charges and the agency fees on cargo of USD0.50 per tonne have not been paid yet ...

Thus, the so-called inland transport fee was distinguished from the 'A.S.S.' fee of 10 per cent of contract value, in turn distinguished from the 50 cents per tonne imposed as port charges. AWB was well aware of these three separate ingredients. It did not inform DFAT or the United Nations of its agreement to pay them.

The December 2001 sale

Negotiations for a contract in December 2001 make clear two matters: first, AWB knew the inland transportation fee ingredient in contracts was a mechanism for payment of monies to Iraq; second, the inland transport company, the ISCWT, being an Iraqi government enterprise within Iraq, was to be the recipient of the inland transportation fees.

By a tender dated 12 December 2001, the IGB sought a price for the supply of 500,000 tonnes of Australian wheat. A price was sought:

CIF free out Umm Qasr on truck to warehouses at all governorates of Iraq cost of discharge at Umm Qasr and land transport will be equivalent to USD\$26.50 per metric tonne to be paid in any exchangeable currency to the water transport company.

For more details contact Iraqi Maritime in Basrah Iraqi State co. for Water Transport – Basrah.

AWB was concerned about the war risk insurance premium approximating US\$10.00 per tonne. It proposed that, as the price of the premium and whether any premium would be imposed would not be known until ships carrying grain reached the Gulf, the IGB, not AWB, should pay that premium. In that way, if the premium was not imposed, Iraq would not pay it. Accordingly, AWB proposed, 'Due to the limitations imposed by the sanctions, settlement of the additional war risk insurance premium will need to be managed via the inland transport fee'.

The reasoning for this proposal was:

If the above is not acceptable to Iraq, then an additional amount will be added to our offer to cover any potential losses due to War Risk Premiums. Based on our current estimates, the War Risk Premiums are around US\$10.00 pmt. In this case, AWB will absorb the risk of increased premiums, or benefit if premiums are reduced or abolished. However, this is not the desired outcome, as Iraq should be the holder of this risk/benefit. Hence I suggest the management via the inland transport system is the most appropriate method.

On 20 December 2001 AWB sent to the IGB an email entitled 'inland transport for tender'. It noted that the IGB required 100 per cent of the transportation fee to be paid before a ship's arrival in Iraq. AWB proposed a payment of 10 per cent by that time, with the remaining 90 per cent to be paid within seven days of receipt of proceeds from the UN escrow account. It objected to paying 100 per cent in advance because, were the port blockaded or the UN inspectors removed, or if for some other reason the

ship could not unload, AWB would be 'unable to recover the money from the transport company'. For that reason the split payment method was said to be reasonable. AWB wrote, 'As far as we can see the only risk that the inland transport company (ISWTC) has is that our company does not make the second payment'. AWB knew the transport fees were going not to Alia but to the ISCWT, an Iraqi entity.

In December 2001 a sale of 1 million tonnes of wheat was agreed, split into two equal contracts known as A1111 and A1112. The inland transportation fee was €55.17 per tonne for the former and €55.40 per tonne for the latter. This sale was under phase XI. Details of the sale, including the amount of the 'inland transport fee' were widely known within AWB because an email containing its details was circulated. Mr Lindberg noted on such an email the comment 'a great result'.

The IGB sought in December 2001 and January 2002 to renegotiate the price of these contracts. AWB would not agree to change the confirmed contracts unless four conditions were fulfilled. The first was that there be 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 transport payment'. The second was that the IGB accept the additional war risk premium, with this to 'be settled by an adjustment to the final inland transport payment'. The third was splitting of the inland transportation payments by a first payment of US\$14.00 per tonne prior to the ship's arrival, with the balance on payment by the United Nations to AWB. The fourth was an agreed US\$-€ exchange rate.

The first two conditions make plain the understanding that the 'inland transportation payment' was a mechanism for channelling funds to Iraq, which was available to be used for contractual monetary adjustments of payments to or from Iraq. AWB was aware that demurrage and despatch payments to or from Iraq were not permissible because of the UN sanctions. Use of the inland transportation mechanism was a means of circumventing those sanctions.

Iraq did not agree to the conditions. Ultimately, Mr Flugge, the AWB Chairman, wrote to the Minister of Trade requesting confirmation of the agreement as reached on 20 December 2001. The Minister subsequently confirmed the sale.

Short-form and long-form contracts were prepared. The contracts submitted to DFAT and the United Nations did not reflect the true arrangements between AWB and the IGB. Neither mentioned the inland transportation fee, the obligation to pay the additional 10 per cent after-sales-service fee incorporated in the inland transportation fee, or the amounts of either fee. The contracts were expressed to be 'CIF F.O.T. to silo all governorates of Iraq via Umm Qasr Port', or equivalent. They did not indicate that in truth AWB had no obligation to discharge or transport grain. The contracts were submitted with an application to export to Iraq to the United Nations on 23 January

2002. Approvals under phase XI were issued by the United Nations on 5 February 2002.

The June 2002 contract

In June 2002 Mr Long and Mr Hogan visited Iraq. They negotiated a sale of 500,000 tonnes on terms similar to those in contract A1111 dated December 2001. This contract became A1441. The inland transportation fee was US\$47.75 per tonne in euro equivalent, including the 10 per cent after-sales-service fee. Short- and long-form contracts were signed, and approvals by the United Nations, dated 13 August 2002, were issued on 8 October 2002. Neither the short-form nor the long-form contracts made reference to the amount of inland transportation fee, the additional 10 per cent after-sales-service fee, or the amount of either fee or its payment by AWB to Iraq.

During negotiation of this contract in June 2002 the Iraqi Minister of Trade made clear that the contract had been reduced from 1 million tonnes to 500,000 tonnes because of what Iraq described as the 'aggressive policy and attitude that the Australian Prime Minister has towards Iraq and his public display of support for Bush and the USA government'. The trip report noted that because of that 'Iraq can no longer justify the significant purchases of Australian wheat'. The report also noted that 'the Minister has reserved a further 500,000 tonnes for AWB under this existing phase (12), if we provide a positive response'. Accordingly, on 1 July 2002 Mr Lindberg wrote a letter to the Prime Minister, recording the Iraqi Minister's concerns and the consequences for the wheat trade. The importance to AWB of the wheat trade in Iraq is indicated by the note in the AWB trip report: 'If negative (Aust gov is not going to provide retraction), then we need to seriously consider the political angle we need to take to ensure we continue sales to Iraq'. The Australian Government did not change its attitude to Iraq.

Recovery of the Tigris debt

In 1995 BHP Petroleum (BHPP) agreed to make a 'humanitarian' donation of a US\$5 million shipload of wheat to Iraq. Iraq was not told the shipment, delivered in 1996, was a donation. Mr Davidson Kelly of the Tigris Petroleum Corporation Limited and Mr Stott of AWB represented to Iraq that the shipment was paid for by a loan by BHPP to Iraq of US\$5 million. In September 2000 BHPP assigned to Tigris any rights it had flowing from the 1996 shipment, subject to Tigris paying to it 25 per cent of any recovery. Throughout 2001 and 2002 AWB assisted Tigris in obtaining Iraq's agreement to repay the 'loan'.

In July 2002 the IGB claimed that delivered shipments of wheat were contaminated with iron filings. It sought compensation of approximately US\$2 million from AWB.

In August 2002 a delegation comprising Messrs Flugge, Lindberg, Long and Cracknell travelled to Iraq to resolve the iron filings compensation claim. Agreement was reached that AWB would pay compensation of US\$6.00 per tonne in respect of the contaminated wheat. This required a payment of US\$2.017 million. Mr Hogan wrote, 'We need to think how we 'legally' pay Iraq'.

In September 2002 the IGB requested that representatives of AWB and Tigris attend Baghdad to seek to resolve the Tigris 'debt'. AWB obtained legal advice regarding whether it could negotiate on Tigris' behalf to effect such recovery. In a memorandum dated 16 September 2002, sent to all members of the AWB Risk Committee, as well as AWB Legal and the AWB (International) pool, Mr 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.

The advice sought was as follows:

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.

Although the matter was discussed, it is not clear whether any legal advice was provided.

In October 2002 Tigris proposed, and AWB accepted, that AWB receive a fee of US\$500,000 for its assistance in recovering the Tigris debt. Mr Davidson Kelly wrote,

‘In relation to the recovery of the loan, I suggest that we settle on a fee payable in line with repayment of the loan. I expect this to be based upon deliveries of grain to you’.

Thus, it was apparent to senior management within AWB, and to lawyers advising them, that there was a proposal for AWB or AWB (International) to receive monies from Iraq in settlement of the Tigris ‘debt’, that AWB would receive a US\$500,000 fee for its assistance, and that thereafter AWB or AWB (International) would pay the received monies to Tigris.

On 27 October 2002 Tigris wrote to Mr Jumah, a senior official in the Iraqi Oil Ministry and an agent of Tigris. It discussed the amount outstanding under the so-called debt being US\$9.519 million with compound interest or US\$8.375 million with simple interest. It stated:

2. AWB Position

AWB have a contractual dispute concerning cargo quality, under which they owe the IGB US\$ 1.6 million approximately. After detailed review they are of the opinion that they can only do one of two things. They can either return this amount to the escrow account, or make the payment to Tigris in an agreed front-end payment in relation to our transaction.

They have communicated this to the IGB. But ‘in code’, not directly.

The balance could be attached to ‘new business’, i.e. a new contract of say 500,000 tons with an agreed payment as Commission. I suggested that this Commission would relate to the hard work we have done in turning round the Australian Government’s hard line position, which led to the suspension of business with Australia.

3. Mechanics

We would agree a payment per ton. Any underpayment would be dealt with in a subsequent contract, and any overpayment would be accounted for in full by Tigris to the authorities.

It was recommended that we agree the amounts outstanding as part of the commercial negotiations. We would then translate Tigris’ US Dollar amount into Euros.

4. Authority

AWB have my authority to deal with all these issues. They will communicate the result to you, and seek your assistance if they require. You know how to contact me if required.

Dominic Hogan, Regional Manger Middle East, heads the delegation. Chris Whitwell, Account Manager, accompanies him. They are staying at the Al Mansur hotel, and are currently planning to leave on Royal Jordanian on Tuesday evening.

Tigris did nothing to ‘turn around the Australian Government’s hardline position’.

Before Mr Hogan and Mr Whitwell travelled to Baghdad there was prepared an Iraq brief. It noted in relation to the iron filings compensation payment:

Due to the inability to make payments direct to IGB because of the long standing UN sanctions, we will propose that these amounts will be paid to BHP to offset the Tigris debt owed by IGB to BHP dating back to January 1996.

Mr Hogan and Mr Whitwell put certain propositions to the IGB at their meetings in Baghdad in October 2002. They reported their proposals widely to senior executives in AWB and AWB (International). Their meeting report recorded discussion of the following proposals:

1. Offsetting vessel claims (iron filings) against Tigris (BHP) debt—approx USD2 million.
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.

IGB—confused abt amount and offer made by Tigris—Jan 2001, where Tigris would accept simple interest amount.

AWB advised we were not involved in the actual amount, but only the mechanism. Actual amount would be agreed between Tigris and relevant authority.

IGB—referred any decisions to the Minister.

AWB to get copy of letter sent by Tigris in Jan this year.

Thus AWB proposed to 'load-up' contracts with the IGB to recover the supposed debt, after offsetting the iron filings compensation claim. That proposal was known to senior management within AWB. The quoted paragraph numbered 3 makes clear that AWB knew that any quality claim payments due by AWB to the IGB should be paid into the UN escrow account.

The report of this trip also recorded a meeting on 28 October 2002 with Minister Saleh. It noted:

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.

The second quoted paragraph makes plain that Minister Saleh and Mr Hogan and Mr Whitwell understood that the 'transport system' was a mechanism for passing monies to Iraq. That must also have been apparent to each of the senior AWB executives who read the report.

Whilst in Iraq, Mr Hogan and Mr Whitwell also met with Mr Sabah, whom they believed was the Director General of the Iraqi Oil Board and a man of influence. They discussed with him whether loading-up the full amount of the Tigris debt on a 500,000-tonne contract would mean the inflation of the price would be obvious to the United Nations and suggested an increased tonnage 'to make things easier to pass through UN'. The trip report noted:

We discussed possible difficulties in raising the price significantly to incorporate the entire debt into one 500K contract. Suggested some alternate pressure could be brought to bear on the Iraqi government to increase the tonnage of next contract to make things easier to pass through UN. He said he would look into it.

Thus AWB sought to disguise and hide the loading-up of the contract from the United Nations. No recipient of the trip report expressed disagreement with the proposal.

On 7 November 2002 Mr Whitwell advised all members of the Executive Leadership Group that at the meetings in Baghdad the Minister had advised that the iron filings compensation claim of US\$6.00 per tonne was to be treated separately from other debt issues – that is, not offset against the Tigris debt – and that the Minister 'has asked for repayment through inland transport mechanism'. He also advised, 'Tigris debt has cabinet approval for repayment – final amount to be agreed during the next month by Tigris/Iraq and then mechanism for repayment to be agreed during next visit'.

The 'inland transport mechanism' was apparently a well-understood concept in AWB: no member of the Executive Leadership Group inquired what it meant.

In mid-November there was an exchange of correspondence between Tigris and the IGB. The proposal in each letter included the following:

1. Tigris would waive its right to compound interest on the debt owed, provided that repayment of the debt be tied to the next contract for the shipment of Australian grain and a calculation based on simple interest would leave the amount owing at US\$ 8,375,000;
2. Interest would run at US\$41,666 per month until settlement;
3. Tigris would be willing to convert the US\$ amounts outstanding to Euros at the exchange rate ruling on the date of the agreement of the contract with AWB
4. The mechanism for repayment would involve a surcharge per ton, to be agreed with AWB in relation to the forthcoming contracts for the supply of Australian grains;
5. Any overpayment due to variations in quantities delivered under the contract would be accounted for by Tigris immediately to Iraq; and
6. The AWB delegation was authorised by Tigris Petroleum to discuss this proposal in detail and to agree the necessary mechanism for repayment of the loan.

In a further letter of 17 November 2002, to Mr Jumah, Mr Davidson Kelly also authorised him to act on Tigris' behalf to agree on repayment terms.

Later in November, Mr Long and Mr Whitwell met with the IGB in Baghdad. Mr Long inquired whether 'for corporate governance reasons' the payment of the iron filings compensation could be passed through Tigris or through the provision of equipment by AWB rather than through Alia. The IGB agreed to refer the matter to the Minister.

It is undoubted that AWB knew that payment through the 'inland transport mechanism' was a payment to Iraq that was neither approved by nor would be permitted by the United Nations because of the sanctions regime. That was because it was a payment to Iraq. Using the 'inland transport mechanism' was a means of avoiding the prohibition, as AWB well knew. The 'corporate governance reasons' to which Mr Long referred was AWB's knowledge that to pay monies to Iraq through the inland transport mechanism was a breach of UN sanctions.

AWB consulted DFAT in November 2002 regarding how the US\$2.17 million iron filings compensation could be paid to Iraq. After consulting the United Nations, DFAT advised AWB on 27 November 2002:

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.

Notwithstanding this, on 28 November 2002, the day following the receipt of advice from DFAT and the United Nations, Mr Whitwell wrote to the IGB asking whether the Minister had reconsidered 'his position to repay it [the iron filings compensation] directly to Alia transport' and instead asked 'whether it would be possible to offset it against Tigris for reasons already advised'.

The 'reasons already advised' were the corporate governance reasons that payment to Iraq via Alia was a breach of UN sanctions, as AWB well knew.

On 4 December 2002 a sale of 1 million tonnes of wheat to Iraq was confirmed. The agreed price did not include an inland transport fee, which was to be later mutually agreed. The contract was to be in euros.

On 5 December 2002 Tigris emailed AWB a letter prepared for the IGB. It advised that Tigris would accept US\$8.375 million and would not require payment of further

interest on the basis that repayment of the debt was tied to the next contract for a shipment of Australian wheat.

On 9 December 2002 AWB emailed the IGB in the following terms:

AWB.0147.0119

Chris Whitwell
09/12/2002 11:17

To: grain@warkaa.net
cc: (bcc: Nigel Edmonds-Wilson/HO/AWB)
Subject: OUR SALE A1670 1 MILLION MT TO IRAQ.

**ATTN : MR YOUSIF M ABDUL RAHMAN
GRAIN BOARD OF IRAQ**

CC : MISS MOONA

REF : A1670 OUR SALE TO YOU OF 1,000,000 MT +/- 5 %

DEAR MR YOUSIF

THANK YOU FOR YOUR CONFIRMATION OF BUSINESS WHICH WAS RECEIVED WITH THANKS. AS DISCUSSED IN OUR PREVIOUS CORRESPONDENCE WE ARE LOOKING TO ORGANISE INLAND TRANSPORT AND EURO CONVERSION AT YOUR CONVENIENCE.

FOLLOWING OUR EMAIL DTD 28/11/02 REF ' QUALITY ISSUES ' WHERE WE ASKED HIS EXCELLENCY, THE MINISTER FOR TRADE, TO CONSIDER AGAIN THE ISSUE OF OFFSETTING THE QUALITY ISSUE PAYMENTS AGAINST THE TIGRIS ISSUE WE WOULD RESPECTFULLY ASK WHETHER THE MINISTER HAS REACHED A FINAL DECISION IN THIS REGARD.

IN THE EVENT THAT THE MINISTER IS AGREEABLE TO AN OFFSET SITUATION THEN WE WOULD ASK FOR YOUR CONFIRMATION OF THE PRICING OPTION A.

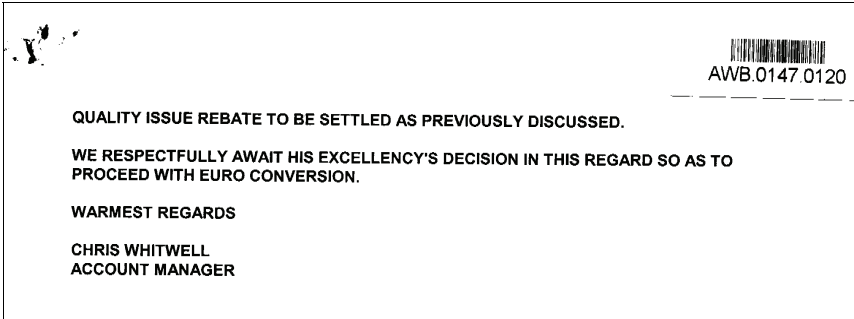
OTHERWISE PLEASE CONFIRM YOUR ACCEPTANCE TO OPTION B.

OPTION A

COST INSURANCE FREIGHT UMM QASR	USD 220 PMT
INLAND TRANSPORT	USD 51.15 PMT
TIGRIS DEBT	USD 8.375 PMT (USD 8,375,000 DIVIDED
BY 1 MILLION MT)	
LESS QUALITY ISSUE REBATE	TOTAL TONNAGE 335,648.65 MT
DISCHARGED X 6 PMT	
	= USD 2,013,891.9
	DIVIDED BY 1 MILLION MT
	= USD 2.01389 PMT
FINAL CONTRACT PRICE IN USD	USD 277.51 PMT
	=====

OPTION B

COST INSURANCE FREIGHT UMM QASR	USD 220 PMT
INLAND TRANSPORT	USD 51.15 PMT
TIGRIS DEBT	USD 8.375 PMT (USD 8,375,000 DIVIDE
BY 1 MILLION TONNES)	
FINAL CONTRACT PRICE IN USD	USD 279.53 PMT
	=====



Thus AWB advanced two alternative methods of inflating the contract price to hide both the inland transport fee, including the 10 per cent after-sales-service fee, and the recovery of the Tigris debt in the wheat price. Option A, involving an offset of the iron filings compensation against the Tigris debt, was contrary to the clear advice conveyed to AWB by DFAT after consultation with the United Nations 12 days earlier.

Mr Long thought it important to raise the iron filings rebate payment and the Tigris debt recovery with the most senior management. He directed Mr Whitwell to prepare a memorandum to be circulated. The memorandum went through seven iterations and was discussed between Mr Whitwell, Mr Long and Mr Geary, the Group General Manager Trading. Notwithstanding this, contracts were entered into on 12 December 2002, being contracts A1670 and A1680, each for 500,000 tonnes. No reference was made in either the short-form or the long-form contracts, approved by both Mr Long and Mr Geary, of the inflation of the prices by either the inland transportation fee, including the 10 per cent surcharge, or the Tigris debt recovery figure of US\$8.375 per tonne in euros. The price in the contracts accorded with Option B. The iron filings compensation was to be paid through the 'inland transport mechanism'.

On 12 December 2002 there was circulated widely throughout AWB an email setting out the final details of pricing of those contracts to produce a netback FOB price to AWB. In that netback calculation a deduction of €51.30 for the inland transportation fee was made, as was an identified figure of €8.40 in respect of the Tigris debt. No one within senior management raised any query about or objection to the Tigris factor in the wheat contracts, which was said to be 'common knowledge' amongst Executive Leadership Group members.

On 17 December 2002 the IGB advised AWB that the US\$2.017 was to be added to the inland transport payment to be made in respect of each of contracts A1670 and A1680 to effect repayment of the iron filings compensation claim.

On 7 February 2003 the final iteration of Mr Whitwell's memorandum, commenced in December and signed by Mr Long, was circulated. It read:

AWB Limited Memorandum



To: P Geary, M Long

CC: S Scales, D Johnson, D Hogan, D 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 USD 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 USD 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 USD 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 prmt for each vessel total = USD 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 USD 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 USD 8.35 million)
- Reducing the any new contract price by the amount of the rebate on a prmt 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.9001.0017

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

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

The so-called legal opinion was nothing of the sort. It 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). This, AWB's lawyers thought, might make it 'at least arguable' that AWB was not 'making funds or financial resources available' to the Iraqi Government, which AWB and its lawyers knew was prohibited by the UN sanctions. This advice was contrary to the clear, specific advice given to AWB by DFAT after consultation with the United Nations in November 2002.

The memorandum recognised corporate governance issues associated with making a direct payment to a company with links to the Iraqi regime. The only company to whom a payment was to be made was Alia. Obviously AWB—at a very senior management level—knew Alia was linked to the Iraqi regime by at least December 2002. AWB also knew that the Australian Government, were it aware of the contemplated payments, would be obliged to stop such payments. It 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, AWB decided both to load-up two contracts to recover \$8.375 million for Tigris (and thus earn a fee of US\$500,000) 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'. AWB was also to look to 'obtain written agreement from IGB to the payment in the format agreed by legal however it is not guaranteed'.

The course of action referred to was recommended by the General Manager International Sales and Marketing and the Group General Manager Trading. AWB (International), the grains pool, being aware of all the corporate governance and legal issues, 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.

The memorandum was forwarded to Mr Geary, who in turn forwarded it with his approval to Mr Lindberg's office. Mr Lindberg did not receive the document. The intention of AWB 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. AWB did not ever inform the Australian Government of either matter.

Long- and short-form contracts for A1670 and A1680 were signed and dated 12 December 2002. They were submitted to DFAT for transmission to the United Nations for approval; the approvals were issued in January 2003. Permissions to export wheat under the Customs (Prohibited Exports) Regulations were granted by the Minister between 10 February 2003 and 27 May 2003. Delivery of the cargoes occurred throughout 2003.

The contracts submitted by AWB to DFAT and the United Nations did not reflect the true agreement for the sale of wheat. The contracts did not disclose:

- the inflation of the price to recover the Tigris debt
- the agreement to pay an inland transportation fee to Iraq via Alia
- the agreement to pay a 10 per cent after-sales-service fee, to be included in the transportation fee
- the agreement to pay an additional US\$2.01 per tonne to Iraq via the inland transportation fee mechanism in payment of the iron filings compensation
- the fact that AWB had no obligation to transport grain to all governorates of Iraq, its obligation being only to pay a fee to an Iraqi entity via Alia.

In May 2003 the Executive Leadership Group received a report stating:

Tigris Petroleum (BHP) has asked for an update of status of their agreement in light [of] 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 was code for payment of bribes. It raised no alarms within the Executive Leadership Group.

In May 2003 Mr Davidson Kelly of Tigris sent to AWB a draft agreement, called a 'service agreement', between AWB and Tigris. It recited that 'Tigris has been of material assistance in procuring for AWB a contract for the supply of Australian wheat to Iraq'. It provided that AWB would pay Tigris US\$7.875 million as 'compensation' for the services said to have been provided by Tigris. That 'compensation' was to be at the rate of US\$7.875 per tonne of grain delivered. Undoubtedly, US\$7.875 million is the \$8.375 million less the US\$500,000 commission it had been agreed AWB would receive for recovering the Tigris debt of US\$8.375 million.

This draft agreement was a sham. It did not represent the true agreement between Tigris and AWB, which was that AWB would inflate wheat contracts with Iraq, recover the Tigris 'debt', receive US\$500,000 for so doing, and pay to Tigris the 'debt' so recovered.

The draft agreement was sent to AWB Legal and other senior executives, including AWB's Group Tax Manager.

Instead of retaining US\$500,000 as commission for recovery of the Tigris debt and paying to Tigris the balance of US\$7.875 million recovered as the Tigris debt, AWB

and Tigris agreed to recast the transaction so that the payment to Tigris of the recovered debt would appear as a payment by AWB (International) to Tigris of a commission earned by Tigris for assisting AWB (International) to obtain contracts for the sale of wheat to Iraq. The amount agreed to be paid by AWB as 'commission' was initially US\$7.875 million, being the US\$8.375 million debt recovered less the commission to AWB of US\$500,000.

The recast agreement was a sham for three reasons:

- The monies being paid by AWB to Tigris were the recovered debt, not a commission.
- Tigris did not assist AWB (International) to obtain contracts for the sale of wheat with Iraq.
- The amount of the so-called commission was in truth the debt recovered less AWB (International)'s agreed fee of US\$500,000.

The recasting of the transaction was done on the advice of, or with the concurrence of, internal and external lawyers for AWB.

The recasting of the agreement with Tigris was done with the knowledge within AWB of Messrs Whitwell, Stott, Long and Cooper. Ms Scales, on learning in 2004 that the contracts had been 'loaded up' to recover the Tigris debt but not disclosed in the contracts submitted to the United Nations, required that senior legal advice be obtained to determine if it was legally permissible to pay the money to Tigris.

Advice regarding aspects of the Tigris transaction, known as Project Water, was obtained from Mr Tracey QC, Mr Richter QC, Dr Donaghue, Mr Quennell, Mr Cooper and Ms Peavey. The final advice from Mr Richter QC was that it did not breach the law to pay the money to Tigris.

Mr Long persuaded Mr Davidson Kelly that, because AWB had been required to reduce its contract prices for contracts A1670 and A1680 in renegotiations with the Coalition Provisional Authority and the World Food Programme, the sum to be paid to Tigris should be reduced by 10 per cent to US\$7.0375 million.

On 10 November 2004 Mr Cooper sought the approval of and advised Mr Lindberg and Ms Scales that a factual review of the Tigris transaction had been completed and signed off, that advice from senior counsel was that no breach of the law was involved, that the matter did not require Board approval, and that his view was that 'this transaction did assist AWBI in securing the Iraqi grain market'.

On 19 November 2004 Mr Lindberg approved payment in principle of monies to Tigris. This approval was sought by Dr Fuller at the request of Mr Cooper.

On 1 December 2004 Tigris faxed AWB (International) an invoice for US\$7,537,500 for a 'service fee', less a 'success fee' of US\$500,000, plus interest of US\$55,224.72, less Australian withholding tax of US\$5,522.46 – making a total payable to Tigris of US\$7,087,202.24. The invoice was a sham for the same reasons that the agreement was a sham.

Authorisation to pay Tigris was signed by Mr Cooper and Ms Scales. The payment of US\$7,087,202.24 was made on 9 December 2004.

The Tigris transaction was executed on 10 December 2004, having an effective date of 12 December 2002, the date of contracts A1670 and A1680.

The Tigris transaction was discussed at an Executive Leadership Group meeting on 13 December 2004. What was said is not known.

The Tigris transaction was discussed at a joint information session and Board meetings of AWB and AWB (International) on 14 and 15 December. The agreement was presented to the Boards as a 'done deal'. It was said to be within Mr Lindberg's authority and presented to the Boards for information only. Approval was not sought. Several directors raised concerns. Mr Thame thought AWB was now 'tainted' and likened the transaction to 'James Hardie'. Mr Simpson sought a paper on the transaction for the next meeting. None was produced.

On 13, 14 and 15 December 2004 Messrs Stott, Long and Whitwell signed off on the factual summary of Project Water. That summary said nothing about Tigris securing the Iraqi grain market for AWB in 2002.

The true nature of the transaction, and the false nature of the agreement in fact signed, were not explained by Mr Lindberg or Mr Cooper to the Boards. Mr Lindberg conveyed to the Boards what he had been told by Mr Cooper. Mr Cooper had received legal advice regarding whether the method used by AWB to collect the Tigris debt by inflating the price of wheat breached UN sanctions or Australian laws. Mr Lindberg informed the Boards that, in respect of the payment by AWB to Tigris, he had 'checked compliance with all necessary laws and confirmed that there had been no breaches'. The Boards were informed of the substance of the advice.

By recovering US\$8.375 per tonne on 1,057,197 tonnes under contracts A1670 and A1680, AWB recovered US\$8,854,024. This was US\$497,024 more than the supposed debt the IGB had agreed to pay.

AWB decided to retain that sum of USD497,024 rather than return it to Iraq. That decision was taken after the lifting of sanctions, when there was no restriction on payment to the IGB or Iraq. Both senior management and AWB Legal were aware of or participated in this decision. The money is still held by AWB (International). Nor

has AWB or AWB (International) paid to Iraq or the IGB the US\$2.17 million agreed as iron filings compensation.

AWB payments to Alia

Between November 1999 and March 2003 AWB paid to Alia by way of transportation fees US\$224,128,189.98. That sum comprised US\$146,101,906.59 in respect of transportation fees and US\$78,026,283.39 attributable to the 10 per cent after-sales-service fee.

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

March to September 2003: post-hostilities

At the outbreak of hostilities on 20 March 2003 AWB had two ships on the water heading for Iraq. They were the *Pearl of Fujairah* and the *Andromeda*. On 14 March 2003, in anticipation of the arrival of the *Pearl of Fujairah* at Umm Qasr, AWB paid a €2,471,522.25 inland transportation fee to Alia. However, on arrival off Umm Qasr, the shipowners declined to permit the vessel to enter Umm Qasr because of the war risk.

AWB was concerned to recover the €2.47 million it had paid to Alia. It sought return of the funds from Alia, which advised that the monies it had received were no longer in an account controlled by Alia. They had, in accordance with the established practice, been transferred by Alia to Iraq. In May 2003 Mr Whitwell and Mr Edmonds-Wilson travelled to Jordan and met representatives of Alia, including its Chairman. Their report stated:

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 Yusef (IGB). Alia said that as soon as there was someone with authority to sign the appropriate documentation from the Iraq side, the money would be returned to Alia and then to the companies 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 hierarchy in Iraq is set 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.

AWB obviously knew the monies had been passed to Iraq, that Alia was not responsible for trucking the wheat, and that payments made to Alia were not for that purpose.

On 21 March 2003 the Australian Government decided to provide 100,000 tonnes of wheat to Iraq in the form of humanitarian food assistance. That was the grain on board the *Pearl of Fujairah* and the *Andromeda*. The Australian Government purchased those cargoes from AWB for A\$35 million. The United Nations requested that the two shipments revert to the World Food Programme. After some negotiations, agreement was reached between AWB and the World Food Programme concerning price and terms of delivery. AWB repaid the Australian Government the AUD\$35 million.

The sales to the World Food Programme in respect of the *Andromeda* and the *Pearl of Fujairah* resulted in reduced prices. The amended contract terms provided for delivery CIF free out, rather than CIF free in truck, so there was no inland transportation fee component in the price. Having reached that agreement, AWB then sought compensation for various expenses in the nature of deviations, demurrage, port charges and agency charges. It was subsequently agreed with the World Food Programme that the price for the grain on the *Pearl of Fujairah* and on the *Andromeda* would be increased to accommodate the compensation claims.

Mr Long was appointed by the Australian Government to assist with the rebuilding of Iraq after the incursion. He worked with the Coalition Provision Authority Ministry of Trade. One of his tasks was to prioritise contracts. His immediate superior was a former US Ambassador who was aware of Mr Long's position at AWB. He asked Mr Long to consider prioritisation of food contracts. Decisions in that regard were made by the Coalition Provisional Authority in conjunction with Iraqi Ministry officials. In conjunction with Iraqi Ministry of Trade officials, and with the support of his American counterparts, Mr Long prioritised AWB contracts A1670 and A1680. That meant they could be included in the Oil-for-Food Programme which, notwithstanding the United Nations indicating it would cease on 20 March 2003, continued. The contracts were passed to the World Food Programme for renegotiation with AWB.

In September 2003 United Nations approval for contract A1670 was issued. The same month the World Food Programme commenced negotiations with AWB to renegotiate the price. The terms it proposed were:

Cargo will be delivered at supplier cost, insurance and freight (CIF), Free on Trucks all governorates' warehouse/Iraq. As the Water Supply Company is no longer functional, it will be the supplier's responsibility to arrange private transportation from the contract stipulated Point of Entry to the final delivery point, as advised by the Ministry of Trade. The value of tonnage renegotiated will be reduced 10 per cent (10%).

The 10 per cent reduction in price requested was a reduction of the 10 per cent after-sales-service fees, which the United Nations correctly believed had been included in all supply contracts under the Oil-for-Food Programme. Mr Long, still in Baghdad, advised AWB that if it wished to continue with the contracts it had no option but to agree to the 10 per cent reduction. AWB did so 'as long as its associated extra costs resulting from the delay in executing this contract are taken into account'. However, AWB ultimately agreed to a price of €254.88 per metric tonne, a decrease of €25.49 per tonne, or 10 per cent, from the price initially agreed with the IGB. That price still included the component for the inland transport fee, excluding the 10 per cent after-sales-service fee, but AWB now had in truth to arrange transport to all governorates of Iraq. It did so by entering into a contract with Alia for the trucking of grain. It had never previously done so. The contract was signed on 21 October 2003 and included all the usual terms with a trucking company. However, it contained one exceptional clause. Clause 4 provided:

In respect of transport charges AWBS to deduct US\$1 per metric tonne representing a part repayment of a previous inland transport payment which was not executed. In the event that AWBS do receive acceptable repayment from the appropriate Iraqi authority then AWBS will remit the total value repaid by the contractor under this repayment scheme to the contractor.

This was a reference to the €2.47 million paid in advance to Alia in respect of transportation fees for the *Pearl of Fujairah*, which fees remained unrecovered from Iraq.

On 22 November 2003, pursuant to UN Security Council Resolution 1483, responsibility for the Oil-for-Food Programme was transferred to the Coalition Provisional Authority. In December 2003 contract A1670 was amended by increasing the contract value by €3,912,830.00 'to support the accelerated delivery of approximately 220,000 metric tonnes (+/-5%) of wheat'. The increase was to cover 'the cost and charges for deviation, diversion, detention, demurrage, stranding and other costs associated with delivery of goods'.

Allegation and inquiries: March 2003 to date

In May 2003 AWB learnt of rumours circulating that it had deposited funds into a Jordanian account in order to secure wheat sales under the Oil-for-Food Programme. It was rumoured that the monies ultimately benefited Saddam Hussein. AWB prepared talking points to be used in rebutting the rumours. The talking points agreed by Mr Whitwell and Mr Hockey, and subsequently used in substance to brief the Australian Government and to respond to inquiries, were:

- we did pay money into a Jordanian account for the inland transportation component of our contract

- this method was approved by the UN and signed off by the 661 Committee
- we are led to believe this was the same arrangement for all companies supplying wheat under OFF
- the method asked for by the Iraqis and agreed by the UN gave us no discretion with regard to inland transport
- the 20% 'kickback' is completely untrue – it is not in our contract and we do not pay a 20 percent deposit
- the payment is linked to vessel arrival in Umm Qasr and payments were correctly described and transparent
- we are led to believe it was monitored by the UN through the Office of Iraq Program
- it was consistent with the requirements of the UN resolution
- payment for the whole transaction was received through a UN approved LC.

In June 2003 US Wheat Associates wrote to the US Secretary of State, alleging that AWB was overcharging for wheat in contracts with Iraq. AWB responded by issuing a media release describing the allegations of inflated prices resulting in benefits to the Hussein family as 'absurd, with no foundation, and ... an insult to Australian wheat farmers and damaging to our reputation'. AWB also wrote to US Wheat Associates denying the allegations. Copies of the press statement and letter were provided to the Australian Government, which conveyed to the US administration its concerns regarding the allegations by US Wheat Associates.

In June 2003 AWB received, initially from Mr Long in Baghdad and subsequently from DFAT, a copy of a memorandum from a Captain Puckett, a US officer working with the Coalition Provisional Authority. He indicated that work was being undertaken to identify contracts which had a 'kickback or surcharge (often 10%)' for the supply of goods to Iraq under the Oil-for-Food Programme. AWB responded to all inquiries in Captain Puckett's memorandum, except that identifying kickbacks or surcharges in its contracts. AWB knew, and had known since November 2000, that an additional, unexplained 10 per cent fee had been included in its wheat contracts, as required by the IGB.

Project Rose

In June 2003, following the US Wheat Associates complaints, AWB established an internal investigation that became known as Project Rose. Mr Cooper, AWB's corporate counsel, was charged with leading the investigation. He engaged Mr Quennell, then of Messrs Blake Dawson Waldron, to conduct the inquiry. Mr Quennell was given instructions to conduct a factual review designed to gather

together all information within AWB relating to its dealings under the Oil-for-Food Programme and subsequently to provide advice regarding certain legal issues relating to those dealings. Mr Quennell gathered together some 30,000 emails, interviewed witnesses, accumulated documents, and from time to time briefed Mr Cooper, the Executive Leadership Group, and the joint Boards of AWB and AWB (International) regarding the factual matters so discovered and gave advice regarding certain legal issues. He briefed the Board on at least 16 occasions. He separately briefed the Chairman and Deputy Chairman. He provided draft advices, and he obtained advice from senior counsel. The Chairman, Deputy Chairman and Board of AWB claimed legal professional privilege in relation to the factual findings made by Mr Quennell and his briefings to the Executive Leadership Group, the joint Boards, and the Chairman and Deputy Chairman. Ultimately the Federal Court of Australia rejected the substance of that claim.

In May 2004 Mr Quennell briefed Mr Tracey QC concerning Project Rose. The brief noted the terms of the June 1999 tender called for by the IGB, which called for a price:

CIF Free on Truck to silo at all governorate. Cost of discharge at Umm Qasr and land transport will be USD12.00 per metric tonne to be paid to the land transport co. For more details contact Iraqi Maritin in Basrah.

It noted that in the three contracts in July 1999 and in contract A4822 in October 1999 there was reference to 'the discharge cost will be a maximum US\$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'. Further, it noted that subsequent contracts included a clause similar to that last noted, however 'the signed contracts as submitted to the UN ... did not include the above provision. Instead, the shipment clause made no reference to the discharge costs'. It noted the increase in the trucking fee from US\$12.00 to US\$47.45 and that prior to July 2000 payments of the trucking fee had been made by shipping companies. It referred to Mr Stott's letter of 30 October 2002 and DFAT's reply of 2 November 2000 but noted that AWB's letter had made no reference to the fact that 'as at 30 October 2000 the arrangements for payment of the trucking fee had already been in place for approximately eight months'. The brief instructed Mr Tracey:

The documents which instructing solicitors have examined do not indicate whether the trucking fees paid by AWB to Alia can be regarded as a genuine payment for the provision of inland freight services actually provided by Alia. We have not seen any contract between AWB and Alia. We have seen no evidence to indicate whether or not the trucks used to transport wheat after its discharge at Umm Qasr were provided by Alia. We have seen no explanation as to how the trucking fee was calculated or the basis upon which the trucking fee was subsequently increased. The trucking fee does not appear to have been calculated with regard to the differing distances between Um Qasr and the various Governorates ...

Mr Tracey gave oral advice on 25 May 2004. The same day Messrs Cooper and Quennell briefed the joint information session of both Boards. The minutes, for which

legal professional privilege was initially claimed but subsequently accepted by AWB to have been waived, stated:

- c) The findings to date of the Project Rose investigation are as follows:
 - 1. all AWB contracts were approved by the Office of the Iraq Program at the United Nations;
 - 2. no evidence has been identified of any AWB knowledge that money paid to the Jordanian transport firm, Alia, was onpaid to the Iraq regime;
 - 3. no evidence has been identified of payment of funds by AWB to any other person in relation to the OFF shipments; and
 - 4. no evidence has been identified of payment of funds to any AWB employee by any other person in relation to OFF shipments.
- d) That the Board would be kept informed of any additional findings that may emerge from the Project Rose investigations.

The following day the AWB Board was advised that:

Legal advice

Richard Tracey QC has been briefed and advised in conference today:

- (1) No evidence of breach of relevant UN Resolution on sanctions (661)
- (2) No evidence of breach of Australian domestic law

It is to be noted no mention was made in the brief that the first contract AWB had entered into with Alia regarding trucking of grain was in October 2003. Nor was there mention of the 10 per cent after-sales-service fee imposed from November 2000, the inflation of contracts A1670 and A1680 to recover the Tigris debt, or the proposal to repay the iron filings claim compensation to Iraq by means of the 'trucking mechanism'.

However, in June 2004 Mr Quennell provided a further memorandum of instructions to Mr Tracey, advising that Mr Quennell now understood the increase in trucking fees after November 2000. He advised that the increased trucking fee from that date was due to adding 10 per cent of the price per tonne by way of addition to the trucking fee. He also advised that the reason for the sharp reduction in the trucking fee payable in respect of contracts A1670 and A1680 was that they were executed after the fall of the Iraqi regime, and the reduction in price was agreed by AWB.

Mr Tracey, who had seen a memorandum prepared by Mr Hogan that indicated the inclusion of inland transport costs in the wheat price, was inquisitive. He asked whether that breakdown had been disclosed in contracts to the United Nations. He also asked whether there was commercial justification for the 10 per cent increase and

why AWB had agreed to reduce the price for contracts A1670 and 1680. Mr Quennell informed him that the contracts forwarded to the United Nations did not disclose the transportation fee, that there was no apparent commercial justification for the 10 per cent increase, and that it was thought that the Coalition Provisional Authority had required a reduction in post-conflict contracts.

With this information, Mr Tracey advised on 8 June 2004:

In the absence of commercial justification for the introduction, increases and decreases in the trucking fee and the lack of specific approval for the fee and its quantum by the UN there is reason to suspect that the fee (or part of it) was used as a kick-back to the IGB or persons associated with it. Whether the money was so used can only be determined by an investigation of the finances of the Jordanian trucking company which was the recipient of the trucking fees.

A further reason for suspecting the efficacy of the fee is Hogan's assertion that UN approval for its payment had been obtained. If this was not the case then a question arises as to why the assertion was made. Was it a deliberate attempt to mislead AWB management or did he make an honest mistake?

None of this establishes that AWB or any of its employees is guilty of any offence or of breaching UN resolutions. What it does suggest is the need for further enquiries (if this is possible) to determine all the facts surrounding the payment of the trucking fee and, in particular, whether any part of it found its way to the IGB or any Iraqi officials.

It is likely that in June or July 2004 the Boards of AWB and AWB (International) learnt of Mr Tracey's advice. It is not known if they were informed of his reservations.

Commencement of the Independent Inquiry Committee investigation

In March 2004, with the Independent Inquiry Committee investigation in the offing, Ms Armstrong of DFAT spoke to Mr Whitwell regarding AWB's contracts under the Oil-for-Food Programme. He told her 'AWB paid the Jordanian trucking company. The Jordanian trucking company might have made payments to the Iraqi's of their own volition'. Ms Armstrong wrote a ministerial memorandum to the Ministers for Foreign Affairs and Trade, in which she noted:

AWB Ltd has strenuously denied US Wheat Associates' allegations that it paid kickbacks to the regime, advising that the relatively high prices for OFF-contracted wheat reflected the costs of insurance, on-the-ground distribution and technical support not just the cost of acquiring and shipping the grain. The Iraqi Grains Board delegation currently in Australia has advised that AWB Ltd has acted with propriety at all times in Iraq. The company concedes however that the Jordanian company handling local transport might, of its own volition, have provided kickbacks to the regime. Given the gravity of the allegations we have suggested to AWB Ltd that they may wish to provide more formal advice on their position to the Government. AWB Ltd is bound by the Commonwealth Criminal Code

which contains offences relating to bribery and corruption by Australian companies and their officials overseas.

Ultimately, in June 2004, a few days after Mr Tracey had provided the advice quoted, AWB, through Mr Lindberg, wrote to Minister Downer. The letter was settled by Messrs Cooper and Quennell, both of whom were aware of Mr Tracey's advice. The letter reiterated AWB's denial of wrongdoing. It made no mention of the reservations of Mr Tracey's advice or the then known fact that AWB had since November 2000 been paying an additional unexplained fee equivalent to 10 per cent of the contract price to Alia as a supposed trucking fee. AWB knew the 10 per cent was not in truth related to trucking.

The Permanent Subcommittee on Investigations inquiry

In June 2004 AWB learnt of a proposed US Senate Permanent Subcommittee on Investigations inquiry into the Oil-for-Food Programme. It briefed US lawyers. A task force was established, which comprised, in addition to Australian and US lawyers, AWB staff from the Stakeholders Relations Division. About 20 meetings were held between June and November 2004. Privilege was claimed for all documents relating to those meetings. AWB sought Australian government help in putting representations to the PSI that AWB ought to be treated fairly in any such inquiry. Such representations were made in August and September 2004, following the provision of talking points to Australian officials by AWB.

The allegations regarding inflated payments to Iraq caused concern within the Wheat Export Authority, which perceived its function as being to ensure that the interests of wheat growers in the wheat pool were protected. In March 2004 the WEA had sought copies of contracts under the Oil-for-Food Programme and other information. This request had not been met. There was a joint meeting of the Boards of the WEA and AWB (International) on 27 July 2004. The AWB (International) Board did not inform the WEA of any matters it had learnt as a result of its briefings on Project Rose during the preceding 12 months or of any advice it had received from Mr Tracey.

On 28 July 2004 there was a joint information session for the Boards of AWB and AWB (International). By then, Mr Cooper had become aware that Alia was 49 per cent owned by the Iraqi Ministry of Transport. In preparation for a briefing of the joint Boards, slides were prepared to update the Boards with the then current knowledge gleaned from Project Rose. At the prior Board meeting it had been suggested that there be an investigation of the 'Alia structure, shareholding etc'. Management had decided not to conduct the investigation sought by the Board. Mr Quennell suggested to Mr Cooper that a slide be prepared showing what was known about Alia. Mr Cooper prepared such a slide. He reviewed his presentation with Mr Lindberg, who directed him to remove the slide from those to be presented to the Board. Whether Mr

Cooper informed the Board of the Ministry of Transport ownership of 49 per cent of the shareholding in Alia is not known. Mr Cooper's evidence was equivocal: the weight of evidence is that he did not.

In response to the WEA's request, AWB prepared a briefing paper in August 2004. That paper did not disclose the fact that the amount of payments for trucking fees was not disclosed on the face of any of the contracts. It did not disclose the unexplained 10 per cent increase in trucking fees, or the pre-payment of transportation fees, or that such fees were to be forwarded to the Ministry of Transport. Nor did it disclose that AWB knew that Alia was 49 per cent owned by the Ministry of Transport. Nor did it disclose the inflation of contracts A1670 and A1680 to recover the Tigris debt.

The WEA inspected and reviewed the contracts. Its concern was to determine whether the FOB price was at least that which it had been advised by AWB. That involved a netback calculation. The WEA satisfied itself that the prices were consistent with those previously notified to it, although it was accepted in evidence by the Chairman of the WEA that the WEA did not have the information necessary to enable it to do the netback calculation. The WEA was informed by AWB that the Coalition Provisional Authority had forced a 10 per cent reduction on all supplies of food imports to Iraq because it wanted to gain credibility with the Iraqis. In truth AWB knew that the 10 per cent reduction initially required was a removal of the after-sales-service fee, as had been highlighted in the brief delivered to Mr Tracey QC in June 2004. The WEA subsequently sought a written explanation of the 10 per cent reduction, but AWB failed to provide that information, notwithstanding that internally it prepared responses. Whilst those responses referred to the commercial reasons why AWB decided to accept the reduction, they did not address the true circumstance known to AWB—that the reduction was a removal of the 10 per cent after-sales-service fee.

In September 2004 the AWB (International) Board was given an update on Project Rose on two occasions. What was said is not known.

Cooperation with the Independent Inquiry Committee

In November and December 2004 there were discussions between AWB and the Independent Inquiry Committee regarding the basis on which AWB would 'cooperate' with the IIC. The Australian Government encouraged AWB to cooperate fully, but AWB required that, before any interviews or provision of documents, there be an agreed protocol with the IIC. Such a protocol was agreed by February 2005. During negotiations for that protocol AWB was able to negotiate down its obligation of production to the IIC from 'all relevant documents' to an obligation to produce documents in specific categories the IIC sought. The IIC also sought interviews with 'AWB staff who were involved in discussions with Iraqi authorities including Andrew Lindberg, Michael Long, Trevor Flugge and Dominic Hogan'. Messrs Lindberg, Long

and Flugge were interviewed but Mr Hogan was not, he no longer being an employee of AWB. In April 2005 the IIC sought interviews with Messrs Whitwell, Watson, Emons, Stott and Edmonds-Wilson, but those interviews did not occur. Mr Hockey was interviewed in relation to his role as an AusAID adviser in Iraq.

AWB established a data room for use by the IIC. It contained 24,000 pages of documents falling within categories formulated in the memorandum of understanding with the IIC. Those were the documents initially made available to this Inquiry. They omitted many relevant documents briefed to Mr Tracey as being important. They did not contain any of the results of the investigations conducted by AWB in Project Rose.

In February 2005 AWB established a Working Group comprising the Chairman (Mr Stewart), Mr Lindberg, Mr Barry (Deputy Chairman and Chairman of the Audit Committee), Mr Polson (Chairman of the Group Corporate Risk Committee) and Mr Starr (Chairman, Compliance Committee). The Working Group was to 'oversee Project Rose matters and receive legal advice on an ongoing basis'. AWB claimed legal professional privilege relating to the briefing of the Working Committee on Project Rose. However, it must be assumed that that Committee, comprising all the senior Board members and the Chief Executive Officer, were fully briefed on the inquiries conducted by Project Rose, the factual findings it had made, and the advice it had received from Mr Tracey and other lawyers. Whilst privilege was claimed in relation to the minutes, Dr Fuller's notes of that meeting were tendered without objection. They refer to:

- Alia
- Trucking fees—reasonable
- Compliance UN conventions circumvented
- Iron Filings. Negotiation of quality claims—\$6/tonnes—\$5 tonne
- Tigris
- Governance—past/future
- Issues mg't—Geoff Owen
- Board oversight

His notes also record a Director, Mr Thame, indicating that, with the 'wisdom of hindsight. Wished hadn't done that', and his requesting that notification be given under the Directors and Officers insurance policy. They also record that Mr Lindberg apparently described the conduct of employees and documents discovered in Project Rose as containing 'blemishes' and 'there are some emails that could be misinterpreted or would not look good'.

After the IIC interviews in late February and early March 2005 there were discussions within the Project Rose Committee on 4 March and 10 March. Following briefing of the Boards of AWB and AWB (International) on 10 March 2005, Mr Quennell asked Mr Tracey for further advice in the light of 26 documents apparently referred to by the IIC investigators.

Later in March 2005 AWB prepared documents to brief DFAT on the IIC meetings. It appears from the briefing that AWB had informed the IIC that AWB had conducted its own legal review, which had found no evidence of corruption by AWB or officials, no side payments or after-sales payments to individuals of the former regime, and no payments by the regime to former or existing AWB representatives. It made no mention of the 10 per cent after-sales-service fees, the Tigris transaction, the agreed arrangement for payment of the iron filings compensation through the inland transportation mechanism, or knowledge that Alia was 49 per cent owned by the Iraqi Ministry of Transport. Before AWB gave its presentation to DFAT, the content of that to be disclosed was cleared by AWB's lawyers.

In April 2005 the Wheat Export Authority Board was advised that the WEA had been unable to cooperate with the IIC because AWB declined to allow it to provide documents to the IIC. In those circumstances confidentiality constraints restricted it from doing so.

In April 2005 there were meetings between AWB, Mr Hargreaves, who was the Manager of Project Rose, and AWB's US lawyers. AWB also met with Ambassador Thawley and other Australian diplomats in the United States. Those diplomats were given an assurance by Mr Hargreaves that 'AWB had not done anything wrong under the OFFP Programme'.

On 22 April 2005 there was a Joint Board Committee meeting on the subject of Project Rose. The meeting was said to be 'a forum of directors of AWB Limited and AWB (International) Limited to discuss Project Rose, to receive legal advice in relation to Project Rose, and if necessary, to provide advice to the respective Boards'. Privilege was claimed concerning those discussions and the discussions at subsequent meetings, on 27 April and 24 May. However, Dr Fuller's notes of the meeting on 27 April record, 'Major exposure. Strong defences – but the headlines. Major implications for our business overseas and whether this company is fit to hold the Single Desk'.

On 1 June 2005 AWB briefed the Australian Government concerning the IIC Inquiry. It maintained its position that it had been obliged to use Alia and had not been aware of it being part-owned by the Iraqi Ministry of Transport until 2004.

In June 2005 AWB representatives travelled to Washington DC, where they updated Australian Embassy staff on the progress on the IIC report, was then expected in July or August. They also appointed advisers to manage AWB's media profile following

publication of the report. The embassy agreed to talk with AWB and recommend consultants in media management, but only on the basis that it had a firm assurance from AWB that it 'had not been involved in any kickbacks or wrong doing, and that it is being completely upfront with us and not hiding anything'. The embassy was given that assurance. It was said that AWB had conducted its own internal audit and legal review and no wrongdoing had been found. AWB denied it was aware that Alia was channelling money to Iraq, denied that Alia was a front company, and denied that it had not been providing trucking services. It also denied any overpricing.

However, at a later meeting with an embassy official, Mr Hargreaves said, 'I have also learnt that Alia had asked for an increase in the trucking fees of 10% in 2000 which AWB had agreed to pay. This increased progressively to 35–45% of the trucking fees by the end of the Oil-for-Food Programme. Alia is a Jordanian company. AWB had paid Alia in Jordan. AWB did not pay any money to Iraq'.

There were briefings to the Board on Project Rose and meetings with government in Canberra in June 2005 and embassy officials in Washington in July 2005. On 12 August 2005 Mr Tracey QC provided a memorandum said to confirm his prior oral advice given in May 2004. After noting that there were passages in various documents with which he had been briefed that were suggestive of the possibility that the trucking fee was, in fact, a payment by AWB to the IGB in contravention of Resolution 661, Mr Tracey concluded that the material was insufficient to establish such a conclusion. He advised:

22. ... The absence of any documentation evidencing the commercial basis for the fixing of the trucking fee at various rates and the absence of any contract with Alia may be taken as suggesting the existence of a bogus arrangement under which money was paid through Alia to Iraqi authorities for a purpose other than payment for the provision of trucking services. On the other hand, it may be that the payments were in the nature of an incentive to make it worth the while of Alia to provide more trucks to clear the wheat. ... That said, the absence of a contract between AWB and Alia is surprising. However, the evidence does not go so far as to suggest that none was ever entered into.

23. It is also of concern that the Department of Foreign Affairs and Trade was not told, when its advice was sought in late 2000, about these pre-existing events. The AWB gave the Department the impression that the demurrage problem had only recently arisen and that the trucking fee solution was about to become the subject of negotiations with Alia. ...

24. Ultimately, however, the question that I was asked to advise on was whether there was evidence that AWB may have contributed to a contravention by Australia of its obligations under Resolution 661. A breach of that resolution would only have occurred if the trucking fees had been paid to the IGB or the Iraqi Government and then only if it was not paid for a legitimate commercial purpose. Whilst some of the material with which I have been briefed raises suspicions that there may have been a perception within the AWB that any payment of the trucking fee may have contravened Resolution 661 and that it was necessary to make the payment to Alia in order to avoid any suggestion that the payments, if made directly to the IGB, would have been in breach of the Resolution, there is absolutely no evidence in the material provided to me that any of the money paid by the AWB to Alia was ever

forwarded to the IGB or any other arm of the Iraqi Government. It was for this reason, that, despite some misgivings I answered the question posed for advice in the negative.

It is to be observed that, in relation to quoted paragraph 22, it was well known within AWB that there was no agreement with Alia prior to October 2003: had there been such an agreement there would have been no need to enter into one at that time. Further, in relation to paragraph 23, Mr Tracey rightly noted the misleading nature of Mr Stott's letter of 30 October 2000. Further, in relation to paragraph 24, whilst Mr Tracey may not have been briefed with the evidence, the material before this Inquiry makes clear that Mr Hogan and other senior officials of AWB had no doubt that the monies paid to Alia were in truth being paid to the IGB or another arm of the Iraqi Government. Further, as was noted in the trip report of January 2001, it was recognised within AWB that the additional 10 per cent surcharge was a method of syphoning off funds from the UN escrow account to be paid to Iraq.

On 8 September 2005 Dr Fuller sent a memorandum to the directors and members of the Executive Leadership Group addressing the forthcoming IIC report. It stated, 'AWB paid a legitimate transport company, based in Jordan and that company provide a genuine service that was critical in successfully distributing wheat to people throughout Iraq'; and, further, that DFAT had expressed to AWB in November 2000 the view that payment of trucking fees at the direction of the IGB to enable distribution of wheat to the Iraqi people was consistent with Resolution 661.

Each of those statements was erroneous. AWB had known at least since Mr Hogan's note, made in May 2001, of how the transportation system worked, and that Alia did not provide a genuine trucking service. It had been known since at least January 2001 that the additional 10 per cent surcharge was a method of syphoning monies from the UN account for payment to Iraq. DFAT's letter of 2 November 2000 did not say that payment of trucking fees at the direction of the IGB to enable distribution of wheat was consistent with Resolution 661. It was not asked to express a view on that issue and it had not done so. The letter of November 2000 was a response to Mr Stott's letter of 30 October 2000, which sought to set up a position where AWB could claim DFAT had approved its trucking arrangements in Iraq—without truthfully telling DFAT what those arrangements were—when in fact DFAT had not.

In September 2005 AWB's present lawyers, Arnold Bloch Leibler, sought an opinion from Sir Anthony Mason, a former Chief Justice of Australia. Advice was sought in relation to:

- (i) Did the inclusion, on the insistence of the Iraqi Grain Board (IGB), of an inland delivery payment term in its wheat contracts with AWB violate the UN sanctions against Iraq that started with Resolution 661 in 1990 and continued until the Oil-for-Food Program ended in 2003?

Answer: No, so long as the price stipulated was reasonable.

- (ii) Did the UN Sanctions Resolutions prohibit AWB from paying fees for the inland delivery of wheat to a transport company?

Answer: So long as the fees were reasonable AWB could reasonably conclude that the payment of such fees was consistent with the Sanctions Resolutions.

- (iii) Whether the payment of inland transport fees by AWB could fall within cl. 4 of Resolution 661.

Answer: The payment of unreasonable fees could fall within the prohibition contained in cl. 4 of Resolution 661.

- (iv) Do the materials presented to me support a finding that AWB knew or ought to have known that the payments of inland transportation fees which it made were illicit payments to, or for the benefit of, the Iraqi Government?

Answer: As to actual knowledge, no. As to “ought to have known”, the position is not as clear. Although the evidence of steep increases in transportation fees invites suspicion, there are strong arguments that it should not be inferred that AWB ought to have known that the payments were being channelled to the Iraqi Government.

The answers were delivered on 24 October 2005. AWB knew that the fees paid to Alia for transportation services were unreasonable. They had increased from US\$12.00 per tonne to US\$55.00 per tonne without explanation or query. They included a 10 per cent factor unrelated to transport.

In September 2005 AWB sought a meeting with Mr Volcker, the Chairman of the Independent Inquiry Committee. Mr Downer, the Minister for Foreign Affairs, met Mr Volcker on 22 September 2005, when he advanced the position of AWB as it had advised it to him.

On 27 September 2005 AWB met with DFAT officers, still maintaining it had actually used the transport services of Alia. It again stressed that its internal investigations and external legal advice showed it had not breached sanctions.

Having seen the draft findings of the IIC report, and in particular statements by Alia in that report, AWB sent Mr Long to Jordan to meet Alia. On 4 October 2005 the way in which the trucking system operated was explained to him. He was informed that, in relation to the trucking fee, AWB paid Alia, which in turn paid the monies to the Iraqi State Company for Water Transport, which in turn paid them to the Ministry of Transport within the Iraqi Government. This was conveyed by email to Arnold Bloch Leibler and Mr Lindberg. The same day, Mr Stewart and Mr Lindberg briefed Mr Downer in Canberra, presumably unaware of Mr Long’s email. They maintained to Mr Downer that Alia was not a front company and had provided transportation services and that AWB had been unaware of any wrongdoing and had used Alia’s services in good faith. Again, they advised of the results of the internal investigation. Mr Lindberg maintained that at every stage AWB had sought and received approval

to use Alia, and that the United Nations had known all the time about its use of Alia. Neither statement was true.

The Chairman and Chief Executive Officer of AWB, and AWB's legal advisers, met with Mr Volcker in New York on 12 October 2005. They provided a letter to Mr Volcker, asserting that:

- AWB did not view Alia to be a front company for the Iraqi Government.
- AWB was never informed of any after-sales-service fee and never made payments characterised as such.

Neither statement was true.

Ultimately, on 25 October 2005, two days before the issue of the IIC report, AWB wrote to the IIC suggesting that the fairest interpretation of the circumstances was that 'AWB was an unwitting participant in an elaborate scheme of deception devised by the regime'. In fact, from mid-1999, AWB had been a willing participant in the scheme with the full knowledge of then senior management and the then Chairman, such participation being known to be necessary to retain the Iraqi wheat trade.

On 26 October 2005 AWB advised the Australian Government of the findings the IIC would make and forwarded a copy of Sir Anthony Mason's opinion.

On 27 October 2005 the IIC issued its final report.

In November 2005 the Wheat Export Authority requested from AWBI a detailed brief on the 'operation of the escrow account for Australian wheat sales under the OFF Programme' and 'how the payments for transport made under the OFF Programme worked'. A brief was provided on 14 November 2005. However, that brief did not disclose:

- the 10 per cent after-sales-service fee or that it was paid through Alia
- that the IGB set the rate for transport and directed the use of Alia
- the inflation of contracts A1670 and A1680 to recover the Tigris debt
- that Alia on-paid transport fees to the Ministry of Transport
- that use of the inland transportation mechanism was one of the means discussed with Iraq for the payment to it of the iron filings compensation.

On 21 November 2005 there was a joint information session of both Boards. Project Rose was renamed Project Lilac to respond to this Inquiry, and a briefing regarding

this Inquiry was given. There was a further update given to the Boards on 13 December 2005. AWB claimed privilege over the minutes of those meetings.

In December 2005 AWB engaged Dr Sandman to provide crisis management and public relations advice regarding AWB's involvement in this Inquiry. Dr Sandman advised that AWB should 'essentially over apologise, to apologise for things that had happened, to cover the ground and in fact to go further than was necessary, and that it was in the interests of the corporation to do so in terms of its public reputation and recovery from events'. In considering that advice, Mr Lindberg drafted a document headed 'Cole Inquiry—Draft Statement of Contrition—Andrew Lindberg'. The document stated:

1. As a result of the Volker inquiry into the OFF program AWB accepts that in paying money for inland transportation and after sales service it paid money to the Iraq government in contravention of the UN sanctions.
2. Even though there were warning signs to some employees that this may have been occurring AWB did not challenge these payments and was not alert to the potential consequences of making these payments. For this we are truly sorry and deeply regret any damage this may have caused to Australia's trading reputation, the Australian government or the United Nations.
3. AWB in pursuing its constitutional requirement to maximise returns to the Australian farmer in selling their wheat took a commercial and technical compliance approach to the UN sanctions but failed to consider the broader purposes of the UN sanctions. This was a failure, at the time, of the culture, systems and procedures which the Company deeply regrets and is committed to continuing to improve.
4. Even though the transaction concerning BHP Petroleum in recovering payment for a prior wheat shipment was well intentioned and AWB believed complied with the UN sanctions, it should not have occurred without specific authorisation of the Australian government and the United Nations. AWB regrets this did not occur.
5. Even though AWB relied on the United Nation's supervision and authorisation of each contract the Company should have established its own internal systems of checks and balances such that it did not participate (and may have even aided stopping) the systematic and wide spread abuse of the OFF program. We deeply regret and apologise for not having done so.
6. While AWB can ex-post rationalise its participation in the OFF Program and claim it did not have the benefit of hindsight or the complete picture this does not excuse what occurred and is not offered as an excuse. We simply should have done better; and I am deeply sorry we didn't.

AWB claimed privilege for this document, asserting that it was delivered to the Inquiry by mistake. That claim was rejected by me and by the Federal Court of Australia. However, Mr Lindberg decided not to make the statement of contrition to the Inquiry.

On 12 January 2006, four days before the commencement of this Inquiry's public hearings, a joint information session was attended by AWB executives and legal advisers. AWB claimed privilege for Dr Fuller's notes of this meeting, although there was evidence given by directors concerning what, at least in part, was said.

Findings

The Letters Patent require that I inquire into and report on whether any decision, action, conduct, payment or writing of AWB Limited, Alkaloids of Australia Pty Limited, Rhine Ruhr Pty Limited, BHP Limited or The Tigris Petroleum Corporation Limited or persons associated with them *might* have constituted a breach of any law of the Commonwealth, a State or Territory and, if so, whether the question of commencing proceedings should be referred to the relevant Commonwealth, State or Territory agency.

I am of the view on the material before me that the following breaches of laws *might* have occurred:

- Acts, conduct and payments by AWB Limited and AWB (International) Limited *might* have constituted a breach of
 - ss. 29D, 29A and 29B of the *Crimes Act 1914*
 - ss. 135.1(7) and 136.1 of the Criminal Code
 - ss. 82 of the *Crimes Act 1958* (Vic)
 - ss. 5 of the Banking (Foreign Exchange) Regulations.
- Acts and conduct by the following persons *might* have constituted them accessories to the offences AWB Limited or AWB (International) Limited *might* have committed
 - Mr Emons
 - Mr Flugge
 - Mr Geary
 - Mr Hogan
 - Mr Ingleby
 - Mr Long
 - Mr Officer
 - Mr Rogers
 - Mr Stott
 - Mr Watson

- Acts and conduct of the following persons *might* have constituted a breach of ss. 180, 181, 182, 184 or 1309 of the *Corporations Act 2001*
 - Mr Cooper
 - Mr Emons
 - Mr Flugge
 - Mr Geary
 - Mr Hogan
 - Mr Ingleby
 - Mr Long
 - Mr Officer
 - Mr Rogers
 - Mr Stott
 - Mr Watson.
- Mr Davidson Kelly *might* have conspired with or aided and abetted AWB or AWB (International) in the commission of an offence against s. 82 of the *Crimes Act 1958* (Vic).

I recommend that each of these matters be referred to the appropriate authority for consideration whether proceedings should be commenced for breach of the law referred to. I recommend that there be established a joint Task Force comprising the Australian Federal Police, Victoria Police, and the Australian Securities and Investments Commission to consider possible prosecutions in consultation with the Commonwealth Director of Public Prosecutions and the Victorian Director of Public Prosecutions. Administrative responsibility for the conduct of the Task Force should reside with the Commonwealth Attorney-General.

I make no other findings of possible breaches of the laws by any company or person.

Recommendations

Issue

In seeking to have the Department of Foreign Affairs and Trade forward to the United Nations contracts for approval for payment from the escrow account or grant permission to export under the Customs (Prohibited Exports) Regulations 1958, the exporter was not required to certify to the Commonwealth the accuracy or completeness of the contractual documents said to constitute the agreement with the foreign entity. The Commonwealth should not be asked to act in such serious matters without such certification of accuracy or completeness.

Recommendation 1

I recommend that the Customs (Prohibited Exports) Regulations 1958 be amended to incorporate a prescribed form that those applying for permission to export would be required to complete. I further recommend that the Regulations be amended so as to:

- make it an offence to knowingly or recklessly provide in an application information that is false or misleading in a material particular
- make it an offence to knowingly or recklessly omit a material particular from an application for a permission to export
- render invalid any permission to export granted on the basis of an application that was false or misleading in a material particular or that omitted a material particular.

The prescribed form should be required to be signed by a senior executive of an exporting company, who should also be personally liable for knowingly or recklessly signing a form that is false or misleading in a material particular or omits a material particular. The penalty for so doing should be imprisonment for 10 years.

Issue

Failure by Australian companies, or their officers, to act in a manner consistent with UN sanctions that Australia has agreed to uphold should be regarded as serious criminal conduct. That is because of the potential harm that such conduct may cause to Australia's trading reputation and international standing. Such conduct affects the national interest. Offences for contravening conduct should not arise from breach of Regulations attracting minor penalties. The prohibitions should include the payment of funds or benefits to a state the subject of sanctions or its residents and the exporting to or importing from such a state or its residents contrary to sanctions.

Recommendation 2

I recommend that there be inserted in the Commonwealth Criminal Code, perhaps in Chapter 4, offences for acting contrary to UN sanctions that Australia has agreed to uphold. The statute should prohibit direct or indirect unapproved financial or trading transactions designated by the Governor-General. Breach of statute should be an offence of strict liability. The penalty for breach should be severe, equivalent to three times the value of the offending transactions, by way of monetary fine for corporations and up to 10 years' imprisonment for individuals.

Issue

At present no power exists for any Commonwealth entity to obtain evidence and information for the purpose of securing compliance with or detecting evasion of statutory restrictions on dealings between Australian companies or persons and a foreign state subject to UN sanctions or its residents. For the maintenance of Australia's international trading reputation, it is important that there be such a power, so that any breach of restrictions can be prevented or stopped.

Recommendation 3

I recommend that there be conferred on an appropriate body a power to obtain evidence and information of any suspected breaches or evasion of sanctions that might constitute the commission of an offence against a law of the Commonwealth.

Issue

Circumstances may arise where it is appropriate for the public interest in discovering the truth should prevail over the private interest in the maintenance of legal professional privilege.

Recommendation 4

That consideration be given to amending the Royal Commissions Act 1902 to permit the Governor General in Council by Letters Patent to determine that in relation to the whole or a particular aspect of matters the subject of inquiry, legal professional privilege should not apply.

Issue

The *Wheat Marketing Act 1989* imposes on the Wheat Export Authority two functions:

- to control the export of wheat from Australia
- to monitor AWB (International)'s performance in relation to the export of wheat and examine and report on the benefits to growers that result from that performance.

Insofar as those functions include the obligation to monitor performance of proper standards of commercial conduct by AWBI, and through it AWB, the WEA was not successful in so doing in relation to sales to Iraq. A strong and vigorous regulatory or monitoring organisation is required whilst AWBI or AWB is responsible for the export of Australian wheat.

Recommendation 5

I recommend that there be a review of the powers, functions and responsibilities of the body charged with controlling and monitoring any Australian monopoly wheat exporter. A strong and vigorous monitor is required to ensure that proper standards of commercial conduct are adhered to.

1 United Nations resolutions restricting trade with Iraq

- 1.1 Following Iraq's invasion of Kuwait in 1990, the United Nations Security Council imposed restrictions on member states trading with Iraq. The object of the sanctions, imposed by Security Council Resolution 661, was to secure compliance by Iraq with paragraph 2 of Resolution 660, which required Iraq's immediate withdrawal from Kuwait, and to restore the authority of the legitimate Government of Kuwait.¹ The relevant clauses of Resolution 661, which was adopted on 6 August 1990, are:

The Security Council,

...

3. Decides that all states shall prevent:

...

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

...

6. Decides to establish, in accordance with rule 28 of the provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council, to undertake the following tasks and to report on its work to the Council with its observations and recommendations:
 - (a) To examine the reports on the progress of the implementation of the present resolution which will be submitted by the Secretary General;
 - (b) To seek from all States further information regarding the action taken by them concerning the effective implementation of the provisions laid down in the present resolution.

1.2 The effect of the exemption in paragraph 3(c) was to permit, where humanitarian circumstances existed, states to allow their nationals to export to Iraq foodstuffs and medicines. The same exemption is found in paragraph 4: payments to the Government of Iraq were permitted if the payments were to be used exclusively for medical or humanitarian purposes, including the supply of foodstuffs. Resolution 661 did not, however, decide or declare that ‘humanitarian circumstances’ then existed in Iraq.

1.3 The committee referred to in clause 6 of the resolution became known as the 661 Committee.

1.4 On 13 September 1990 the Security Council passed Resolution 666, which provided:

The Security Council,

Recalling its resolution 661 (1990) of 6 August 1990, paragraphs 3(c) and 4 of which apply, except in humanitarian circumstances, to foodstuffs,

Recognising that circumstances may arise in which it will be necessary for foodstuffs to be supplied to the civilian population in Iraq or Kuwait in order to relieve human suffering.

...

Emphasizing that it is for the Security Council, alone or acting through the Committee, to determine whether humanitarian circumstances have arisen,

...

1. Decides that in order to make the necessary determination whether or not, for the purposes of paragraphs 3(c) and 4 of resolution 661 (1990), humanitarian circumstances have arisen, the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait shall keep the situation regarding foodstuffs in Iraq and Kuwait under constant review;

...

5. Decides that if the Committee, after receiving the reports from the Secretary-General, determines that circumstances have arisen in which there is an urgent humanitarian need to supply foodstuffs to Iraq or Kuwait in order to relieve human suffering, it will report promptly to the Council its decision as to how such need should be met;
6. Directs the Committee that in formulating its decisions it should bear in mind that foodstuffs should be provided through the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision, in order to ensure that they reach the intended beneficiaries;
7. Requests the Secretary-General to use his good offices to facilitate the delivery and distribution of foodstuffs to Kuwait and Iraq in accordance with the provisions of the present resolution and other relevant resolutions.

1.5 On 1 March 1991 the UN Secretary-General announced his decision to send to Iraq a mission to assess humanitarian needs there.² The mission was led by Mr Ahtisaari, Under-Secretary for Administration and Management. On 20 March the Secretary-General transmitted to the President of the Security Council Mr Ahtisaari's report on humanitarian needs in Iraq.³ On 22 March the 661 Committee considered this report and determined as follows:

2. Under paragraph 5 of resolution 666 (1990), the Committee has the power to determine, after receiving all relevant reports and information, that circumstances have arisen in which there is an urgent humanitarian need to supply foodstuffs to Iraq in order to relieve human suffering; and in that event the Committee will report promptly to the Council its decisions as to how such needs will be met.
3. In the light of the new information available to it, the Committee has decided to make, with immediate effect, a general determination that humanitarian circumstances apply with respect to the entire civilian population of Iraq in all parts of Iraq's national territory. The Committee has also concluded that civilian and humanitarian imports to Iraq as identified in Mr Ahtisaari's report are integrally related to the supply of foodstuffs and supplies intended strictly for medical purposes (which are exempt from sanctions under the provisions of resolution 661 (1990)) and that such imports should also be allowed with immediate effect.
4. The Committee decides upon a simple notification procedure for foodstuffs supplied to Iraq and no-objection procedure for those civilian and humanitarian imports (other than supplies intended strictly for medical purposes) described in the preceding paragraph.⁴

1.6 On 3 April 1991 the Security Council adopted Resolution 687, which provided:

Taking note with grave concern of the reports transmitted by the Secretary General on 20 March and 28 March 1991, and conscious of the necessity to meet urgently the humanitarian needs in Kuwait and Iraq ...

20. Decides, effective immediately, that the prohibitions against the sale or supply to Iraq of commodities or products other than medicine and health supplies, and prohibitions against financial transactions related thereto contained in resolution 661 (1990), shall not apply to foodstuffs notified to the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait or, with the approval of that Committee, under the simplified and accelerated 'no-objection' procedure, to materials and supplies for essential civilian needs as identified in the report to the Secretary-General dated 20 March 1991, and in any further findings of humanitarian need by the Committee.

1.7 Thus, from 3 April 1991 Iraq's humanitarian needs were formally recognised. All restrictions on the export of foodstuffs to Iraq were removed, subject to the foodstuffs being 'notified' to the 661 Committee.

1.8 On 14 April 1995 the Security Council adopted Resolution 986, which established the Oil-for-Food Programme. The resolution provided:

The Security Council,

...

Concerned by the serious nutritional and health situation of the Iraqi population, and by the risk of a further deterioration in this situation,

Convinced of the need as a temporary measure to provide for the humanitarian needs of the Iraqi people until the fulfilment by Iraq of the relevant Security Council resolutions, including notably resolution 687 (1991) of 3 April 1991, allows the Council to take further action with regard to the prohibitions referred to in resolution 661 (1990) of 6 August 1990, in accordance with the provisions of those resolutions,

...

1. Authorizes States, notwithstanding the provisions of paragraphs 3(a), 3(b) and 4 of resolution 661 (1990) and subsequent relevant resolutions, to permit the import of petroleum and petroleum products originating in Iraq, including financial and other essential transactions directly relating thereto, sufficient to produce a sum not exceeding a total of one billion United States dollars every 90 days for the purposes set out in this resolution and subject to the following conditions:

- (a) Approval by the Committee established by resolution 661 (1990), in order to ensure the transparency of each transaction and its conformity with the other provisions of this resolution, after submission of an application by the State concerned, endorsed by the Government of Iraq, for each proposed purchase of Iraqi petroleum and petroleum products, including details of the purchase price at fair market value, the export route, the opening of a letter of credit payable to the escrow account to be established by the Secretary-General for the purposes of this resolution, and of any other directly related financial or other essential transaction;

- (b) Payment of the full amount of each purchase of Iraqi petroleum and petroleum products directly by the purchaser in the State concerned into the escrow account to be established by the Secretary-General for the purposes of this resolution;

...

7. Requests the Secretary-General to establish an escrow account for the purposes of this resolution, to appoint independent and certified public accountants to audit it, and to keep the Government of Iraq fully informed;

8. Decides that 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 requests the Secretary-General to use the funds deposited in the escrow account:

- (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, 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;

- (b) To compliment, in view of the exceptional circumstances prevailing in the three Governorates mentioned below, the distribution by the Government of Iraq of goods imported under this resolution, in order to ensure an equitable distribution of humanitarian relief to all segments of the Iraqi population throughout the country, by providing between 130 million and 150 million United States dollars every 90 days to the United Nations Inter-Agency Humanitarian Programme operating within the sovereign territory of Iraq in the three northern Governorates of Dihouk, Arbil and Suleimaniyeh, except that if less than one billion United States dollars worth of petroleum or petroleum products is sold during any 90 day period, the Secretary-General may provide a proportionately smaller amount for this purpose.

1.9 The effect of Resolutions 986 and 661 was to provide a fund from which foodstuffs and other humanitarian goods could be purchased. The continuing operation of Resolution 661, and in particular clause 4, prevented states and their nationals from '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'. Resolution 986 recognised the need for the provision of foodstuffs and provided a fund from which they could be purchased. The initial period for operation of the Oil-for-Food Programme was 180 days.⁵

1.10 Special provisions were inserted in Resolution 986 to address the needs of the Kurdish population in the three northern governorates of Dihouk, Arbil and Suleimaniyeh. Separate arrangements were later made for distribution of humanitarian supplies in these governorates.

1.11 Paragraphs 12 and 13 of Resolution 986 provided:

12. Requests the Committee established by resolution 661 (1990), in close coordination with the Secretary-General, to develop expedited procedures as necessary to implement the arrangements in paragraphs 1, 2, 6, 8, 9 and 10 of this resolution and to report to the Council 90 days after the date of entry into force of paragraph 1 above and again prior to the end of the initial 180 day period on the implementation of those arrangements;
13. Requests the Secretary-General to take the actions necessary to ensure the effective implementation of this resolution, authorizes him to enter into any necessary arrangements or agreements, and requests him to report to the Council when he has done so;

The 661 Committee, in coordination with the Secretary-General, was thus responsible for the development and implementation of procedures to enable the operation of the Oil-for-Food Programme.

1.12 The Security Council subsequently authorised the Oil-for-Food Programme to be extended in phases. Resolution 986 authorised, for an initial period of 180 days, phase I.⁶ In total, 13 phases were authorised; each phase was authorised by a Security Council resolution that extended the operation of Resolution 986 for a further 180 days.⁷

1.13 On 20 May 1996 the Secretariat of the United Nations and the Government of Iraq executed a Memorandum of Understanding on the implementation of Resolution 986 (as contemplated by paragraphs 12 and 13 of that resolution).⁸ The MOU provided that:

2. The Distribution Plan referred to in paragraph 8(a)(ii) of the Resolution, which has to be approved by the Secretary-General of the United Nations, constitutes an important element in the implementation of the Resolution.

Section II
Distribution Plan

5. The Government of Iraq undertakes to effectively guarantee equitable distribution to the Iraqi population throughout the country of medicine, health supplies, foodstuffs and materials and supplies for essential civilian needs (hereinafter humanitarian supplies) purchased with the proceeds of the sale of Iraqi petroleum and petroleum products.
6. To this end, the Government of Iraq shall prepare a Distribution Plan describing in detail the procedures to be followed by the competent Iraqi authorities with a view to ensuring such distribution. The present distribution system of such supplies, the prevailing needs and humanitarian conditions in the various Governorates of Iraq shall be taken into consideration with due regard to the sovereignty of Iraq and the national unity of its population. The plan shall include a categorised list of the supplies and goods that Iraq intends to purchase and import for this purpose on a six-month basis.
7. The part of the Distribution Plan related to the three northern Governorates of Arbil, Dihouk and Suleimaniyeh shall be prepared in accordance with Annex I, which constitutes an integral part of this Memorandum.
8. The Distribution Plan shall be submitted to the Secretary-General of the United Nations for approval. If the Secretary-General is satisfied that the plan adequately ensures equitable distribution of humanitarian supplies to the Iraqi population throughout the country, he will so inform the Government of Iraq.
9. It is understood by the Parties to this memorandum that the Secretary-General will not be in a position to report as required in paragraph 13 of the Resolution unless the plan prepared by the Government of Iraq meets with his approval.
10. Once the Secretary-General approves the plan, he will forward a copy of the categorised list of the supplies and goods, which constitutes a part of the plan, to the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait (hereinafter the 661 Committee) for information.

Section V
Procurement and confirmation procedures

19. The purchase of medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs of the Iraqi population throughout the country, as referred to in paragraph 20 of resolution 687 (1991), will, subject to paragraph 20 below, be carried out by the Government of Iraq, will follow normal commercial practice and be on the basis of the relevant resolutions of the Security Council and procedures of the 661 Committee.
20. The purchase of humanitarian supplies for the three northern Governorates of Arbil, Dihouk and Suleimaniyeh, as provided for in the Distribution Plan, will be carried out in accordance with Annex I.

21. The Government of Iraq will, except as provided for in paragraph 20, contract directly with suppliers to arrange the purchase of supplies, and will conclude the appropriate contractual arrangements.
22. Each export of goods to Iraq shall be at the request of the Government of Iraq pursuant to paragraph 8 (a) of the Resolution. Accordingly, exporting States will submit all relevant documentation, including contracts, for all goods to be exported under the Resolution to the 661 Committee for appropriate action according to its procedures. It is understood that payment of the supplier from the 'Iraq Account' can take place only for items purchased by Iraq that are included in the categorized list referred to in Section II of the present Memorandum. Should exceptional circumstances arise, applications for the export of additional items may be submitted to the 661 Committee for its consideration.
23. As noted above, the 661 Committee will take action on applications for the export of goods to Iraq in accordance with its existing procedures subject to future modifications under paragraph 12 of the Resolution. The 661 Committee will inform the Government of Iraq, requesting States and the Secretary-General of the actions taken on the requests submitted.
24. After the 661 Committee has taken action on the applications for export in accordance with its procedures, the Central Bank of Iraq will request the bank holding the 'Iraq Account' to open irrevocable letters of credit in favour of the beneficiaries. Such requests shall be referred by the bank holding the 'Iraq Account' to the United Nations Secretariat for approval of the opening of the letter of credit by the latter bank, allowing payment from the 'Iraq Account' upon presentation of credit-conform documents. The letter of credit will require as a condition of payment, inter alia, the submission to the bank holding the 'Iraq Account' of the documents to be determined by the procedures established by the 661 Committee, including the confirmations by the agents referred to in paragraph 25 below. The United Nations, after consultations with the Government of Iraq, shall determine the clause to be inserted in all purchase orders, contracts and letters of credit regarding payment terms from the 'Iraq Account'. All charges incurred in Iraq are to be borne by the applicant, whereas all charges outside Iraq are for the account of the beneficiary.
25. The arrival of goods in Iraq purchased under the plan will be confirmed by independent inspection agents to be appointed by the Secretary-General. No payments can be made until the independent inspection agents provide the Secretary-General with authenticated confirmation that the exported goods concerned have arrived in Iraq.
26. The independent inspection agents may be stationed at relevant Iraqi entry points, customs areas or other locations where the functions set out in paragraph 27 of this Section can be performed. The number and location of the stationing points for the agents will be designated by the United Nations after consultations with the Government of Iraq.
27. The independent inspection agents will confirm delivery to Iraq of shipments. They will compare the appropriate documentation, such as bills of lading, other shipping documents or cargo manifests, and the documents

issued by the 661 Committee, against goods actually arriving in Iraq. They will also have the authority to perform duties necessary for such confirmation, including: quantity inspection by weight or count, quality inspection including visual inspection, sampling, and, when necessary, laboratory testing.

28. The inspection agents will report all irregularities to the Secretary- General and to the 661 Committee. If the problem is related to normal commercial practice (e.g., some shortlanded goods), the 661 Committee and the Government of Iraq are informed, but normal commercial resolution practices (e.g., claims) go forth. If the matter is of serious concern, the independent inspection agents will hold the shipment in question pending guidance from the 661 Committee.

Section VI

Distribution of humanitarian supplies purchased under the Distribution Plan

32. The distribution of humanitarian supplies shall be undertaken by the Government of Iraq in accordance with the Distribution Plan referred to in Section II of the present Memorandum. The Government of Iraq will keep the United Nations observation personnel informed about the implementation of the plan and the activities that the Government is undertaking.
33. The distribution of humanitarian supplies in the three northern Governorates of Arbil, Dihouk and Suleimaniyeh shall be undertaken by the United Nations Inter-Agency Humanitarian Programme on behalf of the Government of Iraq under the Distribution Plan with due regard to the sovereignty and territorial integrity of Iraq in accordance with Annex I.

1.14 Annex I to the MOU, referred to in clauses 7, 20 and 33, dealt with distribution of humanitarian supplies, including foodstuffs, in Iraq's three northern governorates. The annex is important when considering the obligations imposed on the Government of Iraq by clause 32 of the MOU relating to distribution elsewhere within Iraq. It provided:

1. In order to ensure the effective implementation of paragraph 8(b) of the Resolution, the following arrangements shall apply in respect of the Iraqi Governorates of Arbil, Dihouk and Suleimaniyeh. These arrangements shall be implemented with due regard to the sovereignty and territorial integrity of Iraq, and to the principle of equitable distribution of humanitarian supplies throughout the country.
2. The United Nations Inter-Agency Humanitarian Programme shall collect and analyse pertinent information on humanitarian needs in the three northern Governorates. On the basis of that information, the Programme will determine the humanitarian requirements of the three northern Governorates for discussion with the Government of Iraq and subsequent incorporation in the Distribution Plan. In preparing estimates of food needs, the Programme will take into consideration all relevant circumstances, both within the three northern Governorates and in the rest of the country, in order to ensure equitable distribution. Specific rehabilitation needs in the three northern Governorates shall receive the necessary attention.

3. Within a week following the approval of the Distribution Plan by the Secretary-General, the Programme and the Government of Iraq will hold discussions to enable the Programme to determine how the procurement of humanitarian supplies for the three northern Governorates can be undertaken most efficiently. These discussions should be guided by the following considerations. The bulk purchase by the Government of Iraq of standard food commodities and medicine may be the most cost-effective means of procurement. Other materials and supplies for essential civilian needs, specifically required for the three northern Governorates, may be more suitably procured through the United Nations system in view of technical aspects related to their proper use.
 4. To the extent that purchases and deliveries are made by the Government of Iraq in response to the written communication of the Programme, an amount corresponding to the cost of the delivered goods will be deducted from the amount allocated to the Programme from the 'Iraq Account'.
 5. Humanitarian supplies destined for distribution in the three northern Governorates shall be delivered by the Programme to warehouses located within these Governorates. Such supplies can also be delivered by the Government of Iraq or the Programme, as appropriate, to warehouses in Kirkuk and Mosul. The warehouses shall be managed by the Programme. The Government of Iraq shall ensure the prompt customs and administrative clearances to enable the safe and quick transit of such supplies to the three northern Governorates.
 6. The Programme shall be responsible in the three northern Governorates for the storage, handling, internal transportation, distribution and confirmation of equitable distribution of humanitarian supplies. The Programme will keep the Government of Iraq informed on the implementation of distribution.
 7. Whenever possible and cost-effective, the Programme shall use appropriate local distribution mechanisms which are comparable to those existing in the rest of Iraq in order to effectively reach the population. Recipients under this arrangement will pay a fee for internal transportation, handling, and distribution as in the rest of the country. The Programme shall ensure that the special needs of internally displaced persons, refugees, hospital in-patients and other vulnerable groups in need of supplementary food are appropriately met, and will keep the Government of Iraq informed.
- 1.15 Resolution 986 and the MOU of 20 May 1996 thus recognised Iraq's humanitarian needs, established an escrow account to hold the proceeds of petroleum sales to fund purchases of goods (including foodstuffs) to address those needs, established a mechanism whereby payments could be made for such humanitarian goods in accordance with the procedures established by the 661 Committee – which included, in the case of foodstuffs, 'notification' of such contracts – and required that there be equitable distribution of humanitarian supplies throughout Iraq.
- 1.16 Clause 32 of the MOU required that the distribution of humanitarian supplies be 'undertaken by the Government of Iraq in accordance with [an approved]

Distribution Plan.’ Annex I, and in particular clauses 4 to 7 thereof, recognised that in the three northern governorates the UN Inter-Agency Humanitarian Programme was primarily responsible for ‘storage, handling, internal transportation [and] distribution’ of such supplies but accepted that in some circumstances the purchase and delivery of such supplies might be effected by the Government of Iraq. Clause 7 of Annex I recognised that throughout Iraq there were existing ‘distribution mechanisms’ that included ‘internal transportation, handling and distribution’.

- 1.17 The conclusion to be drawn from the provisions of clause 32 of the MOU and Annex I is that the Government of Iraq was obliged to undertake the transport and distribution of humanitarian supplies (including foodstuffs) throughout Iraq, unless in the three northern governorates this task was undertaken by the UN Inter-Agency Humanitarian Programme.⁹
- 1.18 Initially, the MOU was intended to remain in force for 180 days—the initial period of the Oil-for-Food Programme.¹⁰ However, as the Programme was extended so too was the MOU.¹¹

Procedures adopted by the 661 Committee to approve contracts

- 1.19 By letter dated 8 August 1996, the Chairman of the 661 Committee informed the President of the Security Council that the 661 Committee had ‘adopted procedures to be employed by it [the Committee] in the discharge of its responsibilities’; these are referred to as the 661 Committee procedures.¹² The procedures adopted by the committee were divided into six sections and dealt with both the exporting of humanitarian supplies to Iraq and the sale of oil. Section III set out the procedures to be adopted in relation to humanitarian supplies, including foodstuffs. The 661 Committee procedures relating to the exportation of humanitarian supplies mirrored those described in the MOU.
- 1.20 Section III of the 661 Committee procedures provided, in part:

Section III
Export to Iraq of humanitarian supplies

26. The Government of Iraq will prepare a categorized list of humanitarian supplies which it intends to purchase and import pursuant to resolution 986 (1995). This list will be submitted to the Secretary-General together with the distribution plan referred to in paragraph 8(a)(ii) of the resolution.
27. After approving the distribution plan, the Secretary-General will forward the list, which constitutes a part of the plan, to the Committee, and will make it known to all States.

28. The Government of Iraq or the United Nations Inter-Agency Humanitarian Programme will contract directly with suppliers to arrange the purchase of humanitarian supplies, and will conclude the appropriate contractual arrangements.
29. Export to Iraq of medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs (hereinafter humanitarian supplies) financed from the Iraq account shall be undertaken in accordance with the following provisions.
30. Applications for each export of humanitarian supplies, to be financed from the Iraq account consistent with paragraph 22 of the Memorandum of Understanding, shall be submitted to the Committee at the request of the Government of Iraq by the exporting States with all relevant documentation, including the concluded contractual arrangements. Payment from the Iraq account can take place only for items included in the categorized list, unless the Committee exceptionally decides otherwise on a case-by-case basis.
31. The Committee will take action on such applications in accordance with paragraph 20 of resolution 687 (1991), its existing procedures and the provisions of this section. The Committee will inform the Government of Iraq, the requesting States, the Secretary-General and, if appropriate, the independent inspection agents at the intended point(s) of entry into Iraq of the actions taken on the applications submitted.
32. Such applications shall be submitted as follows:
 - ...
 - (b) Foodstuffs

The exporting State notifies the Committee. The notification must indicate that the exporter requests payment from the Iraq account. A copy of the relevant documentation, including the concluded contractual arrangements and intended point(s) of entry into Iraq, must be attached to the notification.

...
33. Experts in the Secretariat examine each contract, in particular the details of price and value, and whether the items to be exported are on the categorized list referred to above. They will also take into consideration the reports of the Secretary-General provided for in paragraph 20 above, in order to check availability of funds in the Iraq account for the contract. They will inform the Committee of their findings.
34. The Committee acts upon the findings of the experts as set forth below:
 - ...
 - (b) Foodstuffs

If the Committee finds, under its expedited no-objection procedure within two business days from the circulation of the application, that the contract is in order, it immediately informs the parties concerned that the exporter is

eligible for payment from the Iraq account. If the contract is not found in order, the Committee informs the parties concerned that payment cannot be made from the Iraq account, but the foodstuffs can be shipped anyway if the exporter so desires.

...

35. When the Committee has informed the parties concerned that the exporter is eligible for payment from the Iraq account, the Central Bank of Iraq will request the bank holding the Iraq account to open an irrevocable, non-transferable, non-assignable (except to the supplier's bank for the repayment of financing for the purchase of the humanitarian supplies) letter of credit for the account of the Iraqi purchaser in favour of the supplier, which will be available only at the bank holding the Iraq account, and provide for payment from the Iraq account. Such requests shall be submitted by the bank holding the Iraq account to the Secretary-General for expeditious approval, so that payment from the Iraq account can be made without delay. The letter of credit will require as condition of payment the submission to the bank holding the Iraq account of the usual commercial documentation, and of the following documents: a copy of the Committee's letter stating that the exporter is eligible for payment from the Iraq account, and a standardized confirmation by the Secretary-General of the arrival of the humanitarian supplies in Iraq.
36. The arrival of the humanitarian supplies in Iraq will be confirmed by independent inspection agents appointed by the Secretary-General pursuant to resolution 986 (1995) and stationed at relevant entry points and other locations in Iraq as referred to in paragraph 26 of the Memorandum of Understanding. The independent inspection agents will add their authenticated confirmation of arrival to a copy of the Committee's letter stating that the exporter is eligible for payment from the Iraq account and to a copy of the invoice, and will inform the Secretary-General in accordance with paragraph 8(a)(iii) of Security Council resolution 986 (1995). This information should be given without delay and in any case within 24 hours. The inspection agents will report all irregularities to the Secretary-General and to the Committee. If the problem is related to normal commercial practice, the Committee and the Government of Iraq will be informed but normal commercial resolution practices will go forth. Performance bonds may not be opened. Payments in favour of the purchaser resulting from normal commercial resolution practices should be made to the Iraq account. If the matter is of serious concern, the independent inspection agents will hold the shipment in question, pending guidance from the Committee. The Committee will make every effort to provide such guidance in the most expeditious manner.
37. The bank holding the Iraq account shall effect payment under any letter of credit only if all documents (listed in para. 35 above) stipulated in the letter of credit are presented to it and the terms and conditions of any such letter of credit are complied with. When specified in the contract and the supporting documents, payment can be made in several instalments corresponding to actual deliveries to Iraq. Documentary discrepancies can only be waived by the Secretary-General.

- 1.21 It is to be noted that these procedures contemplated the following:
- ‘Exporting states’ would submit all relevant documentation, including the concluded contractual arrangement, to the 661 Committee.
 - UN Secretariat ‘experts’ were to ‘examine each contract, in particular the details of price and value ...’
 - The 661 Committee would act on the findings of its experts.
 - For foodstuffs, there would be an ‘expedited no-objection procedure’ for approval of contracts.
 - If resolved commercial disputes resulted in payment due to the purchaser (Iraq), the payment ‘should be made to the ‘Iraq account’.
- 1.22 In the case of foodstuffs, the procedures adopted by the 661 Committee in August 1996 did not affect the ‘notification to the Security Council Committee’ required as a condition of export by Resolution 687 in April 1991. However, to be paid from the Iraq account for such exported foodstuffs, a supplier was obliged to comply with the 661 Committee procedures adopted in August 1996. This is apparent from paragraphs 32 and 34 of the procedures, which included an examination by experts of each contract, ‘in particular the details of price and value ...’

The Office of the Iraq Programme

- 1.23 The UN Secretary-General established the Office of the Iraq Programme, effective 15 October 1997, ‘to consolidate and manage the activities of the United Nations Secretariat pursuant to Security Council resolutions 986 (1995) and 661 (1990)’.¹³

Variation to procedures: Security Council Resolution 1284

- 1.24 The 661 Committee procedures just referred to for the approval of contracts for the provision of humanitarian supplies applied until 17 December 1999, when they were varied by Security Council Resolution 1284, which provided:

The Security Council

...

Acting under Chapter VII of the Charter of the United Nations, and taking into account that operative provisions of this resolution relate to previous resolutions adopted under Chapter VII of the Charter.

17. Directs the Committee established by resolution 661 (1990) to approve, on the basis of proposals from the Secretary-General, lists of humanitarian items, including foodstuffs, pharmaceutical and medical supplies, as well as basic or standard medical and agricultural equipment and basic or standard educational items, decides, notwithstanding paragraph 3 of resolution 661 (1990) and paragraph 20 of resolution 687 (1991), **that supplies of these items will not be submitted for approval of that Committee**, except for items subject to the provisions of resolution 1051 (1996), **and will be notified to the Secretary-General and financed in accordance with the provisions of paragraph 8(a) and 8(b) of resolution 986 (1995)**, and requests the Secretary-General to inform the Committee in a timely manner of all such notifications received and actions taken; [emphasis added]

...

25. Directs the Committee established by resolution 661 (1990) to take a decision on all applications in respect of humanitarian and essential civilian needs within a target of two working days of receipt of these applications from the Secretary-General, and to ensure that all approval and notification letters issued by the Committee stipulate delivery within a specified time, according to the nature of the items to be supplied, and requests the Secretary-General to notify the Committee of all applications for humanitarian items which are included in the list to which the export/import mechanism approved by resolution 1051 (1996) applies;

...

27. Calls upon the Government of Iraq:
 - (i) to take all steps to ensure the timely and equitable distribution of all humanitarian goods, in particular medical supplies, and to remove and avoid delays at its warehouses ...

1.25 The effect of Resolution 1284 was that, provided the items in the application fell within the scope of the approved list, contracts for the exportation of humanitarian supplies (including foodstuffs) did not require the approval of the 661 Committee. Applications for supply and payment were instead required to be 'notified' to the Secretary-General. The exception was items that were subject to the provisions of Resolution 1051, which related to weapons of mass destruction programs. To obtain payment for foodstuffs from the escrow account, an exporter needed to comply with the 661 Committee procedures adopted in August 1996.

1.26 By Resolution 1330, dated 5 December 2000, the Secretary-General was required to expand and update the list of humanitarian items contemplated by Resolution 1284, and the 661 Committee was required to 'approve expeditiously' the expanded list. The expedited approval process described in paragraph 17 of Resolution 1284 then applied to the humanitarian items that fell within the expanded list, so that such contracts were to be 'notified to the Secretary-General and financed in accordance with the provisions of paragraphs 8(a) and 8(b) of resolution 986 (1995) ...'¹⁴

Revised procedures: Security Council Resolutions 1409 and 1454

1.27 On 29 November 2001, by Resolution 1382, the Security Council adopted a proposed set of revised procedures 'for implementation beginning on 30 May 2002'.¹⁵ The revised procedures were subject to further refinement by the Security Council.¹⁶ Resolution 1382 did not affect the provisions of prior resolutions or procedures concerning exports to Iraq of humanitarian supplies (including foodstuffs); rather, it was directed to procedures relating to goods on a 'Goods Review List' generally comprising '(1) advanced materials; (2) materials processing; (3) electronics; (4) computers; (5) telecommunications and information security; (6) sensors and lasers; (7) navigation and avionics; (8) marine; and (9) propulsion'.¹⁷

1.28 On 14 May 2002, by Resolution 1409, the Security Council, 'determined to improve the humanitarian situation in Iraq':

2. Decides to adopt the revised Goods Review List (S/2002/515) and the revised attached procedures for its application for implementation beginning at 0001 hours, Eastern Daylight Time, on 30 May 2002 as a basis for the humanitarian programme in Iraq as referred to in resolution 986 (1995) and other relevant resolutions;
3. Authorises States, beginning at 0001 hours, Eastern Daylight Time, on 30 May 2002, to permit, notwithstanding the provisions of paragraph 3 of resolution 661 (1990) and subject to the procedures for the application of the Goods Review List (S/2002/515), the sale or supply of any commodities or products other than commodities or products referred to in paragraph 24 of resolution 687 (1991) as it relates to military commodities and products, or military-related commodities or products covered by the Goods Review List (S/2002/515) pursuant to paragraph 24 of resolution 687 (1991) whose sale or supply to Iraq has not been approved by the Committee established pursuant to resolution 661 (1990);
4. Decides that, beginning at 0001 hours, Eastern Daylight Time, on 30 May 2002, the funds in the escrow account established pursuant to paragraph 7 of resolution 986 (1995) may also be used to finance the sale or supply to Iraq of those commodities or products that are authorized for sale or supply to Iraq

under paragraph 3 above, provided that the conditions of paragraph 8 (a) of resolution 986 (1995) are met ...

1.29 The result was that from 30 May 2002 all goods, other than those of military application, could be purchased by Iraq and funded from the Iraq escrow account. The procedures for 661 Committee approval—or notification to the Secretary-General in the case of foodstuffs—were effectively revoked in favour of new procedures.

1.30 The new procedures provided:

1. The following procedures replace paragraphs 29 to 34 of document S/1996/636* and other existing procedures, notably for the implementation of the relevant provisions of paragraphs 17, 18 and 25 of resolution 1284 (1999) related to the processing of applications to be financed from the escrow account established pursuant to paragraph 7 of resolution 986 (1995).
2. Each application (the 'Notification or Request to Ship Goods to Iraq', as attached to these procedures, hereafter referred to as 'the application,') for the sale or supply of commodities or products, to include services ancillary to the supply of such commodities and products, to Iraq to be financed from the escrow account established pursuant to paragraph 7 of resolution 986 (1995) must be forwarded to the Office of the Iraq Programme (OIP) by the exporting States through permanent or observer Missions, or by United Nations agencies and programmes. Each application should include complete technical specifications, as requested in the standard application form, concluded arrangements (e.g., contracts), and other relevant information, including, if known, whether the application contains any item(s) covered by the Goods Review List (GRL), in order for a determination to be made on whether the application contains any item referred to in paragraph 24 of resolution 687 (1991) as it relates to military commodities and products, or military-related commodities or products covered by the GRL.
3. Each application will be reviewed and registered by OIP within 10 working days. [The balance of the clause deals with incomplete applications.]
4. After OIP registration of the application, each application will be evaluated by technical experts from UNMOVIC and IAEA in order to determine whether the application contains any item referred to in paragraph 24 of resolution 687 (1991) as it relates to military commodities and products, or military-related commodities or products covered by the GRL ('GRL item(s)') ...
8. If UNMOVIC and/or IAEA determine that the application contains any item referred to in paragraph 24 of resolution 687 (1991) as it relates to military commodities and products, the application shall be considered ineligible for approval for sale or supply to Iraq ...
9. If UNMOVIC and/or IAEA determine that the application contains any GRL item(s), they will immediately inform through OIP the submitting Mission or United Nations agency. Pursuant to paragraph 11 below, absent a request by the submitting Mission or United Nations agency for reconsideration within

10 working days, OIP will forward the application containing the GRL item(s) to the 661 Committee for the purpose of evaluating whether the GRL item(s) may be sold or supplied to Iraq. UNMOVIC and/or IAEA will provide to the 661 Committee through OIP, a written explanation of this determination. In addition, OIP, UNMOVIC and/or IAEA, at the request of the submitting Mission or United Nations agency, will provide to the 661 Committee an assessment of the humanitarian, economic and security implications of the approval or denial of the GRL item(s), including the viability of the whole contract in which the GRL item(s) appears and the risk of diversion of the item(s) for military purposes. The assessment provided by OIP to the Committee should be transmitted in parallel by OIP to the submitting Mission or United Nations agency. OIP will immediately inform appropriate United Nations agents of the finding of a GRL item(s) in the application and that the GRL item(s) may not be sold or supplied to Iraq unless otherwise notified by OIP that the procedures set forth in paragraphs 11 or 12 have resulted in approval for sale or supply of the GRL item(s) to Iraq. The remaining items in the application, which are determined as not covered by the GRL, will be considered approved for sale or supply to Iraq and, at the discretion of the submitting Mission or United Nations agency, and with the consent of the contracting parties, will be processed according to the procedure in paragraph 10 below. The relevant approval letter may be issued for such approved items under request from the submitting Mission or United Nations agency.

10. If UNMOVIC and/or IAEA determine that the application does not contain any item referred to in paragraph 4 above, OIP will inform immediately the Government of Iraq and the submitting Mission or United Nations agency in written form. The exporter will be eligible for payment from the escrow account established pursuant to paragraph 7 of resolution 986 (1995) upon verification by United Nations agents that the items in the application have arrived in Iraq as contracted. OIP and the United Nations Treasury will inform the banks within five working days that the items in the application have arrived in Iraq.

1.31 Document S/1996/636 is the procedures document that had been adopted by the 661 Committee on 8 August 1996. Thus, from 30 May 2002, when the new procedures came into effect, the requirement that the United Nations or its committees or Secretariat examine documents for 'price and value' no longer applied.

1.32 The 'Notification or request to ship goods to Iraq' form attached to Resolution 1409 made provision for the exporting country submitting the notification to 'indicate whether or not you have previously submitted an application(s) for IDENTICAL goods' and, if so, provide the UN committee approval number.¹⁸

Notwithstanding the apparently mandatory procedures specified in the resolution's annexure, the form also made provision for an indication whether the form was to be submitted to 'UNMOVIC/IAEA' and the '[661] Committee (if applicable)'.¹⁹ Presumably, it was intended that contracts for foodstuffs would not be submitted to either of those bodies since UNMOVIC (the United

Nations Monitoring Verification and Inspection Commission) and IAEA (the International Atomic Energy Agency) were concerned only with potential weaponry.

1.33 The effect of the new procedures was that if exporters wanted to be paid from the escrow account they had to lodge an application form with the Office of the Iraq Programme, which reviewed and 'registered' the application. It was examined by experts to determine whether the goods proposed for export included military or other prohibited goods on the Goods Review List. If the goods were not on the list, the Government of Iraq and the submitting mission or UN agency were notified, and the exporter was eligible for payment from the escrow account on confirmation by the UN agents of delivery to Iraq.²⁰

1.34 Although from 30 May 2002 it might technically not have been necessary to review contracts for 'price and value', in fact the United Nations continued to review contracts for those factors. Ms Johnston, the UN Chief Customs Officer, gave evidence that the question of whether such a review was necessary was debated within the Office of the Iraq Programme at the time:

Q: With the adoption of Resolution 1409 in 2002, the establishment of the Goods Review List occurred, and effectively that meant, so far as wheat was concerned, that there was no requirement perforce of any resolution for contracts for the sale of wheat to be examined for price and value after the adoption of resolution 1409; is that right?

A: Well, that was a matter that was debated within OIP at the time. Our initial reading of the situation was that potentially it might involve pre-approval of all contracts on the Goods Review List without referral to the payment clauses, the price, et cetera, et cetera, of the goods.

Therefore, my colleague who, with me, was responsible for the implementation of the resolution, who had responsibility for liaison with the committee concerning the resolution, clarified the matter with some of the committee members.

Q: And what happened in practice thereafter?

A: My colleague was advised by the committee that the spirit of the resolution required OIP to continue with its price checks, to continue carrying out its normal scrutiny of the contracts. Therefore, we adapted our procedures to accommodate the GRL, but we continued to look at the contracts for abnormalities or irregularities.

Q: Would it be appropriate to summarise the situation as follows: that, whereas there may have been no specific requirement for contracts to be reviewed for price and value under these revised procedures following the adoption of Resolution 1409, your department continued the process of monitoring the contracts for price and value and other irregularities after 30 May 2002?

A: Yes, that's correct.²¹

1.35 On 30 December 2002 the Security Council adopted a further revised set of procedures for the approval of contracts under the Oil-for-Food Programme.²² The procedures were set out in Annex B to Resolution 1454 and were, in part, to 'replace paragraphs 29 to 34 of document S/1996/636 and other existing procedures' (summarised in paragraph 15).²³ These further revised procedures were identical to the revised procedures adopted on 14 May 2002 by Resolution 1409, except for paragraph 4, which for present purposes is not material.

1.36 The further revised procedures remained in place until 28 March 2003, when the Oil-for-Food Programme was varied as a result of the hostilities in Iraq and Resolution 1472 was passed. That resolution authorised the Secretary-General:

4 ...

(b) to review, as a matter of urgency, the approved funded and non-funded contracts concluded by the Government of Iraq to determine the relative priorities of the need for adequate medicine, health supplies, foodstuffs and other materials and supplies for essential civilian needs represented in these contracts which can be shipped within the period of this mandate, to proceed with these contracts in accordance with such priorities;

...

(d) to negotiate and agree on necessary adjustments in the terms or conditions of these contracts and their respective letters of credit and to implement the measures referred to in paragraph 4(a), (b) and (c), notwithstanding distribution plans approved under the Programme ...

The mandate was for 45 days; it was later extended by Resolution 1476 to 3 June 2003.²⁴

1.37 On 22 May 2003 the Security Council adopted Resolution 1483, which provided:

The Security Council,

...

Acting under Chapter VII of the Charter of the United Nations,

...

10. Decides that, with the exception of prohibitions related to the sale or supply to Iraq of arms ... all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by resolution 661 (1990) and subsequent relevant resolutions, shall no longer apply.

16. Requests also that the Secretary-General, in coordination with the [Coalition Provisional] Authority, continue the exercise of his responsibilities under Security Council resolutions 1472 (2003) of 28 March 2003 and 1476 (2003) of 24 April 2003, for a period of six months following the adoption of this resolution, and terminate within this time period, in the most cost effective manner, the ongoing operations of the 'Oil-for-Food' Programme (the 'Programme'), both at headquarters level and in the field, transferring responsibility for the administration of any remaining activity under the Programme to the Authority, including by taking the following necessary measures:
 - (a) to facilitate as soon as possible the shipment and authenticated delivery of priority civilian goods as identified by the Secretary-General and representatives designated by him, in coordination with the Authority and the Iraqi interim administration, under approved and funded contracts previously concluded by the previous Government of Iraq, for the humanitarian relief of the people of Iraq, including, as necessary, negotiating adjustments in the terms or conditions of these contracts and respective letters of credit as set forth in paragraph 4(d) of resolution 1472 (2003);
 - (b) to review, in light of changed circumstances, in coordination with the Authority and the Iraqi interim administration, the relative utility of each approved and funded contract with a view to determining whether such contracts contain items required to meet the needs of the people of Iraq both now and during reconstruction, and to postpone action on those contracts determined to be of questionable utility and the respective letters of credit until an internationally recognized, representative government of Iraq is in a position to make its own determination as to whether such contracts shall be fulfilled.

1.38 On 20 November 2003 the Secretary-General made a statement to the Security Council, announcing the termination of the Oil-for-Food Programme.²⁵

Interpretation of Security Council resolutions

1.39 It is necessary to interpret the relevant Security Council resolutions—in particular Resolutions 661, 986 and 1284—to determine whether any activity of AWB Ltd breached those sanctions. Although the Letters Patent require that I report on whether any act of AWB or its associates breached Commonwealth, State or Territory laws, a pervasive issue surrounding both the inquiry of the Independent Inquiry Committee (often called the Volcker Inquiry) and this Inquiry is whether the conduct of AWB was in truth in breach of or contrary to UN sanctions. Interestingly, although the Independent Inquiry Committee report dealt with the manipulation of the Oil-for-Food Programme, it did not make any finding that any act of AWB was an act in breach of UN sanctions. Although I refer to AWB the same interpretation issue arises for Alkaloids of Australia and Rhine Ruhr Pty Ltd.

1.40 This may have been because the sanctions did not impose obligations on individual companies as nationals of member states of the United Nations. Such obligations must be found in domestic law. Whilst no criminality may result from a finding of acts that were contrary to the provisions of UN resolutions, which acts may have permitted or facilitated manipulation of the Oil-for-Food Programme, it is nonetheless important to determine whether any acts of AWB were contrary to, or inconsistent with, Security Council resolutions.

1.41 The issue of construction of the resolutions may be stated in the following terms:

Accepting

- that the object of Resolutions 661, 986 and 1241 was to prohibit trade with, or the provision of funds to, Iraq, except for the provision of humanitarian supplies
- that the export of wheat to Iraq was necessary for humanitarian relief
- that distribution of wheat throughout all governorates by Iraq was necessary to provide the humanitarian relief that was the object of the exceptions in the resolutions

did the resolutions permit AWB, as an exporter of wheat, to contract with Iraq, through its instrumentality the Iraqi Grain Board, to deliver wheat 'free on truck' to silos in all governorates of Iraq?

1.42 This question is one of construction: it does not purport to address the questions whether Iraq or AWB, or both, sought to circumvent or avoid the operation of Resolutions 661 or 986 by engaging a Jordanian trucking company to transport wheat in Iraq or whether a Jordanian trucking company was an instrument of the Iraqi Government used to channel payments of foreign currency to Iraq.

1.43 In an expert opinion provided to AWB and dated 24 October 2005, Sir Anthony Mason, a former Chief Justice of Australia, addressed the interpretation of Security Council resolutions in the following terms:

20. As the relevant resolutions do not specifically deal with the payment of inland transportation fees, it is necessary to refer briefly to the principles governing the interpretation of Security Council resolutions. Subject to some qualifications, a Security Council resolution should be interpreted in accordance with arts. 31 to 33 of the Vienna Convention, that is, in good faith in accordance with the ordinary meaning of its terms in their context and in the light of the object and purpose of the resolution. Security Council

resolutions are, however, very different from treaties. The resolutions are essentially political in nature, often reflecting a compromise of different and conflicting views, fashioned with a view to resolving a dispute or controversy in a flexible and practical way, without the benefit of the considered legal input which is associated with more formal considered legal instruments.

21. The relevant Resolutions are expressed in very general, even vague, terms, so that, in understanding them and their legal consequences, it is necessary to pay close attention to their object and purpose—the imposition of economic sanctions on Iraq subject to an humanitarian exception—and the way in which they have been subsequently acted upon. In this respect, it is legitimate to treat the Resolutions as implicitly authorising the Committee to define, in an operational way, the scope of the permitted categories of exports to Iraq i.e. foodstuffs. Decisions of a Sanctions Committee, being a committee of the whole Council, as the 661 Committee was, will be authoritative, if the Committee is given power to interpret a resolution. In other situations, the interpretation of a resolution by a Sanctions Committee will or may be highly persuasive, depending upon the circumstances. Absent the existence of authority in the 661 Committee to interpret the relevant Resolutions, there would be no stable framework within which States could have confidently participated in exports of foodstuffs and other permitted items to Iraq.
22. Another question is whether the legal opinions of the UN's Office of Legal Affairs are a source of legal interpretation of UN Sanctions Resolutions. These legal opinions are not authoritative in the sense of being conclusive but there is no reason why they should not be regarded as contributing, more particularly if they are accepted or acted upon by a Sanctions Committee, to a general understanding of the way in which resolutions operated.²⁶

1.44 I respectfully agree.

1.45 Insofar as it is permissible to have regard to the manner in which a sanctions committee established by resolution acted in relation to that resolution as an aid to interpreting the resolution, it is important to note the findings in the Independent Inquiry Committee's report dated 7 September 2005. The Committee found that, in respect of identified suspected breaches of sanctions involving the payment of 'kickbacks' on humanitarian purchases, no agreement was reached between member states of the 661 Committee regarding whether the 'making [of] some form of payment for internal transport costs to transportation companies that may have links to the Government of Iraq' was permissible.²⁷ At least one committee member, the United States, said it was not permissible, although this view appeared to conflict in some respects with advice given by the United Nations' Office of Legal Affairs.

Construction of paragraph 3(c) of Resolution 661

- 1.46 Resolution 661 'decides that all states shall prevent ... the sale or supply ... of any commodities ... but not including ... in humanitarian circumstances, foodstuffs'. It seems clear that if humanitarian circumstances so required, the export of wheat to Iraq was permissible. On 22 March 1991 the 661 Committee determined that 'humanitarian circumstances' had arisen. By 3 April 1991 an accelerated 'no-objection' procedure for essential civilian needs, including foodstuffs, applied.
- 1.47 By paragraph 8(a) of Resolution 986, passed on 14 April 1995, the escrow fund was established to meet humanitarian needs, including the supply of foodstuffs, which were to be 'equitably distributed' throughout Iraq. The Memorandum of Understanding between the Secretariat of the United Nations and the Government of Iraq, dated 20 May 1996, implementing Resolution 986, required the preparation of a 'Distribution Plan describing in detail the procedures to be followed by the competent Iraqi authorities'²⁸, to ensure the distribution of humanitarian supplies. The distribution plan was to be submitted to and approved by the United Nations. The procedures adopted by the 661 Committee for approving contracts made similar provisions.²⁹
- 1.48 Resolution 1284 did not qualify the previous resolutions relating to distribution of such foodstuffs. Nor did any subsequent resolutions or revised procedures.
- 1.49 Applying the principles of construction of Security Council resolutions already referred to—and, in particular, having regard to the object of the resolutions—it seems clear that, although restricting trade with Iraq, the UN resolutions contemplated contracts between companies or persons within member states and Iraq for the provision and supply of foodstuffs because of humanitarian considerations, and, at least from 1995, the distribution of those foodstuffs equitably throughout Iraq. That being so, there would be no restriction on Iraq and supplier companies contracting for the supplier to transport and distribute the foodstuffs within Iraq, unless there was some contrary provision restricting the interpretation of the resolutions to which I have referred. If the objective of the qualification on restrictions on dealing with Iraq was to provide humanitarian relief, as plainly it was, a necessary aspect of provision of that relief was distribution of the foodstuffs throughout Iraq.

UN Office of Legal Affairs advice

- 1.50 A restriction on the interpretation of the resolutions might be found in paragraph 4 of Resolution 661, which provided:

Decides that 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 ... 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 ... in humanitarian circumstances, foodstuffs.³⁰

- 1.51 It was the view of the Office of Legal Affairs, adopted by the 661 Committee and the Office of the Iraq Programme, that, properly interpreted, paragraph 4 prohibited the payment of funds to any Iraqi enterprise, except in relation to customary port charges at reasonable rates and paid in dinars only. The 661 Committee received two advices from the OLA, dated 7 November 1997 and 12 June 1998, and the Office of the Iraq Programme wrote to Iraq on 27 June 2000 conveying advice from the OLA about dealings with Iraq.³¹ Although the first two advices do not relate to humanitarian exemptions from trading with Iraq and the letter of 27 June 2000 relates to port charges on the export of oil, the import of the three advices is similar.

- 1.52 The OLA's advice of 7 November 1997 related to whether it would be a contravention of the sanctions if the Dubai Ports Authority operated a passenger shipping service between Dubai and Iraq. The purpose of the shipping service was 'mainly to fulfil religious obligations in visiting holy places in Iraq'.³² The OLA advised that, whilst paragraph 3 of Resolution 661 imposed a comprehensive trade embargo on Iraq, the resolution was 'cargo-oriented and [did] not cover per se the transport of passengers'.³³ Thus, opening a passenger shipping service that did not carry cargo would not breach the embargo. The OLA further advised that paragraph 4 of Resolution 661 prohibited the member states making available to the Iraqi Government or to any commercial, industrial or public utility undertaking in that country any funds or other financial or economic resources, with the exception of payments 'exclusively for strictly medical or humanitarian purposes'.³⁴ It continued:

A separate question is whether the payment to Iraqi entities of fees and other expenses deriving from ports services, such as towing and berthing, which are necessarily associated with maritime shipping, would contravene paragraph 4 of resolution 661 (1990). It is our view that such payments would not fall per se under paragraph 4 of resolution 661 (1990) if the shipping activity which generates them is lawful in every other respect in terms of the relevant Security Council resolutions, and provided that such fees and charges do not exceed what is customary in the circumstances.

1.53 The OLA's advice of 12 June 1998 related to whether Resolution 661 prohibited an overland shipment of construction material from Syria to Iran, through Iraq, by road. The advice contained the following:

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 a 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 dinars only.³⁵

The advice concluded:

... it is the view of this Office that the making of a trans-shipment from Syria to Iran through Iraq by road would not be inconsistent with the measures which the Security Council has imposed in respect of Iraq, provided that:

- 1) the haulier is not a commercial, industrial or public utility undertaking in Iraq, nor is any such undertaking involved in any part of the haulage;
- 2) the goods which are to be shipped do not originate in Iraq;
- 3) the person or body in Iran to which the goods are shipped does not take delivery of them for the purposes of any business carried on in or operated from Iraq;
- 4) any duties, taxes, fees or charges which are levied by Iraq in respect of the entry of the shipment into Iraq, its transit of Iraq and its departure from Iraq do not exceed what is customary and reasonable in the circumstances, do not represent a source of income to Iraq and are paid in Iraqi dinars only;
- 5) the haulage equipment enters Iraq territory fully fuelled and provisioned and, subject to force majeure, does not receive any service in Iraq or take on board there any commodity or product, with the exception of such fuel as might be needed to enable it to exit Iraqi territory and reach refuelling facilities in Iran; and
- 6) the authorities of the Syrian Arab Republic and of the Islamic Republic of Iran should, both independently and in co-operation with each other, take such steps as might be necessary to ensure the strict observance of the terms of all relevant Security Council resolutions, in particular, to ensure that no part of the goods which are shipped or of the haulage equipment which is used to carry those goods is diverted from its journey.³⁶

1.54 The 27 June 2000 advice, from the Executive Director of the Office of the Iraq Programme, Mr Sevan, to the Permanent Representative of Iraq to the United Nations, related to an increase in port charges imposed by the Government of Iraq at two ports, one of them Umm Qasr:

It has come to our attention that the Government of Iraq has increased the port charges at Mina al-Bakr and Umm Qasr. We have discussed this matter with our Office of Legal Affairs.

In their view, and in accordance with paragraph 4 of Security Council resolution 661 (1990) of 6 August 1990, which contains some of the basic provisions of the sanctions regime imposed by the Security Council against Iraq, all States are prohibited from making 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 are required to prevent their nationals from 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. Paragraph 1 of Article 8 of Part II of the standard oil contract of the Iraqi State Oil Marketing Organisation which was agreed upon between the United Nations and the Iraqi authorities provides that the buyer shall bear alone port dues and fees charged on vessels at the port of loading.

The Office of Legal Affairs, in a letter to the Chairman of the Security Council Committee established by resolution 661 (1990), dated 6 November 1997, took the position that payment to Iraqi entities of fees and other expenses deriving from port services, would not fall per se under paragraph 4 of resolution 661 (1990), if the shipping activity which generates them is lawful in every other respect in terms of the relevant Security Council resolutions, and provided that such fees and charges do not exceed what is customary in such circumstances.

Any such entities and charges, should, in principle, be limited to charges for the services rendered, be levied on a non-discriminatory basis, and be commensurate with whatever administrative expenses might reasonably be entailed in this respect. In light of the restrictions imposed by Security Council resolution 661 (1990), such fees and charges must be paid in Iraqi dinars only.

Therefore, the payment of port costs to the Iraqi authorities per se is not inconsistent with the sanctions regime imposed by the Security Council against Iraq so long as the charges in question do not exceed whatever might in the circumstances be customary and reasonable and so long as they are paid in Iraqi dinars.

We have learned, however, that the Government of Iraq is requesting that port charges be paid not to the Iraqi authorities, but to 'alia for transportation and general trade company, Amman-Jordan', which has been entrusted with the operation of the ports in question, and that payments should be deposited in the account of that company in the Jordan National Bank.

If and insofar as 'alia for transportation and general trade company, Amman-Jordan' is a Jordanian company and not an instrument or agency of the Government of Iraq, the measures which have been imposed by the Security Council in respect of Iraq would not in any event apply. That having been said, it would appear that the Government of Iraq has entered into a contract with 'alia for transportation and general trade company, Amman-Jordan' to provide port services in Iraq. The supply of services of this character would appear to be calculated to promote the import from or export to Iraq of products and commodities. That being so, it would appear that the rendering of such services in Iraq would be prohibited by Security Council resolution 661 (1990). Such services

might only be lawfully provided in the event that their provision has been approved by the Security Council Committee. As far as we are aware, no application has been made to the Security Council Committee in respect of the provision of port services by 'alia for transportation and general trade company, Amman-Jordan' to the Government of Iraq, nor has the Security Council Committee granted approval of any such arrangement.

Therefore, no payment should be made to the company concerned unless and until its contract with the Iraqi authorities has been approved by the Security Council Committee. In the absence of such approval, any payment deposited in the Jordan National Bank would be in violation of the sanctions regime established by the Security Council.

I would be grateful if you could bring this matter of concern to the attention of the relevant authorities in Iraq.³⁷

- 1.55 None of these advices relates to humanitarian relief transactions or foodstuffs. The provision of foodstuffs, in humanitarian circumstances, was specifically not prohibited by UN resolutions. Equitable distribution of those foodstuffs was central to the provision of humanitarian relief to Iraqi citizens. Nonetheless, the advices from the OLA contain the basic theme that only reasonable and customary payments made in Iraqi dinars and necessarily associated with permitted transactions were permissible. Transactions with Iraq, or Iraqi entities, were not permissible if they resulted in the provision of funds to Iraq.
- 1.56 A simple agreement between Iraq and a supplier of grain to Iraq that required the supplier itself to deliver grain internally within Iraq as an aspect of humanitarian relief would appear not to infringe paragraph 4 of Resolution 661. That is because it would not involve the supplier making available funds to Iraq; rather, Iraq would be paying funds to the supplier. Nor would it be contrary to the OLA view of Resolution 661.
- 1.57 In contrast, if the supplier then sought to subcontract the transportation within Iraq to an Iraqi entity, involving as it would the payment of funds from the supplier to the Iraqi subcontractor, paragraph 4 of Resolution 661 would be infringed because the transaction would constitute the provision of 'funds or other financial economic resources' to an Iraqi entity. Further, any payment to the Iraqi entity in currency other than dinars was impermissible. That view accords with the view of the OLA and the 661 Committee.
- 1.58 In reality, therefore, a contract requiring an exporter to Iraq to deliver grain internally in Iraq as part of humanitarian relief would infringe paragraph 4 of Resolution 661 if the method of performance of the delivery obligation involved dealing with an Iraqi entity, and paying it funds, particularly in currency other than dinars.

1.59 The view that such a transaction was not permitted by the resolutions is reinforced by the terms of clause 32 of the Memorandum of Understanding dated 20 May 1996. That clause, and Annex I to the MOU, recognised the existence of an internal transportation, handling and distribution system throughout Iraq. It provided that the Government of Iraq was responsible for such distribution except in the three northern governorates of Dihouk, Arbil and Suleimaniyeh. In relation to internal transport and distribution, the agreement contained in the MOU was predicated on the existing system of internal transportation and distribution throughout Iraq being used for the transport and distribution of humanitarian goods, including foodstuffs. The MOU did not contemplate the Government of Iraq agreeing with a foreign supplier of foodstuffs for that supplier to undertake internal transportation of such foodstuffs.

The practice of the 661 Committee and the Secretary-General

1.60 Insofar as it is permissible to have regard to the manner in which the 661 Committee and the Secretary-General, on whom the Security Council conferred certain powers in relation to implementing Resolution 661, interpreted and implemented the resolution, the content of the distribution plans for various phases is of assistance in interpreting Resolutions 661, 986 and 1284.

1.61 Distribution plans were central to the operation of the Oil-for-Food Programme. Only those goods listed in a plan could be exported to Iraq. The plan had to be approved by the Secretary-General. The 661 Committee operated only on the basis of an approved plan. And payment from the Iraq escrow account could be made only for goods listed in an approved plan.

1.62 Each distribution plan submitted by the Government of Iraq and approved by the Secretary-General was divided into a number of sections, one of which dealt with food.³⁸ The section dealing with food described the way food imported under the Oil-for-Food Programme would be distributed by the Iraqi authorities.

1.63 The distribution plan for phase I of the Oil-for-Food Programme provided:

Part One

Procurement and Distribution Plan for Food

Introduction

12. Following the UN Security Council Resolution 661 (1990) imposing sanctions on Iraq, the Government of Iraq established a special rationing system to ensure the distribution of foodstuffs to all Iraqi citizens, Arabs and foreigners residing in Iraq. The system was launched on 1 September 1990. It is

presently applied throughout the country with the exception of the three northern Iraqi Governorates. In accordance with the MOU, the Programme will be responsible for the distribution of foodstuff to the population in the three northern Governorates on behalf of the Government of Iraq.

Main features of the system

13. The main partners of the current system are:
 - (i) The Ministry of Trade/Government of Iraq.
 - (ii) The Consumers (citizens of Iraq, Arabs and foreign residents).
 - (iii) Retail ration agents (private sector).
14. The responsibility of the Ministry of Trade is to undertake, on a monthly basis, the distribution of foodstuffs to the retail ration agents in their designated areas, and to ensure their delivery to the households registered with the concerned agent. There are more than 53,000 ration agents serving the local consumers. Furthermore, to ensure the adequacy, continuity and regularity of supplies of foodstuffs in conformity with the rationing cards, the related coupons are collected from the households monthly by the retail ration agents. Each rationing card has a number of coupons that correspond to basic food items involved in the system and covers one calendar year.

...
15. Every Iraqi citizen, Arab and foreign resident in Iraq is entitled by law to obtain a 'Rationing Card' from the Registration Centers. These centers establish lists of families by name, age and number of consumers in each household and send the lists to the computer center. The computer center sends one copy of each list to the nearest retail ration agent shop at the domicile of the concerned households, and another copy of the list to the food distribution centers.
16. The monthly individual ration under the current system is the same for each individual with regard to commodities, quantity and the related nominal fee. Households are well informed through public and private mass media, on a monthly basis, of their entitlements and on the time of distribution in various distribution centers.³⁹

...

Distribution Plan of foodstuffs

25. The distribution of foodstuffs shall be undertaken by the competent Iraqi authorities. The present rationing system referred to in Part 1 of this document will be applied in distributing foodstuffs purchased with the proceeds of the sale of Iraqi petroleum and petroleum products.⁴⁰

[Paragraphs 26 to 28 dealt with the food requirements of the three northern governorates and the distribution of food to them.]

Purchase and storage arrangements

30. In order to implement the foregoing, the following will apply:

...

- (iv) All items purchased under the Plan will be transported to and stored in specially designated silos and warehouses. The Government of Iraq will keep the Programme informed of the locations of each silo and warehouse.
- (v) Imported grains (wheat and rice) will be delivered to grain silos and rice warehouses located throughout the country in accordance with the details contained in paragraph (iv) above.

...

- (vii) Retail ration agents shall receive the monthly food quota for the population residing within their designated areas upon presentation of ration coupons as explained in Part One above against payment of a standard nominal fee as a contribution towards internal transportation.⁴¹

The distribution plans for each of the remaining phases of the Oil-for-Food Programme included substantially similar terms.⁴²

1.64 From phase IV onwards, in each distribution plan an amount was allocated for 'supporting supplies of equipment/spare parts for food supply, goods transportation/trucks/rehabilitation of rail network' and 'Infrastructure support for food, nutrition, and health sector: transport/telecommunications'.⁴³ Allocation of amounts for these purposes was justified on the basis that a functioning transportation system was necessary to facilitate the distribution of goods imported under the Oil-for-Food Programme, including the transportation of wheat.

1.65 The distribution plan for phase IV provided:

Maintenance, Repairs, Rehabilitation and Replacement of equipment required on the basis of priorities for handling, storage, supply and distribution of food

30. The Plan is based on the actual need of the food sector according to the activities related to the storage and transportation of foodstuffs as well as grain milling and delivering to the consumers in accordance with the ration system and in conformity with the volume of the imported foodstuffs. The following has been taken into consideration in preparing the requirement:

...

- Ensuring new means of transportation to enhance the capacity available in the country for the transportation of grains, flour and foodstuffs as well as their delivery to the citizens according to the determined timings. For example, the provision of trucks and repair of railways.⁴⁴

A similar provision appears in the distribution plans for phases V to XIII.⁴⁵

1.66 The distribution plan for phase VI provided:

PART SEVEN

**Infrastructure support for Food, Nutrition, Agriculture and Health sector
Transport and Tele Communications Plan of purchase of Material and
Requirements**

**FOR TELECOMMUNICATIONS AND TRANSPORTATION/BANKING
REQUIREMENTS**

65. The present state of telecommunication and transportation systems throughout Iraq is extremely poor. Apart from the wider social considerations, there are negative consequences for the efficient procurement and distribution of humanitarian supplies ...

...

66.2 RAILWAYS REHABILITATION

66.2.1 Iraqi Railways plays a great part in the transportation of food and agriculture products, beginning with the first stage of farming by providing fertilizers, seeds, etc. This kind of transportation from most of the cities in Iraq to different parts of the country requires special wagons and rolling stock. Most of the ... food which arrived at Um-Qaser port under the MOU, especially grains and rice, [is] carried by railways to most cities of Iraq. Iraqi Railways can not fulfil its obligations to distribute the required quantities of food due to the lack of spare parts for locomotives and wagons, which are needed for this huge transportation task ...⁴⁶

Similar provisions appear in the distribution plans for phases VII to XIII.⁴⁷

1.67 From phase VIII onwards specific provision was made for 'Land transport'. The phase VIII distribution plan provided:

D. LAND TRANSPORT

74. To carry MOU commodities from Um Qasr and Trebil, different kinds of trucks (flat semi-trailer, refrigerants, open trailers, lorries of different kinds and capacities) are required for this purpose. More than 1,000 trucks are required per year.⁴⁸

1.68 Thus:

- From phase I, each distribution plan provided that Iraqi citizens pay a 'nominal fee' to Iraqi ration agents 'as a contribution towards inland transportation'.

- From phase IV onwards, each distribution plan made provision for funds to be available from the escrow account to support ‘supplies of equipment/spare parts for food supply, goods transportation/trucks/rehabilitation of rail network’ and ‘infrastructure support for ... ‘transport/telecommunications’. This was justified on the basis of the need to have a functioning distribution network for the supply of foodstuffs.
- From phase VI onwards, each distribution plan made provision for funds to be available for railways rehabilitation. This was justified, in part, because ‘most of the ... food which arrived at Um-Qaser port under the MOU, especially grains and rice, [is] carried by railways to most cities of Iraq’.
- From phase VIII onwards, each distribution plan made funds available for ‘Land transport’ by the provision of trucks to carry ‘MOU commodities from Um Qasr ...’

1.69 The various approved distribution plans thus envisaged Iraqi authorities themselves providing transportation infrastructure for the movement of grain within Iraq. They did not envisage inland transportation of grains arriving at Umm Qasr otherwise than by Iraqi instrumentalities or entities. It was on this basis, approved by the Secretary-General, that the 661 Committee operated the Oil-for-Food Programme.

Conclusion: interpretation of Security Council resolutions

1.70 Although member states might have had differing views about whether it was in breach of sanctions for exporters to Iraq to make ‘some form of payment for internal transport costs to transportation companies that may have links to the Government of Iraq’, in practice the 661 Committee implemented Resolution 661 and subsequent resolutions, and operated the Oil-for-Food Programme, on the basis of distribution plans approved by the Secretary-General. These plans contemplated both inland transport and distribution of foodstuffs by Iraq or its authorities.

1.71 It was the view of the Office of Legal Affairs, and of the Office of the Iraq Programme, which had been established by the United Nations to administer the 661 Committee’s obligations, that payments could be made to Iraq or Iraqi entities only for ‘customary charges’, at a ‘reasonable rate’, only in Iraqi dinars, and only in circumstances where the payments could not be regarded as providing a source of funds to Iraq.

1.72 There were only three categories of entity that could possibly transport grain from port to silo:

1. Iraqi state instrumentalities or Iraqi companies
2. foreign transport companies – for example, companies from Jordan
3. the exporter of the grain.

Resolution 661 prohibited a category 3 entity contracting with a category 1 entity to effect such transportation because that would involve payments to an Iraqi entity. It would also constitute a source of funds to Iraq.

Resolution 986, the MOU and each distribution plan contemplated the transportation being effected by Iraqi entities. A category 2 entity performing the transportation was thus not in contemplation of either the United Nations or Iraq, although it was not prohibited by Resolution 661.

A category 3 entity agreeing with Iraq to undertake the transportation task itself was not prohibited by Resolution 661, although it was not contemplated by Resolution 986, the MOU or the agreed distribution plans. If, however, a category 3 entity wanted to subcontract the transportation task, it was:

- prohibited from subcontracting with an Iraqi entity because that would involve payments to an Iraqi entity, contrary to Resolution 661, and would be a source of funds for Iraq, also contrary to Resolution 661
- permitted to engage a category 2 company.

1.73 It necessarily follows that:

- The United Nations should not have approved any contract that disclosed, on its face, a payment by an exporter to an Iraqi instrumentality or entity.
- In accordance with Resolution 986, the MOU and the approved distribution plans, internal transportation was to be undertaken by Iraq.
- The United Nations should have approved contracts that required an exporter to Iraq to undertake internal transportation only if it was satisfied that:
 - the exporter could itself transport the grain – a practical impossibility in reality

or

- the exporter had engaged a foreign transport company that could perform the task without the transport company making payments to Iraq or an Iraqi entity.

UN procedures related to notification and financing of contracts

- 1.74 During the period with which I am concerned, June 1999 to March 2003, three different procedural regimes operated within the United Nations in connection with notification and financing of contracts:
- before 17 December 1999, when the procedures agreed in the 20 May 1996 MOU applied
 - between 17 December 1999 and 30 May 2002, when the procedures required by Resolution 1284 applied
 - between 30 May 2002 and 28 March 2003, when the procedures required by Resolution 1409 and, from 3 December 2002, Resolution 1454 applied. The procedures required by Resolution 1454 were in substance the same as those required by Resolution 1409.
- 1.75 In each period, before any approval for the export of goods to Iraq under a phase of the Oil-for-Food Programme could be given, a distribution plan was required to be approved by the Secretary-General. Further, the United Nations required at all times that the documents seeking approval or funding from the Iraq account, or notifying sales to Iraq, be submitted by a state through its UN embassy.
- 1.76 It is convenient to set out, by way of example, the manner in which, and the forms by which, the United Nations, the 661 Committee or the Office of the Iraq Programme gave consent to the export of grain to Iraq and the financing of such exports, under the three differing procedural regimes.

Procedures before 17 December 1999

- 1.77 Before 17 December 1999 the applicable procedures were those in the 20 May 1996 MOU implementing Resolution 986. The contract used here as an example is AWB contract A4653, dated 14 July 1999. This was within phase VI of the Oil-for-Food Programme.
- 1.78 The distribution plan for phase VI was prepared as required by clause 2 of the MOU of 20 May 1996. The summary of the plan states, 'The Plan constitutes

an important element in the implementation of SCR 1242 (1999) and the Secretary-General's report of 18 May 1999 (S/1999/573). It includes a classified list of supplies and goods to be purchased and imported by Iraq for this purpose'.⁴⁹

1.79 Part 1 of the plan dealt with the 'food sector'. Under the heading 'Plan for food distribution' was the following:

24. The same mechanism for food distribution stipulated in paragraph 22 of the Distribution Plan of Phase III shall be followed under this plan.⁵⁰

Arrangements for procurement and storage

25. Arrangements for procurement, storage and transport of food supplies under this plan shall remain as stated in paragraph 24 of the Distribution Plan of Phase III ...⁵¹

...

Warehouses

27. Specific warehouses shall be designated to store the foodstuffs imported by the Government of Iraq under the Plan. The locations of these warehouses will be within the main storage complexes of the Ministry of Trade throughout the governorates of Iraq.

...

Maintenance, repairs, rehabilitation and replacement of equipment required on the basis of priorities for the handling, storage, supply and distribution of food

29. The Plan is based on the actual need of the Food Sector according to activities related to the storage and transportation of foodstuffs, as well as grain milling and delivering to the consumers, in accordance with the ration system and in conformity with the volume of the imported foodstuffs. The following has been taken into consideration in preparing this requirement:

- Repairing and rehabilitating the apparatuses and equipment of grain silos in a manner that ensures the speedy transportation and receiving of imported grains and supplying them to mills as quickly as required.
- Ensuring the minimum needs of mills to keep them operating, and to ensure the production of the best quality of flour, packing and delivering it to the citizens on time.
- Ensuring new means of transportation to enhance the capacity available in the country for the transportation of grains, flour and foodstuffs, as well as their delivery to the citizens according to determined timings. For example, the provision of trucks and repair of railways.

1.80 Paragraph 22 of the distribution plan for phase III adopts paragraphs 25 to 28 of 'the previous Distribution Plan, Phase I'. As noted, paragraph 25 specified that food would be distributed by 'the competent Iraqi authorities', and paragraphs 26 to 28 dealt with arrangements for the three northern governorates.

1.81 In phase I under 'Purchase and storage arrangements', paragraph 30 provided:

(iv) All items purchased under the Plan will be transported to and stored in specially designated silos and warehouses. The Government of Iraq will keep the Programme informed of the locations of each such silo and warehouse.

(v) Imported grains (wheat and rice) will be delivered to grain silos and rice warehouses located throughout the country in accordance with the details contained in paragraph (iv) above.⁵²

Table IV, which specified the indicative value of 'wheat flour' and other substances, noted, 'The indicate[d] total value of the items include both external and internal transport costs and are subject to usual market conditions and fluctuations'.⁵³

1.82 As noted here in paragraph 1.66, the distribution plan for phase VI referred to the prominent role of the Iraqi rail system in the transporting of foods, especially grains arriving at Umm Qasr, and to the difficulties being posed by a lack of spare parts for locomotives and wagons.⁵⁴

1.83 The distribution plan thus addressed, at least peripherally, the question of transportation of grain from Umm Qasr to storage in silos.

1.84 On behalf of AWB, the Australian mission to the United Nations submitted to the 661 Committee the following:

- a form headed 'Notification or request to ship goods to Iraq' (see Figure 1.1).⁵⁵ It showed a registration date of 11 August 1999 and a deadline of 13 August 1999 for objections
- an AWB short-form wheat contract dated 14 July 1999 and containing the following clause:

The cargo will be discharged Free into Truck to all silos within all Governorates 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 USD12.00 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.

The price was shown as 'C.I.F., Free in Truck'.⁵⁶

- an AWB long-form contract signed on behalf of the purchaser and bearing the seal 'Ministry of Trade—Grain Board of Iraq'. This also stated the price 'C.I.F, F.O.T. to silo at all Governorate of Iraq via Umm Quser port'. It did not contain the clause relating to the discharge cost.⁵⁷

1.85 A customs officer's report dated 10 August 1999 was prepared within the United Nations by Ms Johnston.

1.86 As is evident, the document states, 'Specifically, this application has been examined to establish whether the price and value is credible and whether the items to be exported are in the distribution plan annexes'.⁵⁸ This accorded with the provisions of paragraph 33 of the procedures the 661 Committee adopted on 8 August 1996 to implement Resolution 661.⁵⁹

1.87 On 24 August 1999 the United Nations issued a document dated 13 August 1999 advising that the 661 Committee had been 'duly notified' of the intention to send the shipment of wheat through Umm Qasr and that the 'exporter is eligible for payment from the Iraq account' (see Figure 1.2).⁶⁰

1.88 Notwithstanding the statement in the customs officer's report that the 'item price and value have been examined as per paragraph 33 of the Procedures and appear reasonable and acceptable', and the statement that 'specifically, this application has been examined to establish whether the price and value is credible', the evidence before the Inquiry is that UN customs officers did not notice:

- the discrepancy between the contract signed by AWB and by the Grain Board of Iraq
- the clause stating that 'the discharge cost will be a maximum of USD12.00'
- the provision contractually obliging AWB to deliver 'Free into Truck to all silos within all Governorates of Iraq'.

Figure 1.1

Notification or request to ship goods to Iraq, 11 August 1999

UNO.0003.3322.x

August 1997 REVISED FORM

**SECURITY COUNCIL COMMITTEE ESTABLISHED BY RESOLUTION 661 (1990)
CONCERNING THE SITUATION BETWEEN IRAQ AND KUWAIT
NOTIFICATION OR REQUEST TO SHIP GOODS TO IRAQ**

(TO BE COMPLETED BY THE SECRETARIAT)

9/8/99
 COMM No. **600078** REGISTRATION DATE **AUG 11 1999** DEADLINE FOR OBJECTIONS **AUG 13 1999**

(TO BE COMPLETED BY PROSPECTIVE EXPORTING COUNTRY or INT'L ORG)

1. MISSION OR INTERNATIONAL ORGANIZATION
AUSTRALIA CERTIFYING SIGNATURE AND OFFICIAL SEAL
 Contact: Cath Rosevear (212) 351 6627

2. DATE OF SUBMISSION
3 August 1999

3. MISSION REFERENCE No.
AUST/079 - Contract No. A4653

4a. SECTOR/ITEM CODE (SCR 986)	5. GOODS TO BE SHIPPED (Name and/or description. Attach additional sheet if necessary)	6. QUANTITY IN NUMBERS	7. UNIT OF MEASUREMENT	8. VALUE PER ITEM	9. TOTAL VALUE	10. CURRENCY ISO CODE
1a) 01-02-0001	Wheat in Bulk	5% more or less	METRIC TONS	USD	USD	USD
1b)						
2a)						
2b)						
3a)						
3b)						

11. EXPORTER Name and Address
**AWB Limited
 528 Lorisdale Street
 MELBOURNE VICTORIA AUSTRALIA**

12. ORIGIN of GOODS (if different from applicant State)
One or Two Ports in Australia at Sellers Option

13. RECEIVING COMPANY / ORG Name and Address
**Grain Board of Iraq
 P.O. Box 329
 BAGHDAD IRAQ**

14. SHIPPING ARRANGEMENTS:
 a) Border Point or Port of Entry into Iraq
UMM Qasr (UM Qaser)

14 b) Means of Transportation
BULK CARRIER (S)

14 c) Other information (e.g. route, major ports, etc.)
DIRECT OR INDIRECT AS PER CHARTER PARTY

From the Iraq Account in accordance with SC resolution 986 (1995) 15. METHOD OF PAYMENT By other arrangement (Provide as many details as possible)
 (Relevant documentation including contract(s) must be attached)

16. ADDITIONAL INFORMATION: End-user and End-user (Attach additional sheet if necessary)
SUPPLY TO THE GOVERNMENT OF IRAQ FOR GENERAL FOOD DISTRIBUTION

IMPORTANT NOTICE

- Provide only one item per line in Box 5.
- Sector/Item Codes (Box 4a) are mandatory, and are found in the Annexes to the Distribution Plan of SCR 986.
- HS Tariff Codes (Box 4b), if used, must be 6 digit codes of the International Harmonised System of Tariff Nomenclature as determined by the Customs Co-Operation Council in Brussels, Belgium.
- Information entered must match shipping documents presented to customs officials.


IIC-ARC 003465

Source: Ex 1212, UNO.0003.3322_R.

Figure 1.2

United Nations notification, 13 August 1999

U0040 UNO.0003.3319_R



UNITED NATIONS **NATIONS UNIES**
 SECURITY COUNCIL COMMITTEE ESTABLISHED BY RESOLUTION 661 (1990)
 CONCERNING THE SITUATION BETWEEN IRAQ AND KUWAIT

S/AC.25/1999/986/OC.600078 13 August 1999
 OC. SIX ZERO ZERO ZERO SEVEN EIGHT

Madam,


In reply to your communication dated 03/08/99 (S/AC.25/1999/986/Comm.600078, ref. AUST/079 - CONTRACT NO. A4653), I have the honour to inform you that the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait has been duly notified of the intention to send the following shipment of supplies through the border crossing point/port of Umm Qasr to Iraq:

Line Item Number	Goods To Be Shipped	Quantity	Unit Of Measure
1	WHEAT IN BULK		Metric Ton

The exporter is eligible for payment from the Iraq account as the financing arrangements specified in your communication appear to be consistent with the procedures adopted by the Committee pursuant to Security Council resolution 986 (1995).

The exporter is requested to ensure the arrival of the goods by the required delivery date as indicated in the contract.

Accept, Madam, the assurances of my highest consideration.



A. Peter van Walsum
 Chairman
 Security Council Committee established by resolution
 661(1990) concerning the situation between Iraq and Kuwait

Her Excellency
 Ms. Penelope Anne Wensley
 Ambassador Extraordinary and Plenipotentiary
 Permanent Representative of Australia
 to the United Nations

Date of issuance:	24 AUG 1999
Not valid after:	30 FEB 2000
Issuing officer:	<i>[Signature]</i>


Source: Ex 1216, UNO.0003.3319_R.

Procedures operating between 17 December 1999 and 30 May 2002

- 1.89 In relation to procedures operating between 17 December 1999 and 30 May 2002, I use as an example AWB contract A1112, dated 20 December 2001. The contract was in phase X. The procedures required by Resolution 1284 applied.
- 1.90 The approved distribution plan set out a ‘plan for food distribution’ and ‘arrangements for procurement and storage’, which were in substance the same as those in phase I.⁶¹ Paragraph 185 of the plan contained statements about the use of railways similar to those previously quoted. However, it also contained a reference to ‘land transport’:
190. To carry MOU commodities from Umm Qasr and Trebil, different trucks (flat semi-trailer, refrigerants, and open trailers and lorries of different kinds and capacities are required for this purpose. More than 10,000 trucks are required per year.⁶²
- 1.91 On AWB’s behalf, the Australian mission to the United Nations submitted to the Office of the Iraq Programme a ‘Notification or request to ship goods to Iraq’ form (see Figure 1.3). It was received at the OIP on 23 January 2002 and bears a registration date of 4 February 2002.
- 1.92 Both a short form and long form of contract A1112, each signed on behalf of AWB and the Grain Board of Iraq, were submitted to the United Nations along with the notification form.⁶³ Both forms of contract showed a price ‘C.I.F. Free in Truck’ and contained a provision that ‘the cargo will be discharged Free into Truck to all silos within all Governorates of Iraq ...’
- 1.93 The OIP prepared a report on the request (see Figure 1.4).
- 1.94 The report shows that wheat was on a list of goods approved for export, as contemplated by paragraph 17 of Resolution 1284, and that the price and value of the goods had been examined and appeared ‘reasonable and acceptable’ to the OIP. This examination had been carried out pursuant to paragraph 33 of the MOU dated 8 August 1996.
- 1.95 On 5 February 2002 the OIP issued a document confirming notification of the contract to the United Nations and advising of eligibility for payment from the escrow account (see Figure 1.5).

Figure 1.3

Notification or request to ship goods to Iraq, 23 January 2002


 UNO.1214.0398

UNO.0003.0945

AUGUST 1997 REVISED

**SECURITY COUNCIL COMMITTEE ESTABLISHED BY RESOLUTION 661 (1990)
CONCERNING THE SITUATION BETWEEN IRAQ AND KUWAIT**


NOTIFICATION OR REQUEST TO SHIP GOODS TO IRAQ

(TO BE COMPLETED BY THE SECRETARIAT)

COMM No. **1100013** REGISTRATION DATE **FEB 04 2002** DEADLINE FOR OBJECTIONS

(TO BE COMPLETED BY THE RESPECTIVE EXPORTING COUNTRY or INT'L ORG.)
 ORGANIZATION **AUSTRALIA** CERTIFYING SIGNATURE AND OFFICIAL SEAL

Contact: Penny Holliday
 Tel: (212) 351 6615



2. DATE OF SUBMISSION: 23 January 2002 3. MISSION REFERENCE No. **AUST/110 (A1112)**

4a. SECTOR/ITEM CODE (SCR 986)	5. GOODS TO BE SHIPPED (Name and/or description. Attach additional sheet if necessary)	6. QUANTITY IN NUMBERS	7. UNIT OF MEASUREMENT	8. VALUE PER ITEM	9. TOTAL VALUE	10. CURRENCY ISO CODE
1a) 01-09-00001	Australian wheat in bulk	maximum	Metric tonnes	EUR		EUR
2a) Amended Phytosanitary		105 cartons	Unit		Free of charge	
b) Chief Customs Expert, OIP						
3a) Hatch sealing tape			Unit		Free of charge	
b)						

11. EXPORTER Name and Address: **AWB Limited, 528 Lonsdale Street, Melbourne Victoria 3000 Australia**
 12. ORIGIN OF GOODS (if different from applicant State): **One or two ports in Australia at sellers option**

13. RECEIVING COMPANY / ORG Name and Address: **Grain Board of Iraq, PO Box 329, Baghdad IRAQ**
 14. SHIPPING ARRANGEMENTS: a) Border Point or Port of Entry into Iraq: **Umm Qasr, Iraq**

14 b) Means of Transportation: **Bulk carrier (s)** 14 c) Other information (e.g. route, major ports, etc.): **Direct or indirect as per charter party**

15. METHOD OF PAYMENT:
 From the Iraq Account in accordance with SC resolution 986 (1995) (Relevant documentation including contract(s) must be attached)
 By other arrangement (Provide as many details as possible)

16. ADDITIONAL INFORMATION: End-use and End-user (Attach additional sheet if necessary)
Supply to the Government of Iraq for general food distribution


IMPORTANT NOTICE

1. Provide only one item per line in Box 5.
2. Sector/Item Codes (Box 4a) are mandatory, and are found in the Annexes to the Distribution Plan of SCR 986.
3. HS Tariff Codes (Box 4b), if used, must be 6 digit codes of the International Harmonised System of Tariff Nomenclature as determined by the Customs Co-Operation Council in Brussels, Belgium.
4. Information entered must match shipping documents presented to customs officials.
5. Incomplete, incorrect or illegible applications will be returned by the Committee's Secretariat for completion.

RECEIVED AT OIP
ON
DATE: JAN 23 2002

IIC-ARC 001086

Source: Ex 1211, UNO.1214.0398.


 UNO.1214.0397

UNO.0003.0942

1

S/AC.25/2002/986/COMM.1100013F

REPORT CONCERNING REQUEST TO SHIP GOODS TO IRAQ IN ACCORDANCE WITH RESOLUTIONS 986(1995) & 1284 (1999)

MISSION: AUSTRALIA

EXPORTER: AWB LIMITED

RECEIVING COMPANY: MINISTRY OF TRADE – GRAIN BOARD OF IRAQ

GOODS: WHEAT

.....

The notification has been examined to determine its conformity with the provisions of paragraphs 17 and 25 of Security Council Resolution 1284 (1999) and all related procedures and guidelines. In addition, the notification has been examined in accordance with paragraphs 32 and 33 of the Procedures of the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait in the discharge of its responsibilities as required by paragraph 12 of Security Council resolution 986 (1995) (S/1996/636*). Specifically, the notification has been examined to establish whether the price and value are credible; whether the items to be exported are in the distribution plan annexes; whether all relevant details have been submitted with the notification; and whether the notification includes items which are included in the list to which the export/import mechanism approved by resolution 1051 (1996) applies.

.....

SCR 1284 (1999):

The goods are on the list of items approved by the Committee in conformity with the provisions of paragraph 17 of Security Council Resolution 1284 (1999).

The notification has been examined in accordance with paragraph 25 of Security Council resolution 1284 and the goods are not included in the list to which the export/import mechanism approved by Security Council resolution 1051 (1996) applies.

GOODS ON THE DISTRIBUTION PLAN: Yes, and are within the amounts requested.

PRICING: The item price and value have been examined as per paragraph 33 of S/1996/636 and appear reasonable and acceptable.

COMMENT: The goods consist of [REDACTED] tons of wheat + 105 cartons of fumigation material FOC, for a total amount of [REDACTED] EURO. End use: supply to the Government of Iraq for general food distribution.

DATE OF NOTIFICATION REPORT: 04/02/2002

Reporting Officer: Marco Mamone


Check Officer: Luis Esteban

IIC-ARC 001085


Source: Ex 1211, UNO.1214.0397.

Figure 1.5

United Nations notification, 4 February 2002


 UNO.1214.0396

UNO.0003.0941


UNITED NATIONS **NATIONS UNIES**
 OFFICE OF THE IRAQ PROGRAMME

S/AC.25/2002/986/OC.1100013 4 February 2002
 OC. ONE ONE ZERO ZERO ZERO ONE THREE

Sir,


In reply to your communication dated 23/01/2002 (S / AC.25 / 2002 / 986 / Comm.1100013, ref. AUST/110 (A1112)), I have the honour to inform you that the Secretary-General has been duly notified of the intention to send the following shipment of supplies through the border crossing point/port of Umm Qasr to Iraq:

Line Item Number	Goods To Be Shipped	Quantity	Unit Of Measure
1	AUSTRALIAN WHEAT IN BULK	[REDACTED]	METRIC TON
2	PHOSTOXIN (FOC)	105	CARTONS
3	HATCH SEALING TAPE (FOC)	1	SET

The exporter is eligible for payment from the Iraq account as the financing arrangements specified in your communication appear to be consistent with the procedures adopted by the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait pursuant to Security Council resolution 986 (1995).

It is hereby stipulated that the goods to be supplied shall be delivered within the time defined by the contract.

Accept, Sir, the assurances of my highest consideration.


 Benon V. Sevan
 Executive Director

His Excellency
 Mr. John Dauth
 Ambassador Extraordinary and Plenipotentiary
 Permanent Representative of Australia
 to the United Nations
 New York, NY

Date of issuance:	05 FEB 2002
Not valid after:	04 FEB 2003
Issuing officer:	<i>[Signature]</i>

2002-02-04 11:03:00
 2002-02-04 11:03:00

IIC-ARC 001084

Source: Ex 1211, UNO.1214.0396.

Procedures operating from 30 May 2002

- 1.96 In connection with procedures operating from 30 May 2002, I use as an example AWB contract A1441, dated 23 June 2002. This was in phase XII. The procedures required by Resolution 1409 applied.
- 1.97 The distribution plan contained provisions for food distribution, procurement and storage and statements regarding railways and land transport similar to those previously addressed.
- 1.98 The contract submitted to the United Nations was signed by both AWB and the Grain Board of Iraq. The price was shown per metric tonne for 'CIF F.O.T. to silo to all Governorates of Iraq via Umm Quser port'.⁶⁴ The contract was expressed to be an agreement 'according to the Memorandum of Understanding signed between the UN Secretariat and the Government of Iraq on the implementation of Security Council resolution 1409 Phase (XII)'.⁶⁵ The Office of the Iraq Programme received the 'Notification or request to ship goods to Iraq' form, and the contract, on 25 July 2002 (see Figure 1.6).
- 1.99 The OIP prepared a report on the notification (see Figure 1.7). It is to be noted that the report does not indicate that the contract had been examined for 'price and value'. Such examination was necessary after Resolution 1409 only if checking for price and value was a requirement of the 'review' to be carried out pursuant to paragraph 3 of the procedures attached to that resolution.
- 1.100 The OIP then issued a document showing the 'date of original approval' of 13 August 2002 and a 'date of issuance' of that approval (8 October 2002) (see Figure 1.8).
- 1.101 This document recorded that the Secretary-General had been 'duly notified', as had been required for the export of humanitarian foodstuffs since Resolution 687 came into effect in April 1991. Entitlement to payment from the Iraq account flowed, it was said, because of consistency with 661 Committee procedures adopted to implement Resolution 986, which remained applicable for funding purposes by virtue of paragraph 4 of Resolution 1409.⁶⁶

Figure 1.6

Notification or request to ship goods to Iraq, 25 July 2002

UNO.0003.1237

May 2002 - REVISED

**SECURITY COUNCIL COMMITTEE ESTABLISHED BY RESOLUTION 661
CONCERNING THE SITUATION BETWEEN IRAQ AND KUWAIT
NOTIFICATION OR REQUEST TO SHIP GOODS TO IRAQ**


**RECEIVED AT OIP
ON
DATE: JUL 25 2002**

31/7/02 For further guidance regarding completion of application please consult OIP website (www.un.org/Depts/oip)

(TO BE COMPLETED BY THE SECRETARIAT)

COMM. No. 1200083	REGISTRATION DATE	DATE RECEIVED BY UNMOVIC (if applicable, for 986) DEADLINE DATE (for 661)	DATE SENT TO THE COMMITTEE (if applicable)
-----------------------------	-------------------	---	---

(TO BE COMPLETED BY PROSPECTIVE EXPORTING COUNTRY or INTERNATIONAL ORGANIZATION)

1. MISSION OR INTERNATIONAL ORGANIZATION AUSTRALIA Contact: Penny Holliday Tel: (212) 351 6615	2. CERTIFYING SIGNATURE AND SEAL OF THE MISSION OR INTERNATIONAL ORGANIZATION 
3. DATE OF SUBMISSION 24 JULY 2002	4. MISSION REFERENCE No. AUST/115 (A1441)

5. GOODS TO BE SHIPPED (General description of the goods). AUSTRALIAN WHEAT IN BULK	6. NUMBER OF LINE ITEMS ON THE EXCEL FORM ATTACHMENT 3	7. TOTAL VALUE [REDACTED]	8. CURRENCY ISO CODE EUR
---	--	---	--

9. EXPORTER AWB Limited 528 Lonsdale Street Melbourne Victoria 3000 Australia Phone 613-92092000 / Fax: 61396705539	10. ORIGIN of GOODS (if different from applicant State) One or two ports in Australia at sellers option
11. RECEIVING COMPANY / ORG Grain Board of Iraq PO Box 329 Baghdad IRAQ Phone: 96414158067 / Fax: 96414166200	12. SHIPPING ARRANGEMENTS: Select ONE Point of Entry into Iraq <input type="checkbox"/> Trebil <input type="checkbox"/> Al Waleed <input type="checkbox"/> Zakho <input checked="" type="checkbox"/> Umm Qasr <input type="checkbox"/> Ar' ar
13. END USER entity (if different from receiving company / org.)	14. END USE Provide details of intended end-use. Supply to the Government of Iraq for general food distribution (attach additional sheets if necessary)

15. METHOD OF PAYMENT
 From the Iraq Account in accordance with SC resolution 986 (1995)
 In this case, please fill out PAGE 2
 (Relevant documentation including contract(s) must be attached)
 By other arrangement (in this case, disregard Page 2)

16. ADDITIONAL INFORMATION:
(Attach additional sheet if necessary)

**IF THIS NOTIFICATION OR REQUEST TO SHIP GOODS TO IRAQ
IS TO BE PAID FROM THE IRAQ ACCOUNT**

IIC-ARC 001380

IN ACCORDANCE WITH SC RESOLUTION 806 (1995)
PLEASE FILL OUT THESE ADDITIONAL BOXES
(see box 15 on Page 1)

MISSION REFERENCE No.: AUST/109 (A1111)

<p>17. IDENTICAL GOODS PREVIOUSLY SUBMITTED:</p> <p>Indicate whether or not you have previously submitted an application(s) for IDENTICAL goods.</p> <p><input checked="" type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> UNABLE TO DETERMINE</p> <p>If YES provide Comm. number reference(s) with respective item number(s). (S / AC 25 / 2002 / 986 / Comm.1100014 ref AUST/109 (A1111))</p>
<p>18. DETAILED LIST OF GOODS:</p> <p>Indicate whether or not the scope of supply includes any spare parts, accessories, sets, kits, tool boxes, tools, equipment, special tools, lots or consumables.</p> <p><input checked="" type="checkbox"/> YES <input type="checkbox"/> NO</p> <p>If YES indicate whether or not all components of the spare parts, accessories, sets, kits, tool boxes, tools, equipment, special tools, lots or consumables have been listed as separate line items with the relevant description, quantity and price on the attached Excel form application.</p> <p><input checked="" type="checkbox"/> YES <input type="checkbox"/> NO (in this case, the document will not be registered by the Secretariat)</p>
<p>19. TECHNICAL INFORMATION:</p> <p>Indicate whether or not the scope of supply includes (separately or as part of larger item) any of the goods and/or technology specified on the OIP web site (www.un.org/Depts/oip)</p> <p><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO</p> <p>If YES indicate whether or not the relevant technical specification form for each item has been completed and attached to the application.</p> <p><input type="checkbox"/> YES <input type="checkbox"/> NO (in this case, the document will not be registered by the Secretariat)</p>

Source: Ex 1222, UNO.0003.1237_R.

Figure 1.7 Report concerning request to ship goods to Iraq, 13 August 2002

UNO.0003.1236.04

S / AC.25 / 2002 / 986 / COMM.1200083 F

REPORT CONCERNING REQUEST TO SHIP GOODS TO IRAQ IN ACCORDANCE WITH SECURITY COUNCIL RESOLUTIONS 986 (1995) & 1409 (2002)

The above noted application has been examined by the Office of the Iraq Programme (OIP), United Nations Monitoring Observation Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) to determine its conformity with the provisions of Security Council resolution 1409 (2002) and all related Security Council resolutions, procedures and guidelines.

SUBMITTING MISSION	AUSTRALIA
EXPORTER	A.W.B. LIMITED, MELBOURNE, AUSTRALIA
RECEIVING COMPANY	GRAIN BOARD OF IRAQ, MINISTRY OF TRADE BAGHDAD, IRAQ
END - USER	GRAIN BOARD OF IRAQ, MINISTRY OF TRADE BAGHDAD, IRAQ
GENERIC DESCRIPTION OF GOODS	WHEAT

END - USE :

The goods are intended to be used for supply to the Government of Iraq for general food distribution.

COMMENTS BY OIP :

The goods consist of [redacted] tons of Australian Wheat in bulk. Additionally, one box of fumigation material 'Phostoxin' per [redacted] tons and Hatch Sealing tapes shall be provided.

The total declared value is Euro [redacted] with unit price at [redacted] per metric ton.


SPECIAL AUTHENTICATION PROCEDURE : NO

COMMENTS BY UNMOVIC / IAEA :

The application has been examined in accordance with paragraph 4 of the procedure attached to Security Council resolution 1409 (2002) and the goods are not included in the unofficial version of the revised Goods Review List (GRL) - S/2002/515.

Date OIP APPROVED	13.08.2002
-------------------	------------

OIP Reporting Officer : Nishith Goyal OIP Check Officer : Herve Mathew




IIC-ARC.001379

Source: Ex 1221, UNO.0003.1236_R.

Figure 1.8

United Nations notification, 13 August 2002

UNO.0003.1234..R


UNITED NATIONS **NATIONS UNIES**
OFFICE OF THE IRAQ PROGRAMME

S/AC.25/2002/986/OC.1200083
OC. ONE TWO ZERO ZERO ZERO EIGHT THREE

13 August 2002
Date of Original Approval

Sir,


In reply to your communication received on 25/07/2002 (S / AC.25 / 2002 / 986 / Comm. 1200083, ref. AUST/115 (A1441)), I have the honour to inform you that the Secretary-General has been duly notified of the intention to send the following shipment of supplies through the border crossing point/port of Umm Qasr to Iraq:

See attached page(s)

The exporter is eligible for payment from the Iraq account as the financing arrangements specified in your communication appear to be consistent with the procedures adopted by the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait pursuant to Security Council resolution 986 (1995).

It is hereby stipulated that the goods to be supplied shall be delivered within the time defined by the contract.

Accept, Sir, the assurances of my highest consideration.


Benon V. Sevan
Executive Director

His Excellency
Mr. John Dauth
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of Australia
to the United Nations
New York, NY

Date of issuance:	08 OCT 2002
Not valid after:	07 OCT 2003
Issuing officer:	<i>[Signature]</i>

25 07 11 2 10 10

S/AC.25/2002/88/OC.1200083
OC. ONE TWO ZERO ZERO ZERO EIGHT THREE



Item No.	Description	Quantity	Unit	OIP Approved
1	AUSTRALIAN WHEAT IN BULK		BOX	OIP Approved
2	PHOSTOXIN FOR FUMIGATING CARGO (FOC)		UNIT	OIP Approved
3	TAPE FOR CLOSING TROLES			OIP Approved

OIP Approved: Item approved in accordance with paragraph 6 of the procedures adopted by resolution 1600(2002).
 Not Approved: Item approved by the 681 Committee.
 Not Approved: Item rejected by the 681 Committee or still under its consideration.

Benon V. Sevan
Executive Director

Source: Ex 1220, UNO.0003.1234_R.

Contractual review by the United Nations

- 1.102 A crucial aspect of the Oil-for-Food Programme was the review by the United Nations, through its 661 Committee and later the Office of the Iraq Programme, of contracts for the purchase of humanitarian goods. Only contracts favourably reviewed would be paid for from the UN escrow account. The review was thus central to the Oil-for-Food Programme and central to the provision of humanitarian relief, including foodstuffs, to the Iraqi people.
- 1.103 Notwithstanding that the Oil-for-Food Programme commenced in April 1995 with the adoption of Resolution 986, Ms Johnston, the Chief Customs Officer for the United Nations, gave evidence to the Inquiry that when she joined the Contracts Processing and Monitoring Division in July 1999 the reviewing officers were given only 'very, very minimal guidance' in the performing of their review functions.⁶⁷ All they had was a database of prior contracts and the capacity to use the internet to make any other inquiries thought necessary.⁶⁸ In reviewing the 'price and value' of wheat contracts, the reviewing officers had no benchmark price from which to work⁶⁹, had no price parameters, and knew that the price shown in the contract being reviewed incorporated the costs of delivery to Iraq, insurance, freight and inland transport costs, but they had no method of determining what was a reasonable price for those ingredient costs. In truth, they thus had no method of determining whether the price shown in the contract was reasonable.⁷⁰
- 1.104 Each contract was reviewed by a reviewing officer and then checked by a second officer. Thus there were two independent reviews of the contract. The first four contracts for the sale of wheat to Iraq under phase VI contained a provision requiring the seller to sell grain pursuant to a contract containing the following new clause:
- 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 USD12.00 and shall be paid by Sellers to nominated Maritime Agents in Iraq. This clause is subject to UN approval of the Iraq distribution plan.⁷¹
- 1.105 Neither the reviewing officer nor the checking officer noticed the provision about the 'discharge cost' to a maximum of US\$12.00. Nor did either note that the US dollar currency was to be paid to 'nominated Maritime Agents in Iraq'. Ms Johnston was the reviewing officer and explained her oversight by reference to lack of training. The checking officer was her superior, Mr Christen, who had been in the department for a year.⁷² Ms Johnston gave the following evidence:

Q: What did the checking officer check?

A: The checking officer reviewed the customs report to proofread it, to ensure there were no inaccuracies in comparison with what was stated on the customs report with the contract, and also reviewed the terms of the contract, the contractual clauses, to ensure that the reviewing officer hadn't missed anything.

Q: So, effectively, there were two people independently reviewing this contract on behalf of the United Nations?

A: That's correct, sir.

Q: And they both overlooked this term in the contract?

A: That's correct, sir.⁷³

1.106 It is difficult to understand how two officers independently checking both the application and the contract on a 'line-by-line review' could each have independently overlooked this new contractual term in four separate contracts. However, they did. Apart from lack of training, Ms Johnston also attributed the error to the circumstance that food contracts were treated as a priority and therefore were rapidly processed and that speed of review may have been a factor.⁷⁴ Another factor might have been the good reputation of AWB and Australia at the time, such that it was thought unlikely that AWB would be engaged in any conduct not permitted by the sanctions.⁷⁵

1.107 Ms Johnston drew a distinction between the overlooked 'discharge cost' and the obligation to arrange transport to silos in all governorates of Iraq. In relation to transportation from Umm Qasr to silos in all governorates of Iraq, her evidence was that the United Nations expected the cost of that transportation to be included in the contract price being approved by the United Nations and thus paid for from the Iraq escrow account. Her evidence was as follows:

Q: You will see in this October 1999 contract, under the heading 'Shipment', these words appear: 'The cargo will be discharged Free into Truck to all silos within all Governorates of Iraq at the average rate ... per weather working day ...'

What did you understand those words to mean—'discharged free into truck to all silos within all governorates of Iraq'—and when I say what did you understand them to mean, what did you understand them to mean in terms of the responsibilities of AWB?

A: That it was the responsibility of AWB to arrange for the transportation of the goods from the port of Umm Qasr to all governorates within Iraq.

Q: Did you therefore understand that the cost of that transportation could be expected to be factored into the price?

A: Yes.

Q: Just with the use of those words and those words alone?

A: Yes.

Q: Without reference to the next sentence referring to discharge costs of \$12 a tonne?

A: Correct.

Q: Does that mean that for every AWB contract that was processed by the United Nations which contained the words 'discharged free into truck to all silos within all governorates of Iraq' your expectation is that the UN checking officers would have understood that the contract price included a component for the transport of the wheat from Umm Qasr to all governorates of Iraq?

A: Yes.

Q: And the checking officers would have therefore understood that that component of that price would come out of the escrow account and be paid to the sellers of the wheat, in this case AWB, on account of the obligation that it had undertaken under the contract for the delivery of that wheat?

A: Yes.

Q: As part of checking for price and value, then, does it follow that UN inspectors had to check not just for price and value of the wheat itself but also of the components in the price—that is, sea freight and overland transport cost within Iraq?

A: The customs experts were responsible for assessing the cost of the goods, and that was an overall assessment that was made. It included transportation within Iraq. It also covered transportation while in transit, any sea costs, insurance, handling, research and development. It was essentially the final end price that the customs experts were responsible for looking at. We certainly did not have sufficient resources or sufficient staff or sufficient time to carry out as detailed a breakdown as would be required by looking at transport costs.⁷⁶

1.108 Furthermore, Ms Johnston's evidence was that the United Nations did not expect that the application form for exporting to Iraq would show the inland transportation fee as a separate item:

Q: It [the application form instruction] refers to each of the boxes on the application form for approval under Resolution 986, and in particular, in relation to box 7 it records the following: 'The total value must be expressed in numeric form, and should reflect the total costs involved. The total value must be identical to the value stipulated in the associated contract and to the grand total value of all line items listed on the Excel form attachment'.

Do we correctly understand this instruction, as it was in practice, to require applicants for approval when completing the application form to include the total value as expressed on the face of the contract in the application form, even though that total value might include the cost of the items plus the cost of any service

which is included in the contract—for example, transport or after sales service, or any other form of service?

A: The general procedure within OIP throughout the time that I was there was that any actual services pertaining to the goods, such as installation, anything of a mechanical nature with a cost attached to it, had to be outlined as a line item in order that the service could be verified and the supplier paid for performing that service, but matters such as transportation—like insurance and packaging and sea costs—were wrapped up in the total value of the goods and were not required to be separately itemised.⁷⁷

1.109 Thus, in the case of all contracts for the sale of wheat where delivery was required ‘CIF, FOT to silos all governorates of Iraq’, the United Nations expected that, in the contracts submitted by the vendor and purchaser for approval for payment from the escrow account, inland transport costs would not be separately identified but would be contained in the total price shown. The United Nations had that expectation, recognising that it did not know, and did not have the expertise to determine, what reasonable inland transport costs were within Iraq or, indeed, any other ingredient cost such as sea freight or insurance. It is difficult to understand how the United Nations could maintain that it was checking the contract for ‘price and value’. On the basis of Ms Johnston’s evidence, it did not do so for it had no means of doing so.

1.110 By January 2001 Ms Johnston had become concerned whether the inclusion of costs for inland transportation in food contracts was in accordance with UN resolutions. On 11 January 2001 she forwarded to Ms Scheer, Chief of Office OIP, for forwarding to the Office of Legal Affairs, a memorandum headed: ‘Inclusion of costs of inland freight in food contracts—payment of freight costs to Iraqi transport companies’.⁷⁸

1.111 A document to which she referred in her memorandum, by way of example, was a document signed by the Grain Board of Iraq, stating:

We confirm 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 USD (15) per metric ton to be paid to the land transport company. For more details contact Iraqi Maritimes in Basrah. Iraqi State Co. for Water Transport—Basrah.⁷⁹

1.112 Regarding this document Ms Johnston wrote to the Office of Legal Affairs:

There is, however, a clear statement that an identified portion of the amount that is part of the negotiated cost of the goods will be paid to ‘the Land Transport Company’. This statement is taken to imply that the supplier has negotiated, with the receiver of the goods, the inclusion of a sum of money in the contract price to cover the costs of the inland freight (from Um Qasr) to the governorate warehouses. Further, the statement is taken to imply that an equivalent sum of money will be paid to an Iraqi Transport company for the cartage of the goods to the named warehouse. It is unclear as to how this compensation is to be made.⁸⁰

She sought advice about the ‘acceptability’ of this arrangement as it pertained to Resolution 986.

- 1.113 Ms Scheer drafted a memorandum dated 19 January 2001 based on Ms Johnston’s memorandum. Commenting on the example, she wrote:

The addendum detailed at 2 above relates to payments to the Government of Iraq, rather than to the Iraq account, and such payments may consequently fall outside the provisions of resolution 986 (1995) and in contravention of resolution 661 (1990). That said, under normal commercial practice, contracts often stipulate that the seller shall be responsible for port fees and such an addendum could be considered as an extrapolation of this arrangement and consequently acceptable.

In view of the importance of the timely notification for food contracts by the Secretariat I would appreciate OLA’s consideration of the attached documentation and a reply at your earliest convenience.⁸¹

- 1.114 Ms Johnston gave evidence that she received the advice sought:

A: At the time that I queried inland transportation costs within Iraq with the Office of Legal Affairs, the UN’s lawyers, I was provided an advice which stated that it was not inconsistent with the sanctions imposed by Resolution 661 that certain services would be provided within Iraq. That’s the advice that I was provided, with two caveats: the first caveat was provided the price was reasonable and acceptable; the second was that provided the payments were executed in dinar.

Q: Of course, we understand that as a strict legal position, but the reality was the payment could never be made in dinars, and surely the UN appreciated that?

A: It was very difficult to make payment in dinars. I understood, and continue to understand, that they were available for purchase in Jordan, but that is not something that I am an expert on, the currency transactions within the Middle East. Certainly it presented a lot of practical difficulties.⁸²

The United Nations informed this Inquiry it has no record of such advice.

- 1.115 Regarding whether the United Nations gave thought to how, as a matter of practice, large grain deliveries could be made without breaching UN sanctions where contractual delivery was required to all governorates of Iraq, Ms Johnston gave the following evidence:

Q: What I am asking you is within your area, whilst you were working with customs, was there amongst you—those at your level, those below you, to your knowledge perhaps those above you—knowledge that there more than likely was going to be a breach of sanctions by AWB if it undertook the responsibility that it had under the contract to deliver this wheat to all silos in Iraq?

A: No, that was not something that I considered and it wasn’t something that I recall being discussed by my superiors at the time.

Q: Was there any thought given to how it might be that AWB could actually arrange for the delivery of the wheat in accordance with the contractual obligation that it had and still work within sanctions?

A: Not that I recall.⁸³

1.116 And later:

Q: Can I suggest to you that the temptation looms large to infer that the UN understood that Iraqis would have to be employed in the delivery of these products, and that companies undertaking such obligations would have to breach sanctions in order to ensure that the products—particularly foodstuffs—were in fact delivered. Can you comment on that?

A: Yes, I think that's a reasonable assumption.⁸⁴

1.117 And finally:

Q: What I am suggesting to you is this: there would appear to be a strong inference that those working in the UN and administering this program must have considered the real likelihood that the only way in which large quantities of humanitarian goods could be delivered within Iraq would be if Iraqis were employed to effect the delivery. Can you comment on that?

A: I think that there was an assumption that throughout the program very large numbers of Iraqis would be employed in the construction area, working for the United Nations, transporting goods. I think there was an assumption that probably a vast number of Iraqis were ... in providing various services around the company.

Q: Would it not follow from that assumption that there would be another assumption that those Iraqis would not all be being paid in Iraqi dinars, particularly if they were being employed by foreign corporations?

A: I think this is an area that I am somewhat reluctant to be drawn into, because the matter of Iraqi dinar was discussed fairly widely amongst the committee members and it was acknowledged that it was an inherent weakness in the original resolution—I think it was 986 or 661; I can't recall. But it was acknowledged by the committee members that it was an inherent weakness within the original grounds under which the program was established, and that it provided, as I think I informed Ms Moules on one occasion, very significant practical difficulties. I don't want to be the defender of that position, and I don't think I really should be drawn on it too much. It was an acknowledged fact within the UN and within the 661 committee that it was problematic.⁸⁵

1.118 This evidence makes it clear that the United Nations was content to approve contracts for the delivery of humanitarian goods where the contractual obligation on the vendor was to deliver within all governorates of Iraq. It was content for the price for that inland transportation to be included in the contract price and not identified as a separate ingredient within the price. It necessarily follows that the United Nations understood that such transport

fees would be paid from the Iraq escrow account. According to Ms Johnston's evidence, the United Nations, through the Office of Legal Affairs, was of the view that arrangements made between a seller of goods and an Iraqi company for the internal transportation of goods were not inconsistent with the Security Council resolutions imposing sanctions, provided the payments to be made to the Iraqi company for such transportation were reasonable and provided such payments were made in dinars. The United Nations accepted that there were great practical difficulties, perhaps insurmountable practical difficulties, in making such arrangements because dinars were not a negotiable currency and exchanging hard currency for dinars would constitute a breach of paragraph 4 of Resolution 661.

- 1.119 It is difficult to understand how the United Nations thought such a distribution system could in fact work. The system involved external sellers effecting transportation within Iraq using Iraqi contractors, with payment being made only in dinars, when dinars could not be obtained by exchanging hard currency without breaching sanctions.
- 1.120 These matters are related to, but differ from, the question of whether AWB, in paying hard currency to a Jordanian trucking company that was acting as a conduit for transmission of the money to the Iraqi regime, might have breached Commonwealth, State or Territory law. It is, however, essential background to a consideration of any allegation that might be established that AWB misled or deceived the Department of Foreign Affairs and Trade or the United Nations by submitting to DFAT for approval by the United Nations and for payment from the escrow account contracts that included a sum for inland transport fees or after-sales-service fees intended by AWB to be paid to Iraq or an Iraqi instrumentality.

Notes

¹ S/RES/661, para. 2, 6 August 1990; S/RES/660, 2 August 1990.

² S/22366, para. 1, 20 March 1991.

³ S/22366, 20 March 1991.

⁴ S/22400, paras 2–4, 22 March 1991.

⁵ S/RES/986, para. 3, 14 April 1995.

⁶ S/RES/986, para. 3, 14 April 1995.

⁷ The extending Security Council resolutions were:

- (a) S/RES/1111, 4 June 1997, which authorised phase II
- (b) S/RES/1143, 4 December 1997, which authorised phase III
- (c) S/RES/1153, 20 February 1998, which authorised phase IV
- (d) S/RES/1210, 24 November 1998, which authorised phase V
- (e) S/RES/1242, 21 May 1999, which authorised phase VI
- (f) S/RES/1275, 19 November 1999, which extended phase VI
- (g) S/RES/1280, 3 December 1999, which further extended phase VI
- (h) S/RES/1281, 10 December 1999, which authorised phase VII
- (i) S/RES/1302, 8 June 2000, which authorised phase VIII
- (j) S/RES/1330, 5 December 2000, which authorised phase IX
- (k) S/RES/1352, 1 June 2001, which extended phase IX
- (l) S/RES/1360, 3 July 2001, which authorised phase X
- (m) S/RES/1382, 29 November 2001, which authorised phase XI
- (n) S/RES/1409, 14 May 2002, which authorised phase XII
- (o) S/RES/1443, 25 November 2002, which extended phase XII
- (p) S/RES/1447, 4 December 2002, which authorised phase XIII.

⁸ S/1996/356, 20 May 1996.

⁹ In evidence to the Inquiry Ms Johnston, the United Nations Chief Customs Officer, suggested that within the United Nations a distinction was drawn between transportation to silos or distribution centres and distribution after those points (T 6741.42).

¹⁰ S/1996/356, para. 50, 20 May 1996; S/RES/986, para. 3, 14 April 1995.

¹¹ S/1997/439, 9 June 1997; S/1999/601, 24 May 1999; S/1999/1241, 13 December 1999; S/2000/618, 22 June 2000; S/2000/1178, 12 December 2000; S/2001/682, 10 July 2001; S/2001/1172, 6 December 2001; S/2002/608, 31 May 2002; S/2002/1407, 20 December 2002.

¹² S/1996/636, 12 August 1996.

¹³ Independent Inquiry Committee report, 7 September 2005, vol. III, p. 7.

¹⁴ S/RES/1330, para. 11, 5 December 2000.

¹⁵ S/RES/1382, para. 2 and Annex 2, 29 November 2001.

¹⁶ S/RES/1382, para. 2, 29 November 2001.

¹⁷ S/RES/1382, Annex 1, para. B, 29 November 2001.

¹⁸ S/RES/1409, p. 8, 14 May 2002.

¹⁹ S/RES/1409, p. 7, 14 May 2002.

²⁰ S/RES/1409, p. 4, para. 10, 4 May 2002.

²¹ T6755.15–6756.1.

²² S/RES/1454, para. 1, 30 December 2002.

²³ S/RES/1454, Annex B, para. 1, 30 December 2002.

²⁴ S/RES/1492, para. 10, 28 March 2003; S/RES/1476, para. 1, 24 April 2003.

²⁵ K Annan, 'Statement to the Security Council by the Secretary-General on the closure of the Oil-for-Food Programme', <<http://www.un.org/Depts/oip/background/latest/sgstatement031119.html>>, 20 November 2003.

²⁶ Ex 504, AWB.0338.0150_R at 0158_R-0159_R.

²⁷ Independent Inquiry Committee report, 7 September 2005, vol. II, ch. 3, p. 165; Ex 595, UNO.0011.0019 at 0071.

²⁸ S/1996/356, para. 6, 20 May 1996.

²⁹ S/1996/636, 12 August 1996.

³⁰ S/RES/661, para. 4, 6 August 1990.

³¹ Ex 1262, UNO.0006.0026; Ex 557, UNO.0007.0273; Ex 1263, UNO.0006.0038.

³² Ex 1262, UNO.0006.0026 at 0026.

³³ Ex 1262, UNO.0006.0026 at 0027.

³⁴ Ex 1262, UNO.0006.0026 at 0027.

³⁵ Ex 557, UNO.0007.0273 at 0276.

³⁶ Ex 557, UNO.0007.0273 at 0277.

³⁷ Ex 1263, UNO.0006.0038.

³⁸ The distribution plans submitted by the Government of Iraq and approved by the Secretary-General are Exhibit 585.

³⁹ Ex 585, UNO.0009.0053 at 0068–0069, p. 16 [12]–[16].

⁴⁰ Ex 585, UNO.0009.0053 at 0071, p. 19 [25].

⁴¹ Ex 585, UNO.0009.0053 at 0072–0073, pp. 20–21 [30(iv)–(v), (vii)].

⁴² Ex 585, UNO.0009.0103 at 0112–0113, pp. 9–10 [12]–[17], UNO.0009.0103 at 0114, p. 11 [22], UNO.0009.0103 at 0114, p. 11 [24]; Ex 585, UNO.0009.0130 at 0139–0140, pp. 10–11 [12]–[17], UNO.0009.0130 at 0141, p. 12 [22], [24]; Ex 585, UNO.0009.0157 at 165, [16]–[20], UNO.0009.0157 at 166, [25]–[26]; Ex 585, UNO.0009.0200 at 0207, [15]–[19], UNO.0009.0200 at 0208, [24]–[25]; Ex 585, UNO.0009.0233 at 0242–0243, pp. 9–10 [15]–[19], UNO.0009.0233 at 243, p. 10 [24], UNO.0009.0233 at 244, p. 11 [25]; Ex 585, UNO.0009.0282 at 0292–0293, pp. 10–11 [15]–[19], UNO.0009.0282 at 0293, p. 11 [24], UNO.0009.0282 at 0294, p. 12 [25]; Ex 585, UNO.0010.0002 at 0010, p. 9 [15]–[19], UNO.0010.0002 at 0011, p. 10 [24]–[25]; Ex 585, UNO.0010.0051 at 0060, p. 10 [19]–[22], UNO.0010.0051 at 0061, p. 11 [27]–[28]; Ex 585, UNO.0010.0103 0112, p. 10 [31]–[35], UNO.0010.0103 at 0113, p. 11 [40]–[41]; Ex 585, UNO.0010.0154 at 0162, p. 9 [31]–[35], UNO.0010.0154 at 0163, p. 10 [39]–[40]; Ex 585, UNO.0010.0204 at 0212, p. 9 [26]–[30], UNO.0010.0204 at 0213, p. 10 [34]–[35]; and Ex 585, UNO.0010.0261 at 0269, p. 9 [25]–[29], UNO.0010.0261 at 0270, p. 10 [33]–[34].

⁴³ Ex 585, UNO.0009.0157 at 0164 (Table 1: Allocations for sectors activities covered by the Distribution Plan). See also Ex 585, UNO.0009.0157 at 167, para. 30; Ex 585, UNO.0009.0200 at 0205–0206 (Table 1: Allocations for sectors activities covered by Distribution Plan), UNO.0009.0200 at 0209, para. 29; Ex 585, UNO.0009.0233 at 0241, p. 8 (Table 1: Allocations for sectors activities covered by the Distribution Plan), UNO.0009.0233 at 0244–0245, pp. 11–12 [29], UNO.0009.0233 at 0274, p. 41 [65], p. 44, UNO.0009.0233 at 0277, pp. 44–45, [66.2]; Ex 585, UNO.0009.0282 at 0290, p. 8 (Table 1: Allocations for sectors activities covered by Distribution Plan), UNO.0009.0282 at 0294–0295, pp. 12–13 [29], UNO.0009.0282 at 0326, p. 44 [65], UNO.0009.0282 at 0330, p. 48 [66.2.1]; Ex 585, UNO.0010.0002 at 0009, p. 8 (Table 1: Allocations for sectors activities covered by Distribution Plan DP VIII), UNO.0010.0002 at 0012, p. 11 [29], UNO.0010.0002 at 0046, pp. 45–46, [71], UNO.0010.0002 at 0048, p. 47 [74]; Ex 585, UNO.0010.0051 at 0058, p. 8 (Table 1: Allocations for sectoral activities covered by the Distribution Plan DP IX), UNO.0010.0051 at 0061–0062, pp. 11–12 [32]–[33], UNO.0010.0051 at 0095, pp. 45–46, [172], UNO.0010.0051 at 0096, p. 46 [177]; Ex 585, UNO.0010.0103 at 0110, p. 8 (Table 1: Allocations for sectoral activities covered by the Distribution Plan DP X), UNO.0010.0103 at 0114, p. 12 [45], UNO.0010.0103 at 0146, p. 44 [185], UNO.0010.0103 at 0147, p. 45 [190]; Ex 585, UNO.0010.0154 at 160, p. 7 (Table 1: Allocations for sectorial activities covered by Distribution Plan DP XI), UNO.0010.0154 at 0164, p. 11 [44], UNO.0010.0154 at 0196, p. 43 [181], UNO.0010.0154 at 0197, p. 44 [186]; Ex 585, UNO.0010.0204 at 0210, p. 7 (Table 1: Allocations for sectoral activities covered by the Distribution Plan DP XII), UNO.0010.0204 at 0214, p. 11 [41], UNO.0010.0204 at 0249, pp. 46–47, [184], UNO.0010.0204 at 0250, p. 47 [189]; Ex 585, UNO.0010.0261 at 0267, p. 7 (Table 1: Allocations for sectoral activities covered by Distribution Plan XIII (US\$ millions), UNO.0010.0261 at 0271, p. 11 [40], UNO.0010.0261 at 0302, p. 42 [171], UNO.0010.0261 at 0303, p. 43 [174]. The distribution plan for phases I to III also allocated an amount for ‘Equipment/spare parts for food processing, logistics’ – see Ex 585, UNO.0009.0053 at 0067, p. 15 (Table I: Estimated allocations to selected sector covered within this Distribution Plan); Ex 585, UNO.0009.0103 at 0111, p. 8 (Table 1: Allocations to selected sectors covered by the Plan); and Ex 585, UNO.0009.0130 at 0138, p. 9 (Table 1: Allocations to selected sectors covered by the plan).

⁴⁴ Ex 585, UNO.0009.0157 at 167, [30].

⁴⁵ Ex 585, UNO.0009.0200 at 0208–0209, [29]; Ex 585, UNO.0009.0233 at 0244–0245, p. 11 [29]; Ex 585, UNO.0009.0282 at 0294–0295, pp. 12–13 [29]; Ex 585, UNO.0010.0002 at 0012, p. 11 [29]; Ex 585, UNO.0010.0051 at 0061–0062, pp. 11–12 [32]–[33]; Ex 585, UNO.0010.0103 at 0114, p. 12 [45]; UNO.0010.0154 at 0164, p. 11 [44]; Ex 585, UNO.0010.0204 at 0214, p. 11 [41]; Ex 585, UNO.0010.0261 at 0271, p. 11 [40].

- ⁴⁶ Ex 585, UNO.0009.0233 at 0274, p. 41 [65] and UNO.0009.0233 at 0277, p. 44 [66.2].
- ⁴⁷ Ex 585, UNO.0009.0282 at 0326, p. 44 [65] and UNO.0009.0282 at 0330, p. 48 [66.2.1]; Ex 585, UNO.0010.0002 at 0046, p. 45 [71] and UNO.0010.0002 at 0048, p. 47 [74]; Ex 585, UNO.0010.0051 at 0095, p. 45 [172], UNO.0010.0051 at 0096, p. 46 [177]; Ex 585, UNO.0010.0103 at 0146, p. 44 [185] and UNO.0010.0103 at 0147, p. 45 [190]; Ex 585, UNO.0010.0154 at 0196, p. 43 [181] and UNO.0010.0154 at 0197, p. 44 [186]; Ex 585, UNO.0010.0204 at 0249, p. 46 [184] and UNO.0010.0204 at 0250, p. 47 [189]; and Ex 585, UNO.0010.0261 at 0302, p. 42 [171] and UNO.0010.0261 at 0303, p. 43 [174].
- ⁴⁸ Ex 585, UNO.0010.0002 at 0048, p. 47 [74]. See also Ex 585, UNO.0010.0051 at 0096, p. 46 [177]; Ex 585, UNO.0010.0103 at 0147, p. 45 [190]; Ex 585, UNO.0010.0154 at 0197, p. 44 [186]; Ex 585, UNO.0010.0204 at 0250, p. 47 [189]; and Ex 585, UNO.0010.0261 at 0303, p. 43 [174].
- ⁴⁹ Ex 585, UNO.0009.0233 at 0234.
- ⁵⁰ Paragraph 22 of the distribution plan for phase III provided: ‘The food distribution mechanism stipulated under paragraphs 25, 26, 27 and 28 of the previous Distribution Plan, Phase 1, shall be followed also under this plan’ (Ex 585, UNO.0009.0130 at 0141, para. 22). Paragraphs 25–28 of the distribution plan for phase 1 are set out, to the extent that they are relevant, in paragraph 1.63 of this report.
- ⁵¹ Paragraph 24 of the distribution plan for phase III provided: ‘Arrangements for procurement, storage and transport of food supplies under this plan shall remain as stated in paragraph 30 of the previous Distribution Plan, Phase 1’ (Ex 585, UNO.0009.0130 at 0141, para. 24). Paragraph 30 of the distribution plan for phase 1 is set out, to the extent that it is relevant, earlier in this chapter.
- ⁵² Ex 585, UNO.0009.0053 at 0072–0073, pp. 20–21 [30(iv)–(v)].
- ⁵³ Ex 585, UNO.0009.0053 at 0076, p. 24.
- ⁵⁴ Ex 585, UNO.0009.0233 at 0277, pp. 44–45, para. 66.2.1.
- ⁵⁵ Ex 1212, UNO.0003.3322_R.
- ⁵⁶ Ex 1213, UNO.0003.3323_R.
- ⁵⁷ Ex 1214, UNO.0003.3324_R at 3325_R.
- ⁵⁸ Ex 1215, UNO.0003.3329_R.
- ⁵⁹ S/1996/636, para. 33, 12 August 1996.
- ⁶⁰ Ex 1216, UNO.0003.3319_R.
- ⁶¹ Ex 585, UNO.0010.0103.
- ⁶² Ex 585, UNO.0010.0103 at 0147, p.45 [190].
- ⁶³ Ex 1217, UNO.0003.0944_R; Ex 1218, UNO.0003.0945_R–0948_R.
- ⁶⁴ Ex 1219, UNO.0003.1242_R at 1243_R.
- ⁶⁵ Ex 1219, UNO.0003.1242_R.
- ⁶⁶ S/RES/1409, para. 1, 14 May 2002.
- ⁶⁷ T 6718.19–20.
- ⁶⁸ T 6717.10–16.
- ⁶⁹ T 6718.8–11.
- ⁷⁰ T 6718.
- ⁷¹ Ex 1447, AWB.0058.0414_R; Ex 1448, AWB.0058.0415_R; Ex 1449, AWB.0058.0416_R; Ex 1451, AWB.0058.0068_R.
- ⁷² T 6720.16–35.
- ⁷³ T 6720.42 – T 6721.9.
- ⁷⁴ T 6738.15–32.
- ⁷⁵ T 6737.38 – T 6738.8.
- ⁷⁶ T 6743.3 – T 6744.17.
- ⁷⁷ T 6756.14–42.
- ⁷⁸ Ex 967, UNO.0014.0006.
- ⁷⁹ Ex 967, UNO.0014.0006 at 0009.
- ⁸⁰ Ex 967, UNO.0014.0006.
- ⁸¹ Ex 968, UNO.0014.0001.
- ⁸² T 6772.43 – T 6773.14.
- ⁸³ T 6773.35 – T 6774.3.
- ⁸⁴ T 6774.22–29.
- ⁸⁵ T 6774.43 – T 6775.27.

2 Australian enforcement of United Nations resolutions

- 2.1 The United Nations was established in 1945 by the Charter of the United Nations. A Security Council was established under the charter and given certain powers under Chapter VII. Those powers include the power to determine the existence of threats to international peace and security (Article 39), the power to require member states to apply certain non-military measures to give effect to the Security Council's decisions (Articles 40 and 41) and the power to enforce Security Council decisions by the use of military force (Article 42).¹
- 2.2 By Article 25 of the charter all member states of the United Nations agreed 'to accept and carry out the decisions of the Security Council in accordance with the present Charter'.
- 2.3 The charter was signed by Australia in 1945 and it entered into force for Australia on 1 November 1945. Section 5 (formerly s. 3) of the *Charter of the United Nations Act 1945* provides that the Charter of the United Nations 'is approved'. That provision does not constitute domestic implementation of the charter.

The status of United Nations resolutions under Australian law

- 2.4 In *State of Victoria v Commonwealth of Australia* (1996) 187 CLR 416 five Justices of the High Court said, at 481:
- ... 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.
- 2.5 That remains the law.² It follows 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.
- 2.6 Resolutions 661 and 986 were not, by legislation, incorporated in Australian domestic law. It follows that, although under Article 25 of the Charter of the

United Nations Australia was obliged to adhere to and implement Resolutions 661 and 986, those resolutions imposed no obligations on companies or persons within Australia. 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.

- 2.7 That does not mean however, as AWB submitted³, that as part of my report I should not make findings regarding whether AWB's payments to Iraq via Alia were consistent or inconsistent with the United Nations resolutions imposing sanctions. Such findings are essential background. If such payments were consistent with United Nations resolutions and sanctions there could not possibly be a breach of Australian laws seeking to enforce those resolutions and sanctions.

Implementation of United Nations resolutions in Australian law

- 2.8 Implementation within Australia of the Security Council resolutions restricting dealings with Iraq—in particular, Resolution 661—occurred by amendment in 1990 to the following Regulations:
- the Customs (Prohibited Exports) Regulations 1958, r. 13CA
 - the Customs (Prohibited Imports) Regulations 1956, rr. 4MA and 4QA
 - the Air Navigation Regulations 1947, r. 119 (formerly r. 311D)
 - by conditional exemptions granted from time to time under the Banking (Foreign Exchange) Regulations 1959, r. 39.
- 2.9 Relevant to this Inquiry are r. 13CA of the Customs (Prohibited Exports) Regulations and the exemptions granted under the Banking (Foreign Exchange) Regulations.
- 2.10 Regulation 13CA of the Customs (Prohibited Exports) Regulations provided as at 31 July 1991 (and was not materially altered thereafter during the period of the Oil-for-Food Programme) as follows:
- (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 authorised in writing by the Minister to exercise those powers.

2.11 The powers of the Minister conferred by the Regulations were exercised by authorised delegates, as contemplated by r. 13CA(5).

The Customs (Prohibited Exports) Regulations 1958

Interpretation of the application of r. 13CA

2.12 A submission from the Honourable Kevin Rudd MP, Shadow Minister for Foreign Affairs⁴, argued that r. 13CA of the Customs (Prohibited Exports) Regulations imposed on the Minister (or his authorised delegate) an obligation not to approve the export of wheat unless, on the material available to the decision maker, he was satisfied that granting such export permission would not breach Australia's obligations under the UN sanctions imposed by Resolution 661 and Article 25 of the UN Charter. Whilst the export of wheat, being foodstuff, might not breach such sanctions, payment of monies directly or indirectly to the Iraqi Government would. If the prohibited payment of money was associated with the permitted export of wheat, then the export of wheat was required to be prohibited in order to prevent the payment of money prohibited by Resolution 661.

- 2.13 Further, so the argument ran, because of the obligation on the decision maker to be affirmatively satisfied on the material before him that the grant of permission to export did not infringe Australia's international obligations, the decision maker could not rely on a determination by the UN approving authority that the submitted contract was approved for payment from the escrow account, particularly where such approval was granted administratively in the absence of objection from another state.
- 2.14 The submission did not deny the relevance of the UN decision regarding a submitted contract but contended that, alone, such UN approval would not be sufficient to 'satisfy' the Minister or his delegate, as required by r. 13CA(2).
- 2.15 This argument has some respectability.
- 2.16 There is, however, an alternative construction of r. 13CA that is, at the least, as respectable.
- 2.17 Regulation 13CA(1) prohibited exports to Iraq. This prohibition is qualified by r. 13CA(2), which permits the Minister or his delegate to allow exports of goods of specified kinds if the Minister or his delegate is satisfied that permitting the export will not infringe Australia's international obligations.
- 2.18 Relevantly, Australia's international obligations flow from Article 25 of the UN Charter, which requires Australia, as a signatory to the charter, 'to accept and carry out the decisions of the Security Council ...'
- 2.19 Resolution 661 prohibited exports of goods to Iraq but permitted the export of foodstuffs to Iraq 'in humanitarian circumstances'. Resolution 986, which established the Oil-for-Food Programme, accepted that by 1995 humanitarian needs were such that Iraq should be permitted to sell oil and use the proceeds to import foodstuffs. The resolution established a mechanism for approving and paying for contracts for the supply, relevantly, of foodstuffs. If the United Nations approved an export contract, the exporter was:

eligible for payment from the Iraq account as the financing arrangements specified in your communication appear to be consistent with the procedures adopted by the Security Council Committee established by Resolution 661 (1990) concerning the situation between Iraq and Kuwait pursuant to Security Council Resolution 986 (1995).⁵

The United Nations determined eligibility for payment after its experts had examined export contracts 'for price and value'.

- 2.20 Since the only possible source of breach of Australia's international obligations was breach of the UN resolutions restricting trade with Iraq, UN acceptance that a contract, having been examined by UN experts, was

consistent with, and not contrary to, the resolutions that permitted limited trade with Iraq provided a sound basis for the Minister or his delegate to grant approval for export.

- 2.21 Further, the application being considered by the Minister or his delegate did not concern paying money to Iraq directly or indirectly; it concerned the export of foodstuffs.
- 2.22 For the purposes of this Inquiry, it is unnecessary for me to express a concluded view on which is the correct interpretation of r. 13CA. I do not do so.

Discussion: the Customs (Prohibited Exports) Regulations

- 2.23 By r. 13CA of the Customs (Prohibited Exports) Regulations 1958, exporting goods to Iraq was prohibited unless the Minister for Foreign Affairs or his delegate had granted a permission to export. Permissions to export were invariably issued by a delegate of the Minister in reliance on an approval to ship goods to Iraq issued by the United Nations. No separate certification was required to be made by suppliers under the Oil-for-Food Programme to the effect that the contract, approved by the United Nations, fully and accurately set out all of the terms of the transaction between the supplier and Iraq. Nor did a legal consequence flow as a result of a permission to export being granted on a false or misleading basis.
- 2.24 I recommend that the Customs (Prohibited Exports) Regulations 1958 be amended to incorporate a prescribed form that those seeking a permission to export would be required to complete. I further recommend that the Regulations be amended so as to:
- make it an offence to knowingly or recklessly provide in an application information that is false or misleading in a material particular
 - make it an offence to knowingly or recklessly omit a material particular from an application for a permission to export
 - render invalid any permission to export granted on the basis of an application that was false or misleading in a material particular or that omitted a material particular.
- 2.25 The prescribed form should be required to be signed by a senior executive of the exporting company, who should also be personally liable for knowingly or recklessly signing a form that is false or misleading in a material particular or that knowingly or recklessly omits a material particular. The penalty for so doing should be imprisonment for 10 years.

- 2.26 In the United Kingdom, article 7 of the Iraq (United Nations Sanctions) Order 2000 provided, 'Any person who, for the purposes of obtaining a licence under article 5, knowingly or recklessly makes any statement or furnishes any document or information which is false in a material particular is guilty of an offence.'
- 2.27 In *Re Morris; Ex parte Adams and Others* (1980) 48 FLR 341 the concept of omitting 'a material particular' was discussed. Sweeney J considered the meaning of the phrase 'material particular' and determined that 'a particular which would be relevant to, and might be likely to affect the making of [the relevant] decision, is a material particular'.⁶ The question of materiality is determined by reference to whether the particular was material at the time the statement was made.⁷
- 2.28 In *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 34 FCR 348 the court considered the meaning of the expression 'false in a material particular'. It stated:

The expression 'false in a material particular' appears in many statutes, both in this country and overseas. It has been discussed in *R v Lord Kylsant* [1932] 1 KB 442; *Murphy v Griffiths* [1967] 1 WLR 333; [1967] 1 All ER 424; *R v Mallett* [1978] 1 WLR 820; *R v M* [1980] 2 NSWLR 195; *R v Brott* [1988] VR 1. In the last mentioned case, Brooking J pointed out that the concept is well understood. As his Honour said (at 11): 'an assertion that a document is false is to be taken as an assertion that it is false in a material particular.' The term 'material' requires no more and no less than that; the false particular must be of moment or of significance, not merely trivial or inconsequential.

Section 20(1) does not apply to statements that are merely false or misleading; there is the added requirement that the statement must be false or misleading in a material particular. In the context of s 20(1), a statement will be false or misleading in a material particular if it is relevant to the purpose for which it is made: see *Jovceovski v Minister for Immigration, Local Government and Ethnic Affairs* (unreported, Federal Court, Lockhart J, 12 October 1989). A statement will be relevant to that purpose if it may – not only if it must or if it will – be taken into account in making a decision under the Act as to the grant of the visa or entry permit in respect of which the statement is made.⁸

- 2.29 AWB's failure to disclose the true arrangements with the Iraqi Grain Board – which required AWB to make a payment to an Iraqi entity – would certainly have constituted the omission of a material particular. That is so particularly in view of the Minister's obligation under the Customs (Prohibited Exports) Regulations 1958 to satisfy himself that the granting of the permission to export would not contravene Australia's international obligations.

The same can be said about Rhine Ruhr's payment to Iraq that formed part of its contract arrangements. The failure to inform DFAT of the obligation to make that payment, whether it was considered by Rhine Ruhr to be an 'Iraqi

Engineering Services Fee' or an Iraqi Government surcharge or fee, would have constituted a material omission. As discussed later in the report, the absence of any requirement on a senior executive to certify that the submitted contract fully and accurately set out all terms of the transaction meant that the senior officers of Rhine Ruhr who knew about the payment that Rhine Ruhr was required to make to Iraq as part of its sale, never turned their mind to whether this payment should have been disclosed to DFAT even though it was not referred to in the contract.

- 2.30 Under the recommended regime, if a permission to export were granted on a materially false or misleading basis, it would be rendered invalid. As a result, any goods exported under such a permission would constitute a 'prohibited export'. This would enliven s.233(1)(c) of the *Customs Act 1901*, which prohibits the exportation of prohibited exports. Any such exportation would constitute an offence pursuant to s. 233(1AA) of the Customs Act. The penalty provided by s. 233AB is the greater of three times the value of the goods exported or 1,000 penalty units.

Issue

In seeking to have the Department of Foreign Affairs and Trade forward to the United Nations contracts for approval for payment from the escrow account or grant permission to export under the Customs (Prohibited Exports) Regulations 1958, the exporter was not required to certify to the Commonwealth the accuracy or completeness of the contractual documents said to constitute the agreement with the foreign entity. The Commonwealth should not be asked to act in such serious matters without such certification of accuracy or completeness.

Recommendation 1

I recommend that the Customs (Prohibited Exports) Regulations 1958 be amended to incorporate a prescribed form that those applying for permission to export would be required to complete. I further recommend that the Regulations be amended so as to:

- make it an offence to knowingly or recklessly provide in an application information that is false or misleading in a material particular
- make it an offence to knowingly or recklessly omit a material particular from an application for a permission to export
- render invalid any permission to export granted on the basis of an application that was false or misleading in a material particular or that omitted a material particular.

The prescribed form should be required to be signed by a senior executive of an exporting company, who should also be personally liable for knowingly or recklessly signing a form that is false or misleading in a material particular or omits a material particular. The penalty for so doing should be imprisonment for 10 years.

The Banking (Foreign Exchange) Regulations 1959

2.31 The Banking (Foreign Exchange) Regulations 1959 regulate some aspects of currency movements by Australian companies and nationals or involving Australian currency. The Regulations having some possible relevance are rr. 5, 6 and 8(1)(a).

Regulation 5, as in force until 10 March 2002

2.32 To the extent that it is relevant, r. 5, as in force until 10 March 2002, provided:

- (1) Subject to subregulation (3), except with the authority of the Bank:
 - (a) a person shall not, either on his own behalf or on behalf of another person, buy, borrow, sell, lend or exchange in Australia, or otherwise deal in Australia with, foreign currency; and
 - (b) a resident, or a person acting on behalf of a resident, shall not buy, borrow, sell, lend or exchange outside Australia, or otherwise deal outside Australia with, foreign currency.
- (2) Subject to subregulation (3), except with the authority of the Bank, a person shall not be a party to a transaction that has the effect of or involves a purchase, borrowing, sale, loan or exchange of, or that otherwise relates to, foreign currency, being a transaction that takes place in whole or in part in Australia or to which a resident is a party.
- (3) The Bank may authorize an agent of the Bank:
 - (a) to enter into any transaction prohibited by subregulation (1) of this regulation, or into any transaction included in a class of such transactions and it shall be lawful for the transaction to be entered into accordingly; and
 - (b) to be a party to any transaction prohibited by subregulation (2) of this regulation, or to any transaction included in a class of such transactions, and it shall be lawful for the agent of the Bank to be a party to the transaction accordingly.

2.33 On 21 June 1984 the Reserve Bank, pursuant to r. 38 of the Banking (Foreign Exchange) Regulations 1959, granted an exemption from the application of subregulation 5(1) in respect of:

- (a) any person who, either on his own behalf or on behalf of another person, borrows, lends, or exchanges foreign currency in Australia or who otherwise deals (except by way of buying or selling) with foreign currency in Australia;
- (b) any resident, or any person acting on behalf of a resident, who borrow, lends or exchanges foreign currency outside Australia or who otherwise deals (except by way of buying or selling) with foreign currency outside Australia;

- (c) any person who, either on his own behalf or on behalf of another person, buys or sells foreign currency in the form of coin in Australia; and
- (d) any resident, or any person acting on behalf of a resident, who buys or sells foreign currency in the form of coin outside of Australia.⁹

This exemption came into operation on 25 June 1984.

- 2.34 The exemption was not revoked or varied until 5 April 2002. It follows that, between 25 June 1984 and 10 March 2002, persons were entitled to ‘borrow, lend, exchange or otherwise deal’ with foreign currency in or outside Australia, except for a dealing that involved ‘buying or selling’ foreign currency.
- 2.35 This exemption may be important because in many instances AWB ‘dealt with’ foreign currency by using foreign currency funds held overseas to pay fees to Alia. There was no ‘buying or selling’ of foreign currency in such transactions.
- 2.36 A separate suite of regulations regulated ‘buying and selling’ of foreign currency. Relevantly, on 29 June 1990 the Reserve Bank¹⁰:

... in pursuance of Regulation 38A of the Banking (Foreign Exchange) Regulations hereby grants a general authority to:

1. persons in Australia to sell foreign currency to an authorised dealer in Australia;
2. residents of Australia to sell foreign currency outside Australia;
3. persons in Australia to buy foreign currency from an authorised dealer in Australia;
4. residents of Australia to buy foreign currency outside Australia;

- 2.37 The authority, dated 29 June 1990, came into operation on 1 July 1990.¹¹ On 9 August 1990 the Reserve Bank varied the authority so that it would not apply to transactions in connection with the Governments of Kuwait or Iraq, their agencies or nationals; the variation came into operation on the same date.¹² On 5 April 1991 that variation was revoked and replaced with another variation, which applied exclusively to dealings with Iraq, rather than Iraq *and* Kuwait¹³; this variation came into operation on 5 April 1991.¹⁴

- 2.38 Insofar as it is relevant, the variation stated:

Reserve Bank of Australia pursuant to Regulation 39 of the Banking (Foreign Exchange) Regulations hereby varies the general authority to persons and residents of Australia dated 29 June 1990 so that the general authority does not authorise:

1. persons in Australia to buy foreign currency from or sell foreign currency to an authorised dealer in Australia; or
2. residents of Australia to buy or sell foreign currency outside Australia

where the buying or the selling of foreign currency relates to transactions in property, securities or funds in Australia belonging either directly or indirectly to, or other payments to, the Government of Iraq, its agencies or its nationals.

All such transactions are prohibited without the specific approval of the Reserve Bank of Australia.¹⁵

Thus, up to 10 March 2002, the exemption to r. 5 did not cover the buying and selling of foreign currency (either in Australia or by residents of Australia outside Australia) where the buying or selling related to payments to the Government of Iraq, its agencies or its nationals. The buying and selling of foreign currency in these circumstances in the absence of specific approval was accordingly prohibited by the Regulations.

Regulation 5, as in force from 11 March 2002 to the present

2.39 Regulation 5 was substituted by the Banking (Foreign Exchange) Regulations 2002. As the prohibition in r. 5(1) was repealed on 10 March 2002, the exemption of 21 June 1984 from that prohibition had no prohibition or regulation upon which to operate. The exemption of 21 June 1984, which gave exemption from a prohibition, could not operate on the new r. 5 operative from 11 March 2002 because the new r. 5 did not contain a prohibition. In contrast, it conferred on the Reserve Bank a power to direct that certain transactions not occur.

2.40 The new r. 5 provides:

- (1) The Bank may, in writing, direct a person:
 - (a) not to buy, borrow, sell, lend or exchange foreign currency in Australia (on the person's own behalf or on behalf of another person); or
 - (b) not to deal with foreign currency in any other way in Australia.
- (2) The Bank may, in writing, direct a resident, or a person acting on behalf of a resident:
 - (a) not to buy, borrow, sell, lend or exchange foreign currency outside Australia; or
 - (b) not to deal with foreign currency in any other way outside Australia.
- (3) The Bank may, in writing, direct a person not to be a party to a transaction if:
 - (a) either:

- (i) the transaction takes place in whole or in part in Australia; or
 - (ii) a resident is a party to the transaction; and
- (b) the transaction:
- (i) has the effect of, or involves, a purchase, borrowing, sale, loan or exchange of foreign currency; or
 - (ii) otherwise relates to foreign currency.

2.41 On 5 April 2002 the Reserve Bank issued a direction that a person or resident must not buy, borrow, sell, lend or exchange foreign currency where the transaction relates to the Government of Iraq, its agencies or its nationals – the ‘r. 5 direction’.¹⁶ The direction came into operation on the same date.¹⁷ The exemption of 21 June 1984 and the variation to the general authority of 5 April 1991 were also revoked on 5 April 2002.

2.42 Insofar as it is relevant, the r. 5 direction stated:

The Reserve Bank of Australia pursuant to Regulation 5 of the Banking (Foreign Exchange) Regulations hereby directs that:

1. a person must not, either on the person’s own behalf or on behalf of another person, buy, borrow, sell, lend or exchange foreign currency in Australia, or otherwise deal with foreign currency in any other way in Australia;
2. a resident, or a person acting on behalf of a resident, must not buy, borrow, sell, lend or exchange foreign currency in Australia, or otherwise deal with foreign currency in any other way outside Australia;
3. a person must not be a party to a transaction, being a transaction that takes place in whole or in part in Australia or to which a resident is a party, that has the effect of, or involves, a purchase, borrowing, sale, loan or exchange of foreign currency, or otherwise relates to foreign currency

where the transaction relates to property, securities or funds in Australia belonging either directly or indirectly to, or other payments to, the Government of Iraq, its agencies or its nationals.

All such transactions are prohibited without specific prior approval of the Reserve Bank of Australia.

2.43 There is, however, no regulation that makes breach of a direction given under r. 5(1) since 5 April 2002 an offence. Regulation 42 provides, ‘A person shall not contravene or attempt to contravene, or fail to comply with, any of the provisions of these Regulations’. A penalty is provided.

2.44 Regulation 42 was not amended in April 2002 to provide that failure to comply with a direction given pursuant to r. 5 constitutes a breach of the

Regulations and thus attracts a penalty. A direction is an instrument issued or made pursuant to the power in the regulation: failure to comply with a direction made pursuant to a power in the regulation is not a 'contravention of' or non-compliance with the provisions of the regulation.¹⁸

2.45 There are thus two areas of difficulty in the implementation of sanctions through the Banking (Foreign Exchange) Regulations:

- If payments were made to Iraq by an Australian company between 21 June 1984 and 5 April 2002 using foreign currency held in an overseas account and not involving buying or selling foreign currency, such payments were not prohibited by the Regulations because of the exemption from r. 5(1) granted on 21 June 1984.
- If payments were made to Iraq by an Australian company between 5 April 2002 and 28 May 2003 contrary to the 5 April 2002 direction of the Reserve Bank, such payments in breach of the direction did not constitute a breach of the Regulations and thus there was no offence committed.

2.46 On 28 May 2003 the Reserve Bank revoked the r. 5 direction.¹⁹

Regulation 6

2.47 At the relevant time r. 6 was, and remains, in the following terms:

- (1) A person shall not, except with the authority of the Bank, take or send out of Australia any Australian currency or foreign currency, other than foreign currency obtained under the last preceding regulation.
- (2) Nothing in this regulation shall apply to a money order issued in Australia and payable outside Australia.

2.48 On 29 June 1990 the Reserve Bank issued an exemption from the application of r. 6(1) – the 'r. 6(1) exemption'.²⁰ The exemption came into operation on 1 July 1990 and '... exempts from the application of subregulation 6(1) of the Regulations the taking or sending out of Australia by a person of any Australian currency'.

2.49 On 9 August 1990 the r. 6(1) exemption was varied so that it would not apply to dealings relating to the Governments of Kuwait or Iraq, their agencies or nationals²¹; the variation came into operation on the same date. On 5 April 1991 the variation was revoked and replaced by another variation, which applied exclusively to dealings with Iraq, rather than Iraq *and* Kuwait²²; this variation came into operation on 5 April 1991.²³

2.50 On 28 May 2003 the Reserve Bank revoked its variation of the r. 6(1) exemption²⁴; the revocation came into operation on 29 May 2003.²⁵

Regulation 8(1)(a)

2.51 Regulation 8(1)(a) provides:

(1) Subject to this regulation, a person shall not, except with the authority of the Bank:

(a) make any payment in Australia to, by the order of, or on behalf of, a person who is not a resident or place any sum in Australia to the credit of any such person;

2.52 On 29 June 1990 the Reserve Bank issued an exemption from the application of this regulation—the ‘r. 8(1)(a) exemption’.²⁶ This provided that the Reserve Bank ‘... exempts from the application of subregulation 8(1)(a) of the Regulations a person who makes any payment in Australia to, by the order of, or on behalf of a person who is not a resident or places any sum in Australia to the credit of any such person’.

2.53 The r. 8(1)(a) exemption came into operation on 1 July 1990.²⁷ On 9 August 1990 the exemption was varied so that it did not apply to transactions in connection with the Governments of Kuwait or Iraq, their agencies or nationals²⁸; the variation came into operation on the same date.²⁹ On 5 April 1991 the variation was revoked and replaced with another variation, which applied exclusively to dealings with Iraq, rather than Iraq *and* Kuwait³⁰; this variation came into operation on 5 April 1991.³¹

2.54 On 28 May 2003 the Reserve Bank revoked its variation of the r. 8(1)(a) exemption³²; the revocation came into operation on 29 May 2003.³³

Penalty for contravention of the Banking (Foreign Exchange) Regulations

2.55 As noted, Regulation 42(1) provides, ‘A person shall not contravene or attempt to contravene, or fail to comply with, any of the provisions of these Regulations’.

2.56 The penalty for contravention of r. 42 depends on whether the offence is prosecuted summarily or on indictment. If prosecuted summarily, the penalty is ‘a fine not exceeding One thousand dollars or imprisonment for a term not exceeding six months’ (r. 42(1)(a)). If prosecuted on indictment, the penalty is ‘a fine not exceeding One hundred thousand dollars or imprisonment for a period not exceeding five years’ (r. 42(1)(b)).

- 2.57 Furthermore, r. 42(2) provides, ‘Subject to subregulations (3) and (4) where a person has been convicted by a court of an offence against these Regulations, the court may, if it thinks fit, order the forfeiture of all or any of the articles in respect of which the offence was committed’.
- 2.58 The articles in respect of which the offence was committed ‘means the goods, Australian currency, foreign currency or securities in respect of which the offence was committed’ (r. 42(6)).

Discussion: the Banking (Foreign Exchange) Regulations

- 2.59 It is of the utmost importance to Australia as a member of the international community that it implement effectively sanctions imposed by the United Nations.
- 2.60 The object of the Reserve Bank authority dated 5 April 1991 and of the direction dated 5 April 2002 was to prevent the transfer of funds to Iraq and to make it an offence for an Australian company or person to transfer funds to Iraq, directly or indirectly, howsoever or wheresoever such funds were acquired. The authority and direction did not achieve that objective, principally because of regulatory complexity and drafting deficiencies.
- 2.61 It is likely that sanctions restricting currency transfers to states will be imposed by the United Nations in the future, obliging Australia to enact provisions, by statute or regulation, preventing Australian companies or persons transferring funds contrary to such sanctions. A simple model to allow rapid implementation of prohibitions is required.
- 2.62 I gave consideration to the models for implementing financial sanctions adopted by the United States, the United Kingdom and Canada.
- 2.63 Section 575.210 of the US Code of Federal Regulations provided, ‘Except as otherwise authorized, no U.S. person may commit or transfer, directly or indirectly, funds or other financial or economic resources to the Government of Iraq or any person in Iraq’.³⁴
- 2.64 Section 3 of the UK *Iraq (United Nations Sanctions) Order 2000* provided:

Making funds available to Iraq

3. Any person who, except under the authority of a licence granted by the Treasury under article 5—
 - (a) makes **any** funds available to the government of the Republic of Iraq or any person who is resident in the Republic of Iraq, or

- (b) otherwise remits or removes any funds from the United Kingdom to a destination in the Republic of Iraq,

is guilty of an offence.³⁵

2.65 Regulation 6 of Canada's *United Nations Iraq Regulations* provided:

- (1) No person in Canada and no Canadian outside Canada shall knowingly send, pay, transfer or remit, directly or indirectly, **any** money, cheques, bank deposits or other financial resources, or cause any money, cheques, bank deposits or other financial resources to be sent, paid, transferred or remitted, directly or indirectly, to any person in Iraq or to any other person on the direction or order of any person in Iraq.
- (2) No person in Canada and no Canadian outside Canada shall knowingly send, transfer, remit or assign any money, cheques, bank deposits or other financial resources held by, on behalf of or on account of the Government of Iraq or any agencies of or bodies controlled by Iraq.
- (3) No person in Canada and no Canadian outside Canada shall knowingly make available to or permit the use by the Government of Iraq or any commercial, industrial or public utility undertaking in Iraq of any funds, monetary resources, credit, extension of credit or deposit facilities.
- (4) No person shall knowingly transfer, sell, assign, dispose of, export, endorse or guarantee the signature on any security held by, on behalf of or in the name of the Government of Iraq or any agencies of or bodies controlled by Iraq.
- (5) No person shall knowingly transfer, pay for, export, dispose of or otherwise deal with any property or any interest in property held by the Government of Iraq or any agencies of or bodies controlled by Iraq.

I recommend the simple US or UK models. The difference between them is only one of drafting.

2.66 Since 1993, when Part 3 of the *Charter of the United Nations Act 1945* was introduced, there has existed a standing power for the Governor-General to make Regulations to give effect to decisions of the Security Council made under Chapter VII of the charter, which Article 25 of the charter requires Australia to carry out. That power was not used to give effect to the Oil-for-Food Programme established by Resolution 986, which was an exercise of the Chapter VII power. No doubt that was because there was already in place r.13CA of the Customs (Prohibited Exports) Regulations, as well as the Banking (Foreign Exchange) Regulations.

2.67 The concept of prohibiting conduct by Regulations under a standing statute has the attraction of simplicity. However, the potential damage to Australia's trading reputation and international standing is so great if Australian companies or residents act in breach of sanctions that breaches should no

longer be regarded as mere breach of Regulations attracting minimal penalties—currently 50 penalty units (A\$5,500) under s. 12(1) of the *Charter of United Nations Act 1945*.

- 2.68 Conduct in breach of sanctions that Australia has agreed to uphold should be regarded as serious criminal conduct and should attract severe penalties of imprisonment in the case of individuals and deterrent fines in the case of companies. It must be recognised that the harm caused by such conduct extends far beyond that to the company or individuals concerned and affects the national interest. The prohibitions against offending conduct should be found in the Commonwealth Criminal Code. The proscribed conduct should include both transfer of funds and export of goods to the subject state or its residents. The statute should create an offence of strict liability. Penalties for breach should include imprisonment for up to 10 years and monetary penalties equivalent to three times the value of benefits transferred or goods exported, similar to the Customs Act model.

Issue

Failure by Australian companies, or their officers, to act in a manner consistent with UN sanctions that Australia has agreed to uphold should be regarded as serious criminal conduct. That is because of the potential harm that such conduct may cause to Australia's trading reputation and international standing. Such conduct affects the national interest. Offences for contravening conduct should not arise from breach of Regulations attracting minor penalties. The prohibitions should include the payment of funds or benefits to a state the subject of sanctions or its residents and the exporting to or importing from such a state or its residents contrary to sanctions.

Recommendation 2

I recommend that there be inserted in the Commonwealth Criminal Code, perhaps in Chapter 4, offences for acting contrary to UN sanctions that Australia has agreed to uphold. The statute should prohibit direct or indirect unapproved financial or trading transactions designated by the Governor-General. Breach of statute should be an offence of strict liability. The penalty for breach should be severe, equivalent to three times the value of the offending transactions, by way of monetary fine for corporations and up to 10 years' imprisonment for individuals.

Power to compel production of documents and information

- 2.69 Under the domestic regime implemented to give effect to Resolution 661 there was no mechanism for investigating suspected breaches or evasion of sanctions. The Minister for Foreign Affairs and several officers of his department correctly pointed out that the Department of Foreign Affairs and Trade had no powers to investigate suspected breaches of sanctions or to require production of relevant documents. Such a power should be conferred on an appropriate body—be it the Minister, the Secretary of his department,

the Australian Customs Service, the Australian Federal Police or another entity.

- 2.70 In the United Kingdom, under the *Iraq and Kuwait (United Nations Sanctions) Order 1990* provision was made for obtaining evidence and information for the purpose of securing compliance with, or detecting evasion of, the Order.³⁶ Article 7 of the Order provided:

The provisions of the Schedule to this Order shall have effect in order to facilitate the obtaining, by or on behalf of the Secretary of State or the Commissioners of Customs and Excise, of evidence and information for the purpose of securing compliance with or detecting evasion of this Order and in order to facilitate the obtaining, by or on behalf of the Secretary of State or the Commissioners of Customs and Excise, of evidence of the commission of an offence against this Order or with respect to any of the matters regulated by this Order, of an offence relating to customs.³⁷

- 2.71 The Schedule to the Order provided:

1. – (1) Without prejudice to any other provision of this Order, or any provision of any other law, the Secretary of State (or any person authorised by him for that purpose either generally or in a particular case) or the Commissioners of Customs and Excise may request any person in or resident in the United Kingdom to furnish to him or them (or to that authorised person) any information in his possession or control, or to produce to him or them (or to that authorised person) any document in his possession or control, which he or they (or that authorised person) may require for the purpose of securing compliance with or detecting evasion of this Order; and any person to whom such a request is made shall comply with it within such time and in such manner as may be specified in the request.

...

2. – (1) If any justice of the peace is satisfied by information on oath given by a person authorised by the Secretary of State or the Commissioners of Customs and Excise to act for the purposes of this paragraph either generally or in a particular case –

(a) that there is reasonable ground for suspecting that an offence against this Order or, with respect to any of the matters regulated by this Order, an offence against any enactment relating to customs has been or is being committed and that evidence of the commission of the offence is to be found on any premises specified in the information, or in any vehicle, vessel or aircraft so specified; or

(b) that any documents which ought to have been produced under paragraph 1 of this Schedule and have not been produced are to be found on any such premises or in any such vehicle, vessel or aircraft,

he may grant a search warrant authorising any constable, together with any other persons named in the warrant and any other constables, to enter the premises specified in the information or, as the case may be, any premises upon which the vehicle, vessel or aircraft so specified may be, at any time within one month from

the date of the warrant and to search the premises, or, as the case may be, the vehicle, vessel or aircraft.

(2) A person authorised by any such warrant as aforesaid to search any premises or any vehicle, vessel or aircraft may search every person who is found in, or whom he has reasonable ground to believe to have recently left or to be about to enter, those premises or that vehicle, vessel or aircraft and may seize any document or article found on the premises or in the vehicle, vessel or aircraft or on such person which he has reasonable ground to believe to be evidence of the commission of any such offence as aforesaid or any documents which he has reasonable ground to believe ought to have been produced under paragraph 1 of this Schedule or to take in relation to any such article or document any other steps which may appear necessary for preserving it and preventing interference with it—

Provided that no female shall, in pursuance of any warrant issued under this paragraph, be searched except by a female.

(3) Where, by virtue of this paragraph, a person is empowered to enter any premises, vehicle, vessel or aircraft he may use such force as is reasonably necessary for that purpose.

(4) Any documents or articles of which possession is taken under this paragraph may be retained for a period of three months or, if within that period there are commenced any proceedings for such an offence as aforesaid to which they are relevant, until the conclusion of those proceedings.

(5) In the application of this paragraph to Scotland any reference to a justice of the peace includes a reference to the sheriff.

2.72 Paragraph 4 of the Schedule to the Order provided that the information or documents produced or seized could not be disclosed except:

- by the consent of the person who produced the document or information or from whom the document or information was seized
- to any person empowered under the Schedule to request that it be produced or to any person holding ‘any office under or in the service of the Crown’
- to any organ of the United Nations or to the government of another country for the purpose of assisting the United Nations or that government in securing compliance with or detecting evasion of sanctions
- with a view to the institution of proceedings for an offence against, amongst other things, the Order.

2.73 By paragraph 5 of the Schedule to the Order a person was guilty of an offence against the Order if they:

- refused or failed, without a reasonable excuse, to comply with a request for documents or information made under the Schedule
- wilfully furnished false information or a false explanation or otherwise wilfully obstructed any person in the exercise of their powers under the Schedule

or

- destroyed, mutilated, defaced, secreted or removed any document with intent to evade the provisions of the Schedule.

2.74 By Article 8 of the Order, a person guilty of an offence against the Order was liable to:

- imprisonment for a term not exceeding two years or to a fine or to both upon conviction on indictment

or

- imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both upon summary conviction.

2.75 It is noteworthy that this Schedule encompassed two mechanisms by which information or documents could be obtained for the purpose of securing compliance with the Order or detecting evasion of the Order. The first mechanism, set out in paragraph 1 of the Schedule, was essentially a power to compel the production of documents. The only condition precedent to the exercise of the power was that the request be for information or documents that the person authorised to make the request required for the 'purpose of securing compliance with or detecting evasion of [the] Order'.³⁸ Failure to comply with a request to produce certain information or documents constituted an offence punishable by imprisonment or fine, or both.

2.76 The second mechanism provided for a justice of the peace to issue a search warrant if they were satisfied by information on oath that:

- there existed reasonable grounds for suspecting, amongst other things, an offence against the Order has been or was being committed *and* that evidence of the commission of the offence was to be found on specified premises

or

- documents that ought to have been produced under paragraph 1 of the Schedule had not been produced and are to be found on specified premises.

2.77 In contrast with the first mechanism, the second mechanism required that a higher evidentiary threshold be satisfied before the power to issue a search warrant could be exercised. On the first limb on which a search warrant could be issued, the justice of the peace needed to be satisfied that there were reasonable grounds for suspecting an offence against the Order. On the second limb, a justice of the peace needed to be satisfied that a request had already been made under paragraph 1 of the Schedule for particular documents or information, that the request was sufficiently broad to capture documents the subject of the proposed search warrant, that the documents had not been produced in accordance with a request made under paragraph 1, and that the documents were to be found on the premises specified in the proposed search warrant.

2.78 Although there did exist at the time sanctions were in force against Iraq a power under the Commonwealth *Crimes Act 1914* to apply for a search warrant, there did not exist a provision comparable to paragraph 1 of the Schedule to the UK *Iraq and Kuwait (United Nations Sanctions) Order 1990*. I recommend that a power similar to that in paragraph 1 of the Schedule be incorporated in the domestic regime intended to give effect to United Nations sanctions.

Issue

At present no power exists for any Commonwealth entity to obtain evidence and information for the purpose of securing compliance with or detecting evasion of statutory restrictions on dealings between Australian companies or persons and a foreign state subject to UN sanctions or its residents. For the maintenance of Australia's international trading reputation, it is important that there be such a power, so that any breach of restrictions can be prevented or stopped.

Recommendation 3

I recommend that there be conferred on an appropriate body a power to obtain evidence and information of any suspected breaches or evasion of sanctions that might constitute the commission of an offence against a law of the Commonwealth.

Notes

¹ Ex 3, EXH.0001.0015 at 0017, para. 3. A copy of that opinion is at Appendix 1. Much material in this section of the report is taken from that opinion without further attribution.

² See *Bradley v Commonwealth of Australia* (1973) 128 CLR 557, 582 (Barwick CJ and Gibbs J); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 237; *Nulyarimma v Thompson* (1999) 96 FCR 153.

³ Submissions of AWB, para. D2.

⁴ Ex 693, INQ.0011.0077 at 0077–0094.

⁵ See letter of notification of contract to be paid from the Iraq account—for example, Ex 363, UNO.0007.0020_R.

⁶ *Re Morris; Ex parte Adams and Others* (1980) 48 FLR 341, 343 (Sweeney J).

⁷ *Re Morris; Ex parte Adams and Others* (1980) 48 FLR 341, 344 (Sweeney J).

⁸ *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 34 FCR 348, 352 (Black CJ, Davies and Neaves JJ). See also *Kim v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 44 FCR 75, 85 (Wilcox J).

⁹ *Commonwealth of Australia Gazette*, S 235, 25 June 1984, p. 4.

¹⁰ *Commonwealth of Australia Gazette*, GN 27, 11 July 1990, p. 1,820.

¹¹ *Commonwealth of Australia Gazette*, GN 27, 11 July 1990, p. 1,820.

¹² *Commonwealth of Australia Gazette*, S 224, 10 August 1990, p. 2.

¹³ *Commonwealth of Australia Gazette*, GN 14, 17 April 1991, p. 1,343.

¹⁴ *Commonwealth of Australia Gazette*, GN 14, 17 April 1991, p. 1,343.

¹⁵ *Commonwealth of Australia Gazette*, GN 14, 17 April 1991, p. 1,343.

¹⁶ *Commonwealth of Australia Gazette*, GN 20, 22 May 2002, p. 1,484.

¹⁷ *Commonwealth of Australia Gazette*, GN 20, 22 May 2002, p. 1,484.

¹⁸ *Sinclair v Brown Cool Liquefaction (Victoria) Pty Ltd* 1992 1VR 190, 194–196 (Young CJ), 198 (Murphy J)

¹⁹ *Commonwealth of Australia Gazette*, S 177, 29 May 2003, p. 2.

²⁰ *Commonwealth of Australia Gazette*, GN 27, 11 July 1990, p. 1,820.

²¹ *Commonwealth of Australia Gazette*, S 230, 10 August 1990, p. 1.

²² *Commonwealth of Australia Gazette*, GN 14, 17 April 1991, p. 1,342.

²³ *Commonwealth of Australia Gazette*, GN 14, 17 April 1991, p. 1,342.

²⁴ *Commonwealth of Australia Gazette*, S 177, 29 May 2003, p. 2.

²⁵ *Commonwealth of Australia Gazette*, S 177, 29 May 2003, p. 2.

²⁶ *Commonwealth of Australia Gazette*, GN 27, 11 July 1990, p. 1,820.

²⁷ *Commonwealth of Australia Gazette*, GN 27, 11 July 1990, p. 1,820.

²⁸ *Commonwealth of Australia Gazette*, S 230, 10 August 1990, p. 3.

²⁹ *Commonwealth of Australia Gazette*, S 230, 10 August 1990, p. 3.

³⁰ *Commonwealth of Australia Gazette*, GN 14, 17 April 1991, p. 1,341.

³¹ *Commonwealth of Australia Gazette*, GN 14, 17 April 1991, p. 1,341.

³² *Commonwealth of Australia Gazette*, S 177, 29 May 2003, p. 1.

³³ *Commonwealth of Australia Gazette*, S 177, 29 May 2003, p. 1.

³⁴ *Iraqi Sanctions Regulations* 31 CFR § 575.210.

³⁵ *Iraq (United Nations Sanctions) Order 2000* s. 3.

³⁶ *Iraq and Kuwait (United Nations Sanctions) Order 1990* (UK) art. 7.

³⁷ *Iraq and Kuwait (United Nations Sanctions) Order 1990* (UK) art. 7.

³⁸ *Iraq and Kuwait (United Nations Sanctions) Order 1990* (UK) Schedule para. 1(1).

3 Imposition of inland transportation fees and after-sales-service fees: Iraq documentation

- 3.1 In June 1999 the Government of Iraq imposed inland transport fees on humanitarian goods imported into Iraq. In August 2000 it imposed a tariff described as an 'after-sales-service' fee. Over time the inland transportation fee increased from US\$12.00 to US\$25.00 per metric tonne. For foodstuffs, the after-sales-service fee was 10 per cent of the contract value.
- 3.2 The decision to impose these fees and tariffs was deliberately made with the objective of circumventing UN Security Council Resolution 661 and subsequent resolutions that were designed to deprive Iraq of foreign currency. Provision of foreign currency to Iraq was prohibited by Resolution 661, paragraph 4.
- 3.3 To achieve its objective, the Government of Iraq required that monies paid for transportation fees and after-sales-service fees be paid in a foreign currency and be paid directly to Iraq through its embassies or into the government bank accounts in Baghdad or, where that was not possible, to front companies with which Iraq had made arrangements to receive the monies and remit them promptly to Government of Iraq bank accounts in Baghdad.
- 3.4 Both the documentation available post-March 2003 from Iraqi government sources and the course of events between June 1999 and March 2003 make it clear that Iraq would contract only with companies that agreed to pay the transportation charges and the after-sales-service fees. AWB was therefore confronted with the choice of not agreeing to pay the transportation and after-sales-service fees and potentially losing its Iraqi market or agreeing to pay the fees and retaining its market. It chose the latter course. In the case of Rhine Ruhr and Alkaloids of Australia, both companies were ultimately required to pay the after-sales-service fee. Both companies, however, utilised the services of overseas agents and it was the agents who handled the payment of the fee.
- 3.5 It is useful to record details of the Iraqi Government's decisions to impose the inland transportation fees and the after-sales-service fees.

Inland transportation fees

3.6 The Independent Inquiry Committee found:

On June 10, 1999 (Phase VI), the Iraqi Economic Affairs Committee issued a directive ordering ministries to impose non-negotiable 'transportation fees' on all goods requiring inland delivery by Iraqi trucks. This tariff was levied on all cargoes delivered to Umm Qasr and sometimes on cargoes shipped overland to Iraq. The Economic Affairs Committee set these fees depending on the kind of goods being transported, the form of packaging, the point of entry into Iraq, and the phase in which the contract was signed. The fees were payable to designated Iraqi entities and regime-controlled front companies. Although the Ministry of Transportation oversaw the collection of these funds, a fee schedule was circulated to all Iraqi ministries at the beginning of each phase.¹

3.7 The finding quoted was based on interviews the Independent Inquiry Committee conducted with Iraqi officials and noted a letter dated 10 June 1999 ordering the imposition of transportation fees from Umm Qasr. The United Nations did not make available to this Inquiry that letter and the statements of interviews. The finding accords, however, with the evidence called before this Inquiry, that from June 1999 AWB was required to tender on the basis of payment of such a transportation fee, and all subsequent contracts required delivery of wheat 'FOT to silo at all Governorates of Iraq'. In fact, such inland transportation fees were paid by AWB in US dollars, euros or Deutschmarks and were paid indirectly to the Government of Iraq through Ronly Holdings Limited, shipping companies and Alia for Transportation and General Trade.

3.8 As noted in the Volcker report, and by AWB executives considering the required payment, the exporters were not required to make the payments from their own funds: the amount of the inland transport fee was added to the otherwise agreed contract price and included in the price in the contract submitted to the United Nations and paid from the escrow account. The financial disadvantage to exporters was one of timing because Iraq required payment of the transportation fee in advance of arrival of the goods.

The after-sales-service fee

3.9 On 3 August 2000, shortly after the start of phase VIII, Vice-President Ramadan issued a 'confidential and urgent' memorandum to all ministries. The subject was 'Achieving additional revenues for commercial contracts pertaining to the Memorandum of Understanding'.² (The Memorandum of Understanding, dated 20 May 1996, was that agreed between the United Nations and Iraq to implement Resolution 986.)

3.10 The Vice-President's memorandum of 3 August 2000 stated:

The issue of achieving additional revenues for commercial contracts pertaining to the MOU was discussed in a meeting held on 2/8/2000 by the Supreme Command Council, who oversee the execution of the Memorandum of Understanding, in an orderly fashion and in conformity with the Memorandum's mechanism. It has been decided to execute the following:

1. Gather all commercial contracts by content with the title:

'After Sales Services or any other suitable version that achieves the purpose and also based on the nature of the contract.'
2. The allocated percentages for bullet (1) above will be as follows:
 - a. 2-5% for food and medication (excluding medical tools and equipment)
 - b. 5-10% for everything but food and medication.
3. The designated minister and the head of the entity not related to a ministry are authorized to determine the rate amount in bullet (2) above, based on the nature of the materials that are under contract and at the highest rate whenever possible.
4.
 - a. The Ministry of Transportation revisits the tariff for the currently adopted transportation fees, port and storage services aiming to increase it at a rate of no more than 80% of the adopted tariff in ports of neighboring countries.
 - b. The Ministry of Transportation raises the mentioned amendment bullet (a.) above to the financial committee to be endorsed and work accordingly.
5. **All the increases mentioned in bullet (2) above that are generated from the after sales services as well as the increase resulting from amending the tariff for transportation costs, and port and storage services fees, are to be transferred to general treasury.** [emphasis added]
6. Income generated from after sales services are to be handed over in cash inside Iraq, or to a banking entity determined by the Iraqi side according to pre-determined banking arrangements, in the case that handing over the money in cash inside Iraq fails.

7. The above mentioned procedure is to be applied to all commercial contracts that have not been signed in a final form yet and for all phases.

Please review and take the necessary action, confirming the execution of the mentioned process in an accurate and clear manner under the supervision of the delegated Minister.

Signed
Taha Yassin Ramadan
Vice President³

- 3.11 It is apparent from this document that Iraq intended to seek to obtain additional revenue in foreign currency both by increasing transportation charges and by imposing an after-sales-service fee. Such monies were to be transferred to the 'general treasury'. The monies were to be paid in cash in Iraq or, where that was not possible, through banking arrangements made by Iraq. The fee was to apply to all commercial contracts in all phases of the Oil-for-Food Programme.
- 3.12 Consistent with the desire for increased revenues, on 6 August 2000 the Council of Ministers Economic Affairs Committee, headed by Deputy Prime Minister Al-Azawi, issued a 'confidential and urgent' memorandum to all ministries (see Figure 3.1). The subject was 'Tariff for transporting MOU goods'.⁴
- 3.13 Two things are apparent from paragraph 3 of the memorandum. First, it was Iraqi instrumentalities that were providing services for the transport and port services. Second, the Iraqi Government recognised the need for 'front companies' in order to enable companies exporting to Iraq to make the payments.
- 3.14 The Iraqi objective of removing the sanctions by seeking to circumvent them was made clear in a 25 October 2000 memorandum sent to all ministries and signed by the head of the Secretariat of the Council of Ministers. The memorandum read:

The President and leader (may God protect him) has ordered the following during the 44th Council of Ministers' meeting held on 22/10/2000.

1. The final outcome with respect to the 10% of the value of contracts that are made with external entities is considered the minimum per contract, exclusive of transportation fees. Any percentage above that will be welcomed, as this is the way sanctions are lifted. For this reason we want to provoke them so that they are faced with two options: either accept reality or lift the sanctions. With regards to oil contracts, they will be discussed by the Financial Affairs Committee and a report will be developed.

Figure 3.1

Memorandum from Iraqi Deputy Prime Minister, 6 August 2000

UNO.0001.0060

Republic of Iraq
Council of Ministers
Economic Affairs Committee
No: L.S 1984
Date: 6 / 8 / 2000

Confidential and Urgent

To: All Ministries - Minister's office (except Transport & Communication Ministry)

Military Industry Commission
Planning Commission
Youth & Sport Commission
Legislative Council of Self-Governing Region
Executive Council of Self-Governing Region
Central Bank of Iraq
Board of Supreme Audit
Atomic Energy Organization
Baghdad Municipality
Electricity Commission
Tourism Commission
Al-Qadisia Warriors Sponsorship Commission
Al-Thawra House for Press and Publishing

Subject: Tariff for transporting MOU goods

Based on port services, land transport, insurance, and handling services in warehouses, the Economic Affairs Committee decided the following:-

1. Approving the new tariff in the below table and making sure that all generated revenues go to the general treasury in full:-

HC-ARC 000058

Republic of Iraq
 Council of Ministers
 Economic Affairs Committee

No:

Date:

<u>Statement of Goods</u>	<u>New Tariff in Dollar</u>
A. General & packed goods transport tariff / ton	25
B. Unpacked wheat goods transport tariff/ ton	25
C. 40 feet containers	900
D. 20 feet containers	600
E. Sized loads (pipes, wood, cotton and the equivalent) In a standard truck 35 ton load	900
F. Buses or trucks that are driven to Umm Qasr - Baghdad or the equivalent in size or weight	500
G. Coaster cars or whatever is equivalent in medium buses with regards to size or weight	400
H. Small pick-up Sedan cars, Land Cruiser and the equivalent	300
2. All special cases not mentioned in above table are agreed on by means of a special agreement between the supplier and the national transporter particularly for loads in excess of 50 tons which require trucks with special specifications.	
3. Regarding allocations of parties that provide services in return for the tariff above and includes the different divisions of the Ministry of Transport and Communications (State Company for Iraqi ports and the State Company for Land Transport, and State Company for Water Transport)	

IIC-ARC 000059

Republic of Iraq
 Council of Ministers
 Economic Affairs Committee

No:
 Date:

And the different divisions of the Ministry of Trade and National Insurance Company, they should be working based on the economic affairs committee's decision no. L.S/ 17 dated 23/1/2000 which includes percentages of these parties allocations including allocations for front companies when transport fees are received (which means keep them as they are without an increase).

4. Business is conducted based on the new tariff for all contracts which were not presented to 661 committee after price modification and after signed contracts that have been approved by the Economic Affairs Committee are dated.
5. We confirm the necessity of abiding by the instructions and guidelines of the leadership committee to use Umm Qasr port as a priority and to use other external ports for emergencies only. Please do the necessary ...regards.

Signed

Hikmat Al- Azawi
 Deputy Prime Minister
 Chief of Economic Affairs Committee
 /8/2000

Please review...regards.

In reference to your letter no. 1339 on 3/8/2000, with a copy of the Ministry of transport and Communications letter no. 10974 on 2/8/2000, please review, regards.

Please review...regards.

In reference to your letter above please take necessary action...regards

[Handwritten: To Senior Deputy Circulate to all General managers **illegible** to work very carefully based on the Economic Affairs Committee resolution and the implementer will follow up in details by Mr. **illegible** Department T.M. regards Signed 6/8/2000]

A copy to

- Presidential Council
- Office of Mr. Taha Yaseen Ramadan,
- Municipality of Council of Ministers
- Ministry of Transport and Communications-Minister's Office

IIC-ARC 000060

Source: Ex 949, UNO.0001.0060.

2. The Memorandum of Understanding is in essence economic occupation. As long as it exists, it means that there is a form of control over the exports and over places where imports are stored. Therefore we must work towards the goal of destroying the Memorandum and liberating external trade by creating revenues outside of its framework that help achieve this goal, and we don't care whether or not the United States finds out about it.
3. Our enemy has implemented a policy to achieve its goals step by step until it has caused us extreme damage, without our finding any reason to engage in conflict with it at any particular step along the way. After this long experience, we should avenge the enemy over this matter step by step.

Please review ... and take the necessary action.

With regards

Signed

Khalil Yassin Al-Ma'mouri

Head of the Secretariat of the Council of Ministers⁵

- 3.15 Addressing the manner in which the after-sales-service fee might be paid by exporters to Iraq, on 27 October 2000 Mr Saleh, the Minister of Trade, wrote a 'very confidential and private' memorandum to 'Member of the Revolutionary Command Council/Vice President Mr Taha Yasin Ramadan':

Subject: Incorporating contract amounts to After Sales Services

Our kindest regards

In reference to your letter number (M.T/1574) on 13/9/2000 regarding forming a committee, headed by a representative from this ministry and representative members of your office, the ministry of irrigation and the Central Bank of Iraq, to study the matter mentioned in paragraph (3) of your above-mentioned letter.

The committee's suggestions have been determined as follows:

Firstly: With regards to goods that are imported via Umm Qasr port, the involved sectors can add the percentage to the pre-determined transportation fees within the country and as a result collect the fees from contracts coming in via this port in combination with shipping fees by the State Company for Water Transport in collection of internal transportation fees, therefore there is no problem collecting this percentage of contracts that have been imported via Umm Qasr port.

...

Thirdly: With regards to the execution mechanism for the above, we suggest that Al-Rafidain Bank should be in charge of assigning one or more banks in Amman and in Beirut where accounts are to be opened with names and numbers to be determined by the contracting Iraqi side and Al-Rafidain bank whereby money collected from the agreed upon percentages and based on the agreement with Al-Rafidain Bank, is deposited.

Fourthly: The supplier issues the required bank guarantee required by the Iraqi importer within a period not exceeding 15 days from opening of L/C [letter of credit] by BNP, and the duration of the bank guarantee is over once the amount stated in the guarantee is paid to the account open in the name of the importing Iraqi side, and it is possible to divide the bank guarantee making it (assignable) to the contract based on the shipping schedule agreed upon with the supplier.

We kindly ask your review, and we suggest the circulation of the above to the sectors involved in the MoU for them [to] adopt ensuring the collection of the determined percentage.

Regards,

Signed
Muhammed Mahdi Salih
Ministry of Trade
27/10/2000⁶

- 3.16 This memorandum makes apparent that the transportation fee and the after-sales-service fee were to be recovered by the Iraqi State Company for Water Transport, using accounts with the Rafidain Bank in Amman, by having deposits made to accounts opened with that bank by the purchasing entity or by use of a bank guarantee.
- 3.17 On 6 November 2001, in a confidential and private memorandum headed 'the mechanism of receiving and transferring revenues from after sales services', the Minister of Finance and Vice President of the Council of Ministers, Hikmat Al-Ghazawi, advised all ministries:

To follow up on our letter no. 4165 dated 27/8/2000.

It has been decided to adopt the following mechanism instead of the mechanism stated in our mentioned letter as follows:

Based on the letter by the member of the Revolutionary Command Council and Vice President of the republic no. 1339 dated 3/8/2000, below is the mechanism of receiving and transferring revenues, which were included in the MOU trade contracts from the after sales services to the account of the General Treasury that has been set up for this purpose:

1. The information included in form (1) for the signed contracts for which L/C have been opened to the MOU account and form (2) for the signed and executed contracts with open L/Cs of which a copy of each is enclosed in a very precise manner assuming we receive it before the end of the first week of the following month to the intended month.
2. a. The Ministry of Transportation – the State Company for Water Transport is in charge of receiving the revenues from after sales services stated in paragraph (2) of the letter referred to above in addition to additional and original transportation fees from vessels upon their unloading for goods

imported via Umm Qasr port and distributed to Ministries and entities unaffiliated with any ministry.

- b. The Ministry of Transportation—the State Company for Water Transport transfers the revenues from the after sales services arriving to its account, to the accounts of Ministries and departments not affiliated with a Ministry, after the completion of the inspection and matching process and the confirmation of the inspection company (Cotecna).
3. The Ministry or department not affiliated with a Ministry receives the revenues from after sales services mentioned in paragraph (2) of the letter referred to above earned on goods arriving to the country from other points of entry besides Umm Qasr, in cash in foreign currency inside Iraq and if that fails, then it is received based on the following:
 - a. To be deposited into the Ministry's account or an entity not affiliated with a Ministry, at Al-Rafidain bank or one of the Jordanian Banks.
 - b. A deposit into the Al-Wasel & Babel in Dubai in the United Arab Emirates which will be opened for this purpose and we will inform you of the number later, and the supplier is to be informed of providing the bank where the mentioned company's account is open, with the contract number and date, supplier's name and L/C number at BNP upon depositing the money.
 4. Every Ministry or entity not affiliated with a Ministry will conduct the following:
 - a. Deposit the amount they received within the country, for after sales services in foreign currency into our account at the main branch of Al-Rafidain (treasury account no. 620) immediately after receiving it, with a statement of the contract date and number, name of supplier and the BNP L/C number, and informing us once the deposit has been made, according to what is stated in form no. (2).
 - b. Transfer the revenues earned from after sales services in foreign currency registered in your account at Al-Rafidain bank in Amman or one of the Jordanian banks to our mentioned account in 3-a via Al-Rafidain Bank—Amman as an intermediate until we inform you of our account number at Al-Rafidain bank, ensuring the transfers match the stated amount in the corresponding field in form (2) mentioned in paragraph (1).
 - c. Al-Wasel & Babel will transfer the money deposited in its account that is open for this purpose, based on the agreement that will be made with it.
 5. On the second week of the intended month, the Ministry of Finance will transfer the Ministry's share or the share of the entity not affiliated with a Ministry as well as the Ministry of Defense's share of revenues earned from after sales services.
 6. Information related to this matter should be restricted to your office and someone should be appointed to coordinate with us on this matter. All correspondences should be handwritten.

Regards,
Signed
Hikmat Al-Ghazawi
Vice President of the Council of Ministers
Minister of Finance
5/11/2000⁷

- 3.18 This memorandum makes apparent the role of the Iraqi State Company for Water Transport in monitoring and receiving the foreign currencies through use of accounts opened by front companies at the Rafidain Bank in Jordan and the subsequent remission of the foreign currencies to the General Treasury.
- 3.19 On 11 November 2000 the account of the General Treasury, to which the funds deposited through front companies with the Rafidain Bank in Amman or other Jordanian banks were to be transferred, was emphasised and confirmed in a 'confidential and private' memorandum forwarded to all ministries and headed 'the mechanism of receiving and transferring revenues from after sales services' (see Figure 3.2).
- 3.20 On 21 December 2000, the Iraqi Minister of Trade wrote a memorandum marked 'very confidential' to the State Company for Water Transport. The memorandum was headed 'Jordanian companies commission for collecting transport fees under MOU'; it is reproduced as Figure 3.3.
- 3.21 The objective of this memorandum was to ensure the receipt of foreign currency within Iraq and to introduce measures to prevent such transfers of foreign currencies from the Rafidain Bank in Amman, after that bank had received monies from 'Jordanian front companies', being blocked before they could be transferred to the Iraqi State Company for Water Transport account at the Rafidain Bank in Baghdad.
- 3.22 The income Iraq received 'by MOU transport charge from Umm Qassir port' between 10 June 1999 and 31 December 2002 amounted to US\$650,855,540.92, which was distributed principally between the Ministries of Transport, Trade and Finance (see Figure 3.4).⁸

Figure 3.2

Memorandum from Iraqi Minister of Finance, 11 November 2000

UNO.0001.0033

[Translation from Arabic- letter: 2 pages]

In the Name of God the Merciful the Benevolent

Ministry of Finance
Minister's office

[Stamp: Oil Ministry/Minister's office
No.: 15049
Date:

12/11/2000] No.: 5559
Date: 11/11/2000

CONFIDENTIAL AND PRIVATE

To:
Ministry of Interior -Minister's Office
Ministry of Trade- Minister's Office
Ministry of Health- Minister's Office
Ministry of Transportation and Communication- Minister's Office
Ministry of Oil- Minister's Office
Ministry of Irrigation- Minister's Office
Ministry of Industry and Mines- Minister's Office
Ministry of Housing- Minister's Office
Ministry of Culture and Media- Minister's Office
Ministry of Higher Education & Scientific Research- Minister's Office
Ministry of Agriculture-Minister's Office
Ministry of Education- Minister's Office
Electric Company-Manager's Office
Municipality of Baghdad, Mayor's Office

Subject: The mechanism of receiving and transferring revenues from after sales services

Following up on our letter no. 5451 dated 6/11/2000 we would like to tell you the following:

1. We refer you to paragraph (1) of the letter from the Council of Ministers Trust no. 8048 dated 25/10/2000.
2. We inform you that our account no. at Rafidain-Amman, stated in paragraph (b) of item (4) of our above letter is the treasury account 24/8782/2, please take note of this and approve it for the transfer of money earned from after sales services to that account from your accounts with Jordanian banks, as shown in the mentioned paragraph above.

Regards,
Signed
Hikmat Al-Ghazawi
Vice President of the Council of Ministers
Minister of Finance
9/11/2000

Copy to:
Presidential Council, for your information...regards.
Member of the Revolutionary Command Council, Vice President of the Republic,
Mr. Taha Yassin Ramadan, for your information...regards
Vice President of the Council of Ministers: President of the Economic Affairs Committee, please review...regards.
Minister of Foreign Affairs, please review...regards.
Minister of Transportation and Communication, for you to note and approve the account above for the transfer of additional transportation costs...regards.
Governor of the Central Bank of Iraq, for your review...regards.

HC-ARC 000031

Source: Ex 949, UNO.0001.0033.

Figure 3.3

Memorandum from Iraqi Minister of Trade, 21 December 2000

UNO.0001.0066

Republic of Iraq
Ministry of Trade

Department: T.M/Budgets
No: 3/4/L.S/15864
Date: 21/12/2000

Very Confidential

State Company for Water Transport/ General Manager

Subject: Jordanian Companies Commission for collecting
Transport fees under MOU

In reference to the Economic Affairs Committee's letter no. 3264 dated 16/12/2000 including approval on joint meeting recommendations (attached to committee's letter) and in order to conduct related procedures, please work based on the following:-

1. Issue a transfer to Al- Rafidain bank-Amman, a copy to general administration of the bank in Baghdad, to transfer the entire amounts deposited into the company's account no.(8229)in Amman to the company's account at the main branch of Al-Rafidian bank in Baghdad no.(15) as soon as it is received.
2. Inform Jordanian companies responsible for collecting transport fees from MOU suppliers arriving via Umm Qasr port to reduce the commission from 1% to 0.25% of the total received amount from each supplier starting from (16/12/2000)(on the 16th of December, 2000) all designated Iraqi parties take their share from the commission amount.
3. Working with paragraphs B & G from 3 of the report) in coordination with Al -Rafidain Bank
4. Working with what appeared in paragraph (D. from 3 of the report)
5. Taking into consideration what appeared in paragraphs 6 & 7 of the report in coordination with ministries not related to a ministry.

To be informed and work accordingly and inform us of any comments related to the successful execution.
Regards,

Signed
Mohamed Mahdi Saleh
Minster of Trade
21/12/2000

-To be followed-

[Handwritten: Internal Audit]
[Handwritten: Signed, received on Sunday 31/12/2000]

IIC-ARC 000064

Republic of Iraq
Ministry of Trade

Department:**No:****Date:**

A copy to:

- Ministry of Finance / Minister's office/ Finance Consultations Department/ Ref. to Economic Affairs Committee letter no. L.S 3264 dated 16/12/2000 ..for your review...regards.
- Al- Rafidain Bank/ General Manager/ following up on our letter /M.T/ 7/10/14665 dated 26/11/2000/ we attach paragraphs (A, B, C from 3) of the meeting report together with the Economic Affairs Committee's approval no. 3264 dated 16/12/2000 and to work accordingly as this matter relates to the bank (Main branch, as well as the Amman or Beirut or others).. Regards.

- Paragraphs-

An appropriate mechanism has been put in place by the General Manager of Al- Rafidain Bank and designated individuals in both the Trade and Transport & Communication Ministries to deliver main and extra transport fees as well as services fees deposited into Al-Rafidain Bank/ Amman to Baghdad to prevent risk of money blockage and provides cash in foreign currency inside the country. The following procedures were agreed upon:

- A. The State Company for Water Transport, through its representative in Amman, regularly follows up on the transfer of money received from MOU suppliers through Umm Qasr by Jordanian front companies within two business bank days after deducting the commission percentage of 0.25% to the account of the State Company for Water Transport at Rafidain-Amman no.(8229) to guarantee that the money is under the control of the Iraqi government, bearing in mind to immediately pay off amounts received from suppliers into the company's account at Amman bank (whenever this is possible)
- B. As soon as Al-Rafidain Bank in Amman receives any amount from Jordanian front companies, they are responsible for transferring it to the account of the State Company for Water Transport at the main branch of Al-Rafidain Bank- Baghdad no. 415 in cash or bank clearance and inform the State Company for Water Transport in Baghdad of bank note transfers by express mail of the new mechanism.
- C. The main branch of Al-Rafidain Bank-Baghdad is responsible for informing the State Company for Water Transport in Baghdad of cash transfers to their account no.(415) from Amman as soon as they receive the money whether in cash or via clearance and to provide them with a weekly bank statement.

- To be followed-

HC-ARC 000065

Figure 3.4

Memorandum from Iraqi Minister of Transport, 11 March 2003

UNO.0001.0089

In the name of God most Gracious most merciful
Republic of Iraq [Iraqi Republic logo]
Ministry of Transport
Office: Planning and follow up / Dep: T.M./M.H.KH
No. : 3343/Transportation fees / 1/ 178
Date: 8 Muharam /1424 H
Date: 11/3/2003 **Very confidential**

Respected Mr. Deputy Prim Minister council and Minister of finance

Sub/ MOU Transportation fees

This Ministry sends its regards ...

Annex to our very confidential letter no. (922) in 19/1/2003.

We'd like to inform your Excellency that the that income achieved by MOU transport charge from Umm Qassir port since the economic affairs committee issued the decision witch was reported to us through their very confidential letter No. (L.S./1397) in 10-June-1999 until 31-Dec.-2002 has reached (\$650 855 540/92) (six hundred fifty million, eight hundred fifty five thousand five hundred forty dollars and ninety two cents) distributed as follows:-

- 1- \$34 681 712/52 (thirty four million six hundred eighty one thousand seven hundred twelve dollars and fifty two cents) for internal hand over, transport, load and unload material under MOU to be delivered to company stores that belong to the Ministry of Trade.
- 2- \$364 239 249/52 (three hundred sixty four million two hundred thirty nine thousand two hundred forty nine dollars and fifty two cents) for extra MOU materials transport charge, after sale services and insurance on goods imported to companies that belongs to the Ministry of Finance.
- 3- \$249 777 686/13 (two hundred forty nine million seven hundred and seventy seven thousand six hundred eighty six dollars and thirteen cents) for MOU materials transport and load and unload charge and marine agencies services for companies that belongs this ministry.
- 4- \$ 2 156 892/75 (two million one hundred fifty six thousand eight hundred ninety two dollars and seventy five cents) for internal hand over, load and unload material under MOU to be delivered to other ministries According to details in the attached schedule.

Please review... with respect.

Attachments

Schedule

[Signature]
Ahmed Murtadha Ahmed
Minister of Transport
11/3/2003

[Signature]
[Hand written]
Mohamed Ali Nsaief
Deputy General Manager
11/3/2003

[Signature] 3/11
[Hand written]
[Signature]
Amira Abdulameer

Very Confidential

IIC-ARC 000087

[The attached schedule]

Schedule for detailed income achieved through transferring MOU goods in Umm Qassir port transferred by state company for Water transport for the bellow ministries until 31/1/2003.

NO.	Name of Ministry	Transferred Amount	
		Dollars	Cents
1	Ministry of Transport	249 777 686	13
2	Ministry of Trade	34 681 712	52
3	Ministry of Finance	364 239 249	52
4	Other Ministries	2 156 892	75
Total		650 855 540	92

Source: Ex 949, UNO.0001.0089

Notes

¹ Independent Inquiry Committee into the UN Oil-for-Food Programme, *Manipulation of the Oil-for-Food Programme by the Iraqi Regime*, (Paul A Volcker, Chairman), United Nations, New York, 2005, ch. 3, p. 266; Ex 13, UNO.0005.0001 at 0273.

² Ex 997, UNO.0001.0008.

³ Ex 997, UNO.0001.0008–0009; see also Volcker report, ch. 3, p. 276; Ex 13, UNO.0005.0001 at 0283.

⁴ Ex 949, UNO.0001.0060–0065.

⁵ Ex 997, UNO.0001.0016.

⁶ Ex 997, UNO.0001.0022–0023.

⁷ Ex 997, UNO.0001.0026–0028.

⁸ Ex 997, UNO.0001.0089–90.

4 United Nations knowledge of breaches of sanctions: 1999 to 2003

- 4.1 The United Nations knew that Iraq was breaching sanctions by requiring payment of inland transport fees and surcharges or after-sales-service fees. It knew this between 1999 and 2003, through the Office of the Iraq Programme and the 661 Committee. It took no steps to publicise or warn member states of the Iraqi practices, and it took no steps to stop the practices. The United Nations did not know that AWB was making such payments to Iraq because AWB denied to the United Nations that it was.
- 4.2 So much is established by the Independent Inquiry Committee into the UN Oil-for-Food Programme in its report dated 7 September 2005 (the Volcker report).¹ It is important when considering the conduct of Australian companies to bear in mind the knowledge of the United Nations, particularly when considering any possible offences by Australian companies in relation to possible deception of the United Nations.
- 4.3 The Independent Inquiry Committee September report stated:

... By November 2000, Iraq was engaging in a pattern of sanctions breaches that ultimately generated billions of dollars in illegal revenues. The illicit revenues were collected through kickback payments on Programme contracts, surcharge payments on oil purchases, and oil smuggling to neighbouring countries ... With respect to the United Nations Secretariat and OIP ... OIP's Executive Director, Benon Sevan, Deputy Secretary-General Louise Fréchette and Secretary-General Kofi Annan each was aware – in varying degrees – of efforts by the Iraqi regime to divert revenues from the Programme. As explained below, their response was inadequate.

Regarding kickbacks on humanitarian contracts, OIP was particularly well-positioned to investigate and understand the true scope of the regime's activities. OIP's customs experts were attuned to the issue and, as much as their resources and expertise would permit, tracked contract irregularities. OIP's sources provided increasingly detailed evidence that the Iraqi regime was engaging in a widespread kickback scheme through which suppliers were required to make payments to the regime, often in amounts representing ten percent or more of the full contract value. Some suppliers and their respective missions, in fact, provided OIP with documents confirming illicit side agreements with the Iraqi regime.

By October 2001, OIP's Chief Customs Expert, Felicity Johnston, was convinced that the Iraqi regime's kickback scheme was occurring 'left, right and center'. She brought her concerns and specific information to the attention of her supervisors at OIP – Farid Zarif, the Director of the Contracts Processing and Monitoring

Division ('CPMD'), and Mr. Sevan—and urged them to take action. No meaningful action was taken. Instead, in the face of multiple, documented cases of illicit activity, Mr. Sevan refused to disclose material evidence to the 661 Committee. Mr. Sevan maintained that there was no hard evidence that the kickback scheme existed. For their parts, Deputy Secretary-General Fréchette, S. Iqbal Riza, the former Chef de Cabinet, and Secretary-General Annan were each informed of the kickback issue and received some, but not all, of the documentation and information possessed by OIP regarding the scheme. There is no indication that Deputy Secretary-General Fréchette took any steps or issued any directives to ensure that the Iraqi regime's collection of illicit payments was properly investigated and brought to the attention of the Security Council and the 661 Committee. Secretary-General Annan told the Committee that he gave oral instructions to Mr. Sevan to be transparent with the 661 Committee. He did not, however, confirm that such transparency existed, particularly in connection with the kickback issue. Further, neither Deputy Secretary-General Fréchette nor the Secretary-General addressed the kickback scheme with Iraqi officials, and they made no mention of the scheme in the Secretary-General's 90 and 180-day reports to the Security Council. With little resistance from the Secretariat, the Iraqi regime's kickback scheme continued through the balance of the Programme and undermined the humanitarian effort.²

The Secretariat's state of knowledge

4.4 The Independent Inquiry Committee found as follows:

- On 21 December 1999 the Office of the Iraq Programme received a query from the Canadian permanent mission regarding a contract between the Iraqi Ministry of Trade and the Canadian Wheat Board. The OIP was advised that the Iraqi regime was 'requiring CWB to deposit \$700,000 in a Jordanian bank account to cover the transportation costs in Iraq'.³ Mr John Almstrom, Chief of the Contracts Processing Section of the OIP until early 2000 (when he was replaced by Mr Zarif), instructed Ms Johnston to investigate the matter.
- Between 21 December 1999 and 13 January 2000 Ms Johnston spoke with the Canadian mission about the matter. The Canadian mission reported that 'similar arrangements had been made by the Iraqi regime with the Australian Wheat Board ... and various suppliers from Thailand'.⁴ Ms Johnston spoke with the Australian permanent mission and asked it to 'inquire from AWB whether it had agreed to any financial arrangements with the Iraqi regime outside the United Nations escrow account'.⁵ Ms Johnston's testimony to the Independent Inquiry Committee was that the Australian mission 'informed her that AWB had "categorically denied" the circumstances set forth in the memorandum'.⁶ According to Ms Johnston's knowledge, the matter was not brought to the 661 Committee's attention.

- On 10 January 2000 the Austrian permanent mission faxed the Office of the Iraq Programme 'requesting an examination of the business practices of Marquette Hellige Ges.m.b.H. (Marquette)'.⁷ The facsimile attached correspondence from Marquette dated 10 December 1999, 'suggesting the existence of side-arrangements'.⁸ In essence, Marquette disclosed that it had entered into two 'service undertakings' in connection with the supply of medical products to the Iraqi State Company for Marketing Drugs and Medical Appliances. These undertakings provided that Marquette would pay commissions to a third party it had engaged to act as its agent.⁹ The Office of the Iraq Programme did not inform the 661 Committee of the Marquette commission payments.¹⁰
- On 7 February 2000 Mr Almstrom notified his successor, Mr Zarif, of the information provided by the Canadian Wheat Board.¹¹
- In July 2000 J Christer Elfverson, Director of the Programme Management Division of the Office of the Iraq Programme, was contacted by a representative of Scania CV AB (Scania), a Swedish company, who 'complained about a fifteen percent payment that the Iraqi regime was demanding on a contract'.¹²
- On 5 December 2000 Mr Elfverson wrote a note to Mr Sevan 'regarding reports of unauthorized commissions on humanitarian contracts'.¹³ Mr Elfverson had been provided with 'detailed information "on the existence and scale of 'back-handers' now routinely being demanded by Iraqi ministries"'.¹⁴ The Independent Inquiry Committee concluded that the note did not appear to have been forwarded to the 661 Committee.¹⁵
- On 11 December 2000 Mr Sevan responded to Mr Elfverson's note of 5 December.¹⁶ He wrote that suppliers who brought this type of information to the attention of the Office of the Iraq Programme should be advised to inform 'their governments who may decide to write to the Security Council Committee established by resolution 661 (1990)'.¹⁷
- At the formal meeting of the 661 Committee held on 13 December 2000 no mention was made of either Mr Elfverson's 5 December note to Mr Sevan or Mr Sevan's reply of 11 December. This was despite the fact that the United Kingdom had asked the Office of the Iraq Programme at that meeting whether it was true that Iraq required 'businesses to pay an "import tax" equal to three percent of the value of the contract as a "precondition to granting ... the contract"'.¹⁸
- On 14 February 2001 Mr Sevan sent a note to Under-Secretary Jayanta Dhanapala, attaching briefing papers for the Secretary-General's meetings

with the Foreign Minister of Iraq, scheduled for 26 and 27 February 2001.¹⁹ One of the issues addressed was '10 per cent commission on contracts'.²⁰ Relevantly, the section dealing with commissions stated:

It is also alleged that Iraq is requesting suppliers to pay a 10 per cent commission prior to being awarded contracts under the humanitarian programme. The Secretariat has no formal/official information on this, though some companies have called the Office of the Iraq Programme ... to complain about it. When requested to provide proof, they have refused to do so.²¹

- The notes and summaries of the meetings between the Secretary-General and the Iraqi Foreign Minister 'do not contain any reference to a discussion of kickbacks in connection with the humanitarian contracts'.²²
- On 28 February 2001 the Secretary-General briefed the Security Council on his meetings with the Iraqi Foreign Minister. No reference was made to the 'Iraqi regime's alleged kickback scheme or a discussion of the matter with the Iraqi officials'.²³
- On 2 March 2001 the Secretary-General issued his 90-day report to the Security Council on phase IX of the Oil-for-Food Programme.²⁴ The report was 'devoid of any reference to the sanctions-busting payments to the Iraqi regime'.²⁵
- On 7 March 2001 the *New York Times* published an article entitled 'Iraq is running payoff racket, U.N. aides say'²⁶, which provided 'a detailed description of the various means and methods employed by the Iraqi regime to perpetrate the kickback scheme'.²⁷ The article was the subject of an advisory note to Mr Riza, copied to Deputy Secretary-General Fréchette and Mr Fred Eckhard, Spokesperson for the Secretary-General.
- On 10 March 2001 Mr Sevan 'issued Mr. Zarif a directive regarding the review process for Programme contracts'.²⁸
- The Office of the Iraq Programme took a number of 'internal measures to address kickbacks on Programme contracts'.²⁹ One of those measures was to update its 'Compendium of Customs Procedures'. The following language was added to the compendium:

High prices, in particular, should be queried as it is believed that *many suppliers pay illegal commissions or 'kick-backs' to the Government of Iraq and that suppliers cover these expenses by artificially inflating the value of goods for which they receive payment from the escrow account.* If the value of the goods appears artificially high or low, transfer the application to non-compliant status and request a written explanation from the supplier, via the submitting Mission. Upon receipt of a response, ensure the correspondence is

copied to the Committee and that the customs report reflects the reviewing experts [sic] concerns and the supplier's response.³⁰ [original emphasis]

- The Independent Inquiry Committee's view was that this language 'reflected OIP's knowledge of the kickbacks and recognition of the means of imposition'.³¹
- On 22 October 2001 Ms Johnston drafted a 'Note for the file' entitled 'Potential Illicit Payments to the Government of Iraq' (the 'Johnston note').³² This summarised a 'number of the incidents of kickbacks that had been discovered by or reported to OIP as of October 2001'.³³ The purpose of the Johnston note was to 'summarize the compelling evidence that the scheme existed and present the information to Mr. Zarif and Mr. Sevan to encourage action by the Secretariat'.³⁴ The note refers to seven incidents that provided evidence of the scheme. Following is a summary, in chronological order, of the portion of the report that deals with the Johnston note:
 - On 7 January 2001 Neptune Exports Limited (Neptune), which had contracted with Iraq for the supply of tea, was 'informed by the Iraqi State Company for Food Stuff Trading that there was a delivery shortage of approximately 1220 kilograms of tea'.³⁵ The Iraqi State Company for Food Stuff Trading 'directed Neptune to pay the equivalent value of tea into a bank account at the Rafidain Bank in Amman, Jordan'.³⁶ The Indian permanent mission advised the OIP of the request. The 661 Committee was not informed of the incident.³⁷
 - On 25 February 2001 Woodhouse International LLC (Woodhouse) wrote to the United Arab Emirates Ministry of Foreign Affairs 'regarding a number of its Programme-related contracts for oil spare parts'.³⁸ The Iraqi Ministry of Oil had instructed Woodhouse to 'include an extra ten percent in the contract price over and above the original tender value' in respect of each of its contracts with the Ministry.³⁹
 - On 13 March 2001 Ingersoll-Rand World Trade Ltd (Ingersoll-Rand), which had executed two contracts with the Baghdad Mayoralty for rollers, paving equipment and spare parts, 'sent a letter to the Swiss State Secretariat for Economic Affairs indicating that the contract total value "includes 10% working capital to be given as rebate to Baghdad Mayoralty"'.⁴⁰
 - On 19 March 2001 Ingersoll-Rand sent a letter to the OIP regarding its second contract with the Baghdad Mayoralty, which 'confirmed that the agreement with the Baghdad Mayoralty included a ten percent

cash payment, which the company was told would be used as working capital'.⁴¹

- In March 2001 the Swiss mission forwarded to the OIP the '*actual side agreements*' requiring the payment of the ten percent fee'.⁴² [original emphasis]
- Ms Johnston's testimony to the Independent Inquiry Committee was that, to her knowledge, the Ingersoll-Rand matter was not brought to the 661 Committee's attention.⁴³
- On 3 April 2001 Hajlaoui and Partners (Hajlaoui) 'executed a contract with the Economics and Finance Department of the Ministry of Oil for the supply of tractors'.⁴⁴
- On 11 April 2001 Hajlaoui signed a letter confirming its agreement to 'pay ten percent of the contract value ... to the Oil Products Distribution Company, Daura, Baghdad for "installation, technical supervision and the service after sales"'.⁴⁵
- On 25 April 2001 two OIP staff members met with a Woodhouse representative.⁴⁶ They were informed that 'suppliers were being forced to sign "side agreements" requiring the increase of the original contract price by ten percent with that difference to be paid to the Iraqi regime'.⁴⁷ They were further 'informed that the kickback scheme was extensive and that Woodhouse's understanding was that "*all Phase [VIII] and IX* oil spares applications required this kind of side agreement"'.⁴⁸ [original emphasis]
- On 6 May 2001 Woodhouse wrote to the OIP to 'request a "general letter" outlining the United Nations' position on payments to Iraq so that the position could be forwarded to Iraqi officials'.⁴⁹
- On 15 June 2001 the Belgian permanent mission submitted Hajlaoui's request to ship the goods to Iraq, which attached the 11 April 2001 side letter 'setting forth the terms of the kickback arrangement'⁵⁰ between Hajlaoui and the Iraqi Oil Products Distribution Company.
- On 20 July 2001 'Ms Johnston prepared a note entitled "Funds Obtained by the Government of Iraq Outside the Oil for Food Programme" and placed it in the Irregularities File'.⁵¹ This stated that the Iraqi regime 'continue[d] to extract funds from suppliers ... by refusing to sign contracts unless a commission of between 10% to 15% [was] paid'.⁵² It further stated that such contracts 'contravene[d] paragraph 4 of Security Council resolution 661 (1990)'.⁵³

- The 20 July 2001 note stated that ‘the Japanese Permanent Mission had informed OIP that Marubeni Heavy Machinery Trading Company (Marubeni) had been requested to pay a fee, equal to ten percent of the total subcontract value, into a bank account designated by an Iraqi company, Upper Gulf Agencies (UGA)’.⁵⁴ The fee ‘constituted “a commission paid directly to the Government of Iraq”’.⁵⁵ The OIP advised the Japanese mission to raise the matter directly with the 661 Committee or with Mr Sevan, ‘requesting that he raise the issue with the 661 Committee’.⁵⁶
- On or about 9 August 2001 Mr Sevan asked the UN Office of Legal Affairs ‘whether the subcontracting agreements mentioned [by the Japanese mission] ... constitute[d] a breach of Security Council resolutions regarding the situation between Iraq and Kuwait’.⁵⁷
- Between September and November 2001 the OIP corresponded with Hajlaoui about the side letter of 11 April 2001.
- On 4 September 2001 Mr Zarif drafted a memorandum to Mr Sevan regarding the Marubeni matter.
- On 5 September 2001 the OIP advised Hajlaoui and the Belgian mission that it could not process the request to ship the goods to Iraq because ‘the customs experts were unable to determine compliance with the United Nations requirements’.⁵⁸ It requested further information and asked Hajlaoui to ‘confirm its understanding that all payments to the Iraqi regime must be remitted to the United Nations escrow account and that failure to do so violated the relevant Security Council resolutions’.⁵⁹
- On 8 September 2001 Woodhouse wrote another letter to the OIP, informing it that ‘the **Iraq authorities are insisting in a number of cases for this extra 10% to be added to the contract value**’.⁶⁰ [original emphasis]
- On 19 September 2001 Hajlaoui responded to the OIP’s letter of 5 September 2001. It denied that the side letter had been executed and confirmed that ‘all payments were to be made into the United Nations escrow account, and noting that a failure to do so was a violation of Security Council resolutions’.⁶¹
- On 21 September 2001 the Office of Legal Affairs responded to Mr Sevan’s note of 9 August 2001, advising:

... while the 661 Committee did not normally need to approve subcontracts, the Marubeni case was different because the subcontract involved the payment of a fee in connection with a 'service agreement' to an Iraqi company outside the United Nations escrow account. OLA stated that absent explicit approval by the 661 Committee the 'service agreement' would violate the sanctions regime. OLA recommended to Mr Sevan that the '*situation be brought to the attention of the 661 Committee as soon as possible*'.⁶² [original emphasis]

- IIC investigators did not locate 'any evidence that would indicate that Mr. Sevan complied with OLA's advice that the "situation be brought to the attention of the 661 Committee as soon as possible"'.⁶³
- On 25 September 2001 Ms Johnston prepared a file note in relation to a contract between Belhasa Motors Co. LLC (Belhasa) and the Iraqi State Company for Water Transport.⁶⁴ The contract included an undertaking that Belhasa 'would pay the Iraqi State Company for Water Transport 1,436,640 Japanese yen, representing approximately ten percent of the contract value'.⁶⁵ The amount was to be deposited into the Rafidain Bank in Amman, Jordan.⁶⁶
- On 30 September 2001 'Belhasa admitted to OIP that it had signed the undertaking'.⁶⁷
- The Belhasa contract was subsequently forwarded to the 661 Committee with a customs report that mentioned the undertaking.⁶⁸ A subsequent note of Ms Johnston indicated that the Belhasa contract had been 'placed on hold on October 12, 2001'.⁶⁹ The Belhasa contract was not executed.⁷⁰
- Ms Johnston's testimony to the Independent Inquiry Committee was that, apart from the reference to the undertaking in the customs report that was submitted along with the Belhasa contract to the 661 Committee, the Belhasa matter was not raised with the 661 Committee by either Mr Sevan or Mr Zarif.⁷¹
- Also in September 2001, Safmarine Container Lines NV (Safmarine) advised the Belgian permanent mission that '**shippers were being required to pay a 10% tax, prior to unloading cargo, for all contracts approved during Phases VIII and IX**'.⁷² [original emphasis] The Belgian mission brought the Safmarine matter to the attention of the OIP. The note stated that '[the] "tax" was payable to the Iraqi State Company for Water Transport or Alia Transportation Company and that vessels were not allowed to unload until the fees were paid'.⁷³

- On 22 October 2001 Ms Johnston replied to the Belgian mission, stating her ‘understanding that Mr Sevan had written to the Government of Iraq outlining the cases [of potentially illicit payments of which the OIP was aware] and that any response from the Iraqi regime would be forwarded to the 661 Committee’.⁷⁴ The Independent Inquiry Committee concluded that it did not ‘appear that the 661 Committee was informed of any of the information provided by Safmarine’.⁷⁵
- On 20 November 2001 the Belgian mission wrote to the OIP, indicating that ‘Safmarine had reported that “shippers [were] still paying the after sales tax for shipments from Dubai to Umm Qasr and containers [were] refused when proof of this payment [was] missing”’.⁷⁶
- On 26 November 2001 the Belgian mission sent another letter to the OIP, ‘enclosing copies of communications from Safmarine, which explained that shipments of containers from a number of Belgian companies had been blocked because an “after sales tax” of ten percent of the total contract value had not been paid’.⁷⁷ One of the attachments ‘reported that for Phases VIII and IX an “after sales service payment” [was] *applicable for all shipments to Iraq*. This tax [was] about 10% of the value of the cargo’.⁷⁸ [original emphasis]
- On 18 December 2001 the OIP prepared a customs report on the Hajlaoui contract for submission to the 661 Committee. ‘The report noted that OIP was “not able to approve the application, and it [wa]s circulated to the [661] Committee for their consideration”’.⁷⁹
- On 11 March 2002 the 661 Committee approved the Hajlaoui contract.
- On the basis of the various matters in the Johnston note, the Independent Inquiry Committee concluded:

OIP’s information was not limited to rumors about a few contracts as Secretariat officials would later maintain. Rather, written complaints made it apparent to the OIP leadership that the kickback payments were a pervasive problem with significant impact on the functioning of both the sanctions and humanitarian programs.⁸⁰
- The committee further concluded:

The Johnston Note summarized much (but not all) of OIP’s accumulated knowledge of the kickbacks and offered the Secretariat a prime opportunity to report that knowledge to the Security Council and 661 Committee. However, the 90 and 180-day reports to the Security Council and the records of formal and informal 661 Committee meetings are devoid of any reference

to what OIP officials knew was a widespread fraudulent practice and a violation of the sanctions regime.⁸¹

- On 22 October 2001 a letter was drafted to Ambassador Al-Douri, Iraq's Permanent Representative to the United Nations. The letter stated that the 'OIP's contacts had **"effectively confirmed the initial suspicion of a fraudulent practice"**.⁸² [original emphasis] Further:

Extensive discussions with the suppliers ... have revealed that, as a **precondition for awarding contracts, the Iraqi buyer institutions have systematically sought written unilateral undertakings ... to make post-award payments** into bank accounts other than the United Nations Iraq Account of amounts representing 10 per cent or higher of the value of the negotiated contracts.⁸³ [original emphasis]

- The letter stated that 'Mr. Sevan was **"duty bound to bring the matter to the attention of the [661 Committee]"**'.⁸⁴ [original emphasis] The Independent Inquiry Committee concluded that the letter of 22 October 2001 'appears to be a draft that Mr. Sevan reviewed, but never sent'.⁸⁵
- In November 2001 a second letter was drafted to the Iraqi Ambassador. It stated that 'Mr. Sevan had "been informed by the Permanent Mission of Belgium to the United Nations that suppliers shipping approved goods to Iraq via the port of Umm Qasr are currently required to pay a 10 per cent tax [to Iraqi controlled entities] ... for all contracts approved under phases VIII and IX"'.⁸⁶ The letter emphasised that such payments were 'clearly contrary to the spirit of paragraph 4 of Security Council resolution 661 (1990)'.⁸⁷
- The Independent Inquiry Committee concluded that the letter of November 2001 had not been sent.⁸⁸
- On 4 November 2001 Mr Sevan drafted a note to Deputy Secretary-General Fréchette that was identical to the Johnston note of 22 October 2001. With a 'few notable exceptions', the note reflected a 'softening of the information assembled by the customs experts'.⁸⁹ It was unclear whether Deputy Secretary-General Fréchette received the note. When asked by the IIC whether she had received it, she could 'neither confirm nor deny' receiving it.⁹⁰
- On 14 November 2001 Entreprise Nationale de Tubes et Transformation de Produits Plat Anabib (Anabib) 'submitted a contract for the sale of galvanized steel pipes to the Iraqi State Trading Company for Construction Materials, which required Anabib to pay ten percent of the contract price ... to the Iraqi regime'.⁹¹

- On 19 November 2001 the Secretary-General submitted to the Security Council a report on implementation of the Oil-for-Food Programme, in accordance with the Secretariat's obligations under the relevant Security Council resolutions.⁹² The report 'made no mention of the kickback issue'.⁹³ The Independent Inquiry Committee:

reviewed all of the 90 and 180-day reports from the Secretary-General to the Security Council submitted after December 2000, when the kickback issue began to escalate, until the removal of the previous Iraqi regime and has not located any evidence that the Secretariat raised the issue of kickbacks, or conferred the information it possessed in such reports.⁹⁴

- On 30 November 2001 the OIP wrote to the Algerian permanent mission about the Anabib contract. It informed the mission that the 'repatriation of any sum of money to Iraq "would clearly contravene" Security Council resolutions 661 and 986'.⁹⁵
- On 4 December 2001 the Algerian mission responded to the OIP's letter of 30 November 2001. The mission had 'confirmed with Anabib that "there [wa]s no payment to be repatriated to the Iraqi Government or to any Iraqi company" and the table, which was "enclosed inadvertently", should be disregarded and sent back to the Mission'.⁹⁶
- On 7 December 2001 a customs report about the Anabib contract was circulated to the 661 Committee. It 'noted that "a recapitulation table of the prices of the goods [was] attached to the contract" and that all the prices had "been increased by 10% and that this amount will be repatriated to the G.O.I"'.⁹⁷
- On 11 December 2001 the 661 Committee approved the Anabib contract.
- On 24 January 2002 the Spanish permanent mission forwarded a copy of correspondence it had received from Laiex SL (Laiex) regarding 'the payment of ten percent of the contract value to its Iraqi customer'.⁹⁸ The Independent Inquiry Committee concluded that it did not 'appear that the 661 Committee was notified' of this.⁹⁹
- On 19 March 2002 the Danish mission to the United Nations wrote to the OIP, explaining that Oticon A/S was 'required to pay an "after sales tax" to the Iraqi regime; otherwise the shipment would be rejected'. The Independent Inquiry Committee concluded that it did not 'appear that the 661 Committee was notified of this'.¹⁰⁰
- On 26 March 2003 Capex Spain (Capex) forwarded documents to the Spanish mission regarding its contract with the Iraqi Ministry of Oil.¹⁰¹ The documents were subsequently forwarded to the OIP. Capex had paid

a kickback but, because it did not have a receipt for the payment, ‘the Iraqi officials blocked shipment of the goods in Basrah’.¹⁰² Capex requested the Spanish mission’s assistance and ‘furnished documentation ... showing that it had paid a kickback’.¹⁰³

- On 25 April 2003 the OIP wrote to the Spanish mission, ‘explaining that OIP could not assist Capex in their efforts to ship the goods, because the “payment to an Iraqi Government entity constitute[d] a breach of the sanctions [regime]”’.¹⁰⁴

The 661 Committee’s state of knowledge

4.5 The Independent Inquiry Committee made the following findings:

- ‘[M]edia reports of improprieties regarding humanitarian contracts under the Programme surfaced as early as November 1997 and then more broadly in August and November 1999.’¹⁰⁵ Reports resurfaced in February and March 2001.¹⁰⁶
- On 24 March 2000 ‘the United States raised numerous concerns in the Security Council about the Government of Iraq’s conduct relating to humanitarian aspects of the Programme’.¹⁰⁷ In part, the United States asserted that ‘*the establishment of front companies, the payment of kickbacks to manipulate and gain from the oil-for-food contracts*—these and other practices are well documented. Such abuses ebb and flow at the whim of Iraq’s leadership’.¹⁰⁸ [original emphasis] The Independent Inquiry Committee’s report stated, however, ‘Although the United States noted its view that these practices were “well documented”, no evidence suggests that humanitarian kickbacks had been discussed at any previous meeting of the Security Council or its 661 Committee’.¹⁰⁹
- In November 2000 France learned that ‘the Iraqi Minister of Trade, Medhi Saleh, openly had requested at a Baghdad trade fair that companies selling humanitarian goods to Iraq under the Programme ... pay ten percent kickbacks to Iraqi bank accounts in Jordan, the United Arab Emirates and other countries’. France advised the Minister that such payments would be contrary to the sanctions regime and warned French exhibitors against the Iraqi request.¹¹⁰
- On 13 December 2000 the 661 Committee first addressed the ‘issue of humanitarian kickbacks’ at a formal meeting.¹¹¹ At the meeting the United Kingdom reported that ‘it had heard that the Government of Iraq “asked businesses to pay an import tax amounting to 3 per cent of the value of

the contract, ostensibly to pay for storage and distribution costs, as a precondition to granting them the contract”¹¹²

- On 18 January 2001 the United Kingdom suggested at a formal meeting of the 661 Committee that the committee ‘consider allegations that Iraq was “deduct[ing] a 10 per cent commission on contracts”¹¹³
- On 1 February 2001, at an informal meeting of the 661 Committee, the ‘United States asked OIP what information it possessed regarding allegations that Iraq had been demanding a ten percent kickback for awarding contracts to particular humanitarian goods suppliers’.¹¹⁴ Mr Farid Zarif, Director of the Contracts Processing and Monitoring Division of the OIP, responded that the ‘OIP had received no formal complaints from any permanent or observer mission in that regard’.¹¹⁵
- On 13 February 2001, at an informal meeting of the 661 Committee, the ‘United Kingdom invited OIP to draft and circulate a paper addressing whether Iraq in fact was seeking humanitarian kickbacks from firms supplying humanitarian goods through the Programme’.¹¹⁶ The OIP agreed that it ‘would look into providing what very little information existed on the “commission question”¹¹⁷. The United States added that it would ‘recommend that the 661 Committee adopt several proposals, including a number addressing the alleged humanitarian kickbacks. These measures included: (1) sending letters asking the missions to instruct suppliers not to pay any humanitarian kickbacks; (2) noting this prohibition in the 661 Committee’s approval letters; and (3) issuing a related press release’.¹¹⁸
- In March 2001 the United States ‘introduced a draft non-paper, with United Kingdom support, containing four interrelated proposals for combating kickbacks’.¹¹⁹ The draft non-paper included each of the proposals just outlined as well as a proposal that the ‘OIP explain in its Programme briefings to member states that humanitarian kickbacks are prohibited and also that OIP’s website similarly underscore this prohibition’.¹²⁰
- The United States’ proposals were not adopted.¹²¹
- On 1 March 2001, at a formal meeting of the 661 Committee, ‘the United Kingdom requested an update on the report previously requested from OIP regarding the estimated ten to twenty-five percent commissions that Iraq allegedly had been seeking from humanitarian goods suppliers’.¹²² The OIP advised that it ‘had not received any “formal, official report of such commissions”¹²³

- The Independent Inquiry Committee reviewed the United Nations' records relating to the Oil-for-Food Programme and was 'unaware of any document suggesting that OIP prepared the written report on the kickbacks scheme' as requested.¹²⁴
- The committee expressed the view that 'the comments made by the OIP representatives at these 661 Committee meetings reflect a conscious decision to limit the amount of knowledge shared with the 661 Committee'.¹²⁵
- On 7 March 2001 the Chairman of the 661 Committee, Ole Peter Kolby of Norway, told CNN:

Governments have been approached by their own companies and told there has been a request for a surcharge ... This has happened with contracts for oil, as well as other goods, including food and medicine.

...

When companies negotiate with their Iraqi counterparts, then there is a request for a surcharge. This is what I heard When they approach their governments it's either to seek clarification whether this is legal, or what they're going to do about it.

...

It's quite clear that this is not allowed. This is in violation of the regime, of the sanctions rules, Security Council resolutions, to make surcharges and then make payments.¹²⁶

Mr Kolby subsequently 'commented that he was unaware of any "hard evidence"' of this scheme.¹²⁷

James B Cunningham (the United States' Acting Permanent Representative to the United Nations), Sergey Lavrov (Russia's Permanent Representative to the United Nations) and UN spokesperson Fred Eckhard also stated that, although reports of kickbacks were not new, they could not be substantiated for want of 'actual hard evidence'.¹²⁸

- On 16 March 2001 'there was a discussion of the allegations that Iraq was demanding commission payments for Programme contracts' at an informal meeting of the 661 Committee.¹²⁹ The meeting notes 'do not reflect any contribution by Mr. Zarif to inform the 661 Committee of OIP's knowledge'.¹³⁰
- On 5 April 2001 port fees were discussed at a formal meeting of the 661 Committee. This was the last 'mention of humanitarian kickbacks at a formal 661 Committee meeting, before the war'.¹³¹

- On 9 April 2001 a UK official sent the OIP a letter ‘identifying fifteen humanitarian applications that included “unusual payment/service clauses that could mask payments of commission to Iraq”’.¹³² It had not placed holds on these contracts because of humanitarian concerns. However, it ‘indicated that it was not “keen to let Iraq get away with blatant and profitable manipulation of the [Programme] to obtain hard currency outside UN control”’.¹³³ The United Kingdom reiterated its request that the OIP ‘brief the 661 Committee on humanitarian kickbacks’.¹³⁴

Conclusion

4.6 The following is clear from the material quoted:

- Iraq asked many major companies from many countries to pay commissions, surcharges or after-sales-service fees or to inflate prices.
- Many major companies approached their national governments, advising them of these requests, and sought guidance on whether such payments infringed UN sanctions.
- The Secretariat of the United Nations had considerable information about attempts by Iraq to circumvent sanctions and acquire hard currency outside the Oil-for-Food Programme.
- Iraq’s circumvention of the Oil-for-Food Programme was raised frequently within the 661 Committee between March 2000 and April 2001, but the 661 Committee did nothing to stop the practice or advise member states or suppliers to Iraq of the existence of Iraq’s demands and that such demands infringed UN sanctions.

4.7 None of the Australian companies—as mentioned in the Independent Inquiry Committee’s final report (dated 27 October 2005)—that received from Iraq demands for payment of fees advised the Australian Government of demands by Iraq for such payments or sought advice from the Australian Government about the legality of making such payments or whether such payments would infringe UN sanctions.

Nonetheless, on several occasions during the Oil-for-Food Programme the Australian Government warned and advised AWB that the provision of funds to Iraq would breach UN sanctions.

4.8 The United Nations did not know AWB was paying to Iraq surcharges or after-sales-service fees or had inflated prices to encompass such payments. When the United Nations, through Australia, inquired of AWB whether it was making such payments to Iraq, AWB emphatically denied that it was.

Notes

¹ Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *The Management of the United Nations Oil-for-Food Programme*, Paul A Volcker (Chairman), United Nations, New York, 7 September 2005.

² IIC September report, vol. III, ch. 4, p. 67; Ex 595, UNO.0011.0091 at 0096.

³ IIC September report, vol. III, ch. 4, p. 73; Ex 595, UNO.0011.0091 at 0102.

⁴ IIC September report, vol. III, ch. 4, p. 74; Ex 595, UNO.0011.0091 at 0103.

⁵ IIC September report, vol. III, ch. 4, p. 74; Ex 595, UNO.0011.0091 at 0103.

⁶ IIC September report, vol. III, ch. 4, p. 74; Ex 595, UNO.0011.0091 at 0103. The Canadian complaint is addressed in Chapter 16.

⁷ IIC September report, vol. III, ch. 4, p. 75; Ex 595, UNO.0011.0091 at 0104.

⁸ IIC September report, vol. III, ch. 4, p. 75; Ex 595, UNO.0011.0091 at 0104.

⁹ IIC September report, vol. III, ch. 4, pp. 75–6; Ex 595, UNO.0011.0091 at 0104–5.

¹⁰ IIC September report, vol. III, ch. 4, p. 76; Ex 595, UNO.0011.0091 at 0105

¹¹ IIC September report, vol. III, ch. 4, p. 74; Ex 595, UNO.0011.0091 at 0103.

¹² IIC September report, vol. III, ch. 4, p. 77; Ex 595, UNO.0011.0091 at 0106.

¹³ IIC September report, vol. III, ch. 4, p. 79; Ex 595, UNO.0011.0091 at 0108.

¹⁴ IIC September report, vol. III, ch. 4, p. 79; Ex 595, UNO.0011.0091 at 0108.

¹⁵ IIC September report, vol. III, ch. 4, p. 80; Ex 595, UNO.0011.0091 at 0109.

¹⁶ IIC September report, vol. III, ch. 4, p. 80; Ex 595, UNO.0011.0091 at 0109.

¹⁷ IIC September report, vol. III, ch. 4, p. 80; Ex 595, UNO.0011.0091 at 0109.

¹⁸ IIC September report, vol. III, ch. 4, p. 82; Ex 595, UNO.0011.0091 at 0111.

¹⁹ IIC September report, vol. III, ch. 4, p. 85; Ex 595, UNO.0011.0091 at 0114.

²⁰ IIC September report, vol. III, ch. 4, p. 85; Ex 595, UNO.0011.0091 at 0114.

²¹ IIC September report, vol. III, ch. 4, p. 85; Ex 595, UNO.0011.0091 at 0114.

²² IIC September report, vol. III, ch. 4, p. 85; Ex 595, UNO.0011.0091 at 0114.

²³ IIC September report, vol. III, ch. 4, p. 86; Ex 595, UNO.0011.0091 at 0115.

²⁴ IIC September report, vol. III, ch. 4, p. 86; Ex 595, UNO.0011.0091 at 0115.

²⁵ IIC September report, vol. III, ch. 4, p. 86; Ex 595, UNO.0011.0091 at 0115.

²⁶ IIC September report, vol. III, ch. 4, p. 87; Ex 595, UNO.0011.0091 at 0116.

²⁷ IIC September report, vol. III, ch. 4, p. 87; Ex 595, UNO.0011.0091 at 0116.

²⁸ IIC September report, vol. III, ch. 4, p. 90; Ex 595, UNO.0011.0091 at 0119.

²⁹ IIC September report, vol. III, ch. 4, p. 91; Ex 595, UNO.0011.0091 at 0120.

³⁰ IIC September report, vol. III, ch. 4, p. 91; Ex 595, UNO.0011.0091 at 0120.

³¹ IIC September report, vol. III, ch. 4, p. 91; Ex 595, UNO.0011.0091 at 0120.

³² IIC September report, vol. III, ch. 4, p. 94; Ex 595, UNO.0011.0091 at 0123.

³³ IIC September report, vol. III, ch. 4, p. 94; Ex 595, UNO.0011.0091 at 0123.

³⁴ IIC September report, vol. III, ch. 4, p. 94; Ex 595, UNO.0011.0091 at 0123.

³⁵ IIC September report, vol. III, ch. 4, p. 95; Ex 595, UNO.0011.0091 at 0124.

³⁶ IIC September report, vol. III, ch. 4, p. 95; Ex 595, UNO.0011.0091 at 0124.

³⁷ IIC September report, vol. III, ch. 4, p. 96; Ex 595, UNO.0011.0091 at 0125.

³⁸ IIC September report, vol. III, ch. 4, p. 97; Ex 595, UNO.0011.0091 at 0126.

³⁹ IIC September report, vol. III, ch. 4, p. 97; Ex 595, UNO.0011.0091 at 0126.

⁴⁰ IIC September report, vol. III, ch. 4, p. 100; Ex 595, UNO.0011.0091 at 0129.

⁴¹ IIC September report, vol. III, ch. 4, p. 100; Ex 595, UNO.0011.0091 at 0129.

⁴² IIC September report, vol. III, ch. 4, p. 100; Ex 595, UNO.0011.0091 at 0129.

⁴³ IIC September report, vol. III, ch. 4, p. 100; Ex 595, UNO.0011.0091 at 0129.

⁴⁴ IIC September report, vol. III, ch. 4, p. 100; Ex 595, UNO.0011.0091 at 0129.

⁴⁵ IIC September report, vol. III, ch. 4, p. 100; Ex 595, UNO.0011.0091 at 0129.

⁴⁶ IIC September report, vol. III, ch. 4, p. 97; Ex 595, UNO.0011.0091 at 0126.

⁴⁷ IIC September report, vol. III, ch. 4, p. 97; Ex 595, UNO.0011.0091 at 0126.

⁴⁸ IIC September report, vol. III, ch. 4, p. 97; Ex 595, UNO.0011.0091 at 0126.

⁴⁹ IIC September report, vol. III, ch. 4, pp. 98–9; Ex 595, UNO.0011.0091 at 0127–8.

- ⁵⁰ IIC September report, vol. III, ch. 4, p. 101; Ex 595, UNO.0011.0091 at 0130.
- ⁵¹ IIC September report, vol. III, ch. 4, p. 102; Ex 595, UNO.0011.0091 at 0131.
- ⁵² IIC September report, vol. III, ch. 4, p. 102; Ex 595, UNO.0011.0091 at 0131.
- ⁵³ IIC September report, vol. III, ch. 4, p. 102; Ex 595, UNO.0011.0091 at 0131.
- ⁵⁴ IIC September report, vol. III, ch. 4, pp. 102-3; Ex 595, UNO.0011.0091 at 0131-2.
- ⁵⁵ IIC September report, vol. III, ch. 4, p. 103; Ex 595, UNO.0011.0091 at 0132.
- ⁵⁶ IIC September report, vol. III, ch. 4, p. 103; Ex 595, UNO.0011.0091 at 0132.
- ⁵⁷ IIC September report, vol. III, ch. 4, p. 103; Ex 595, UNO.0011.0091 at 0132. Refer in particular to footnote 272 at 104, which states, insofar as it is relevant, 'Although undated, Mr Sevan's note to OLA appears to have been sent on or before August 9, 2001, when he sent a letter to the Japanese Permanent Mission informing it that the matter had been referred to OLA'; Ex 595, UNO.0011.0091 at 0133.
- ⁵⁸ IIC September report, vol. III, ch. 4, p. 101; Ex 595, UNO.0011.0091 at 0130.
- ⁵⁹ IIC September report, vol. III, ch. 4, p. 101; Ex 595, UNO.0011.0091 at 0130.
- ⁶⁰ IIC September report, vol. III, ch. 4, p. 99; Ex 595, UNO.0011.0091 at 0128.
- ⁶¹ IIC September report, vol. III, ch. 4, p. 102; Ex 595, UNO.0011.0091 at 0131.
- ⁶² IIC September report, vol. III, ch. 4, p. 104; Ex 595, UNO.0011.0091 at 0133.
- ⁶³ IIC September report, vol. III, ch. 4, p. 104; Ex 595, UNO.0011.0091 at 0133.
- ⁶⁴ IIC September report, vol. III, ch. 4, p. 104; Ex 595, UNO.0011.0091 at 0133.
- ⁶⁵ IIC September report, vol. III, ch. 4, p. 104; Ex 595, UNO.0011.0091 at 0133.
- ⁶⁶ IIC September report, vol. III, ch. 4, p. 105; Ex 595, UNO.0011.0091 at 0134.
- ⁶⁷ IIC September report, vol. III, ch. 4, p. 106; Ex 595, UNO.0011.0091 at 0135.
- ⁶⁸ IIC September report, vol. III, ch. 4, p. 106; Ex 595, UNO.0011.0091 at 0135.
- ⁶⁹ IIC September report, vol. III, ch. 4, p. 106; Ex 595, UNO.0011.0091 at 0135.
- ⁷⁰ IIC September report, vol. III, ch. 4, p. 106; Ex 595, UNO.0011.0091 at 0135.
- ⁷¹ IIC September report, vol. III, ch. 4, p. 106; Ex 595, UNO.0011.0091 at 0135.
- ⁷² IIC September report, vol. III, ch. 4, p. 107; Ex 595, UNO.0011.0091 at 0136.
- ⁷³ IIC September report, vol. III, ch. 4, p. 107; Ex 595, UNO.0011.0091 at 0136.
- ⁷⁴ IIC September report, vol. III, ch. 4, p. 107; Ex 595, UNO.0011.0091 at 0136.
- ⁷⁵ IIC September report, vol. III, ch. 4, p. 107; Ex 595, UNO.0011.0091 at 0136.
- ⁷⁶ IIC September report, vol. III, ch. 4, p. 107; Ex 595, UNO.0011.0091 at 0136.
- ⁷⁷ IIC September report, vol. III, ch. 4, pp. 107-8; Ex 595, UNO.0011.0091 at 0136-7.
- ⁷⁸ IIC September report, vol. III, ch. 4, p. 108; Ex 595, UNO.0011.0091 at 0137.
- ⁷⁹ IIC September report, vol. III, ch. 4, p. 102; Ex 595, UNO.0011.0091 at 0131.
- ⁸⁰ IIC September report, vol. III, ch. 4, p. 108; Ex 595, UNO.0011.0091 at 0137.
- ⁸¹ IIC September report, vol. III, ch. 4, p. 109; Ex 595, UNO.0011.0091 at 0138.
- ⁸² IIC September report, vol. III, ch. 4, p. 109; Ex 595, UNO.0011.0091 at 0138.
- ⁸³ IIC September report, vol. III, ch. 4, p. 109; Ex 595, UNO.0011.0091 at 0138.
- ⁸⁴ IIC September report, vol. III, ch. 4, p. 109; Ex 595, UNO.0011.0091 at 0138.
- ⁸⁵ IIC September report, vol. III, ch. 4, p. 110; Ex 595, UNO.0011.0091 at 0139.
- ⁸⁶ IIC September report, vol. III, ch. 4, p. 110; Ex 595, UNO.0011.0091 at 0139.
- ⁸⁷ IIC September report, vol. III, ch. 4, p. 110; Ex 595, UNO.0011.0091 at 0139.
- ⁸⁸ IIC September report, vol. III, ch. 4, p. 110; Ex 595, UNO.0011.0091 at 0139.
- ⁸⁹ IIC September report, vol. III, ch. 4, p. 111; Ex 595, UNO.0011.0091 at 0140.
- ⁹⁰ IIC September report, vol. III, ch. 4, p. 111; Ex 595, UNO.0011.0091 at 0140.
- ⁹¹ IIC September report, vol. III, ch. 4, p. 115; Ex 595, UNO.0011.0091 at 0144.
- ⁹² IIC September report, vol. III, ch. 4, p. 112; Ex 595, UNO.0011.0091 at 0141.
- ⁹³ IIC September report, vol. III, ch. 4, p. 112; Ex 595, UNO.0011.0091 at 0141.
- ⁹⁴ IIC September report, vol. III, ch. 4, p. 112; Ex 595, UNO.0011.0091 at 0141.
- ⁹⁵ IIC September report, vol. III, ch. 4, p. 115; Ex 595, UNO.0011.0091 at 0144.
- ⁹⁶ IIC September report, vol. III, ch. 4, p. 115; Ex 595, UNO.0011.0091 at 0144.
- ⁹⁷ IIC September report, vol. III, ch. 4, p. 115; Ex 595, UNO.0011.0091 at 0144.
- ⁹⁸ IIC September report, vol. III, ch. 4, p. 116; Ex 595, UNO.0011.0091 at 0145.
- ⁹⁹ IIC September report, vol. III, ch. 4, p. 116; Ex 595, UNO.0011.0091 at 0145.
- ¹⁰⁰ IIC September report, vol. III, ch. 4, p. 116; Ex 595, UNO.0011.0091 at 0145.

- ¹⁰¹ IIC September report, vol. III, ch. 4, pp. 116–17; Ex 595, UNO.0011.0091 at 0145–6.
- ¹⁰² IIC September report, vol. III, ch. 4, p. 117; Ex 595, UNO.0011.0091 at 0146.
- ¹⁰³ IIC September report, vol. III, ch. 4, p. 117; Ex 595, UNO.0011.0091 at 0146.
- ¹⁰⁴ IIC September report, vol. III, ch. 4, p. 117; Ex 595, UNO.0011.0091 at 0146.
- ¹⁰⁵ IIC September report, vol. II, ch. 3, p. 157; Ex 595, UNO.0011.0023 at 0063.
- ¹⁰⁶ IIC September report, vol. II, ch. 3, pp. 162–3; Ex 595, UNO.0011.0023 at 0068.
- ¹⁰⁷ IIC September report, vol. II, ch. 3, p. 159; Ex 595, UNO.0011.0023 at 0065.
- ¹⁰⁸ IIC September report, vol. II, ch. 3, p. 159; Ex 595, UNO.0011.0023 at 0065. See also S/PV.4120, p. 8, 24 March 2000.
- ¹⁰⁹ IIC September report, vol. II, ch. 3, p. 159; Ex 595, UNO.0011.0023 at 0065.
- ¹¹⁰ IIC September report, vol. II, ch. 3, pp. 159–60; Ex 595, UNO.0011.0023 at 0065–6.
- ¹¹¹ IIC September report, vol. II, ch. 3, p. 159; Ex 595, UNO.0011.0023 at 0065. See also S/AC.25/SR.209, pp. 5–6, 13 December 2000.
- ¹¹² IIC September report, vol. II, ch. 3, p. 159; Ex 595, UNO.0011.0023 at 0065. See also S/AC.25/SR.209, pp. 5–6, 13 December 2000 and IIC September report, vol. III, ch. 4, p. 82; Ex 595, UNO.0011.0091 at 0111.
- ¹¹³ IIC September report, vol. II, ch. 3, p. 160; Ex 595, UNO.0011.0023 at 0066. See also S/AC.25/SR.212, pp. 7–8, 18 January 2001.
- ¹¹⁴ IIC September report, vol. II, ch. 3, p. 161; Ex 595, UNO.0011.0023 at 0067. See also IIC September report, vol. III, ch. 4, p. 82; Ex 595, UNO.0011.0091 at 0111.
- ¹¹⁵ IIC September report, vol. III, ch. 4, p. 82; Ex 595, UNO.0011.0091 at 0111.
- ¹¹⁶ IIC September report, vol. II, ch. 3, p. 161; Ex 595, UNO.0011.0023 at 0067.
- ¹¹⁷ IIC September report, vol. II, ch. 3, p. 161; Ex 595, UNO.0011.0023 at 0067. See also IIC September report, vol. III, ch. 4 p. 83; Ex 595, UNO.0011.0091 at 0112.
- ¹¹⁸ IIC September report, vol. II, ch. 3, p. 161; Ex 595, UNO.0011.0023 at 0067.
- ¹¹⁹ IIC September report, vol. II, ch. 3, p. 164; Ex 595, UNO.0011.0023 at 0070.
- ¹²⁰ IIC September report, vol. II, ch. 3, p. 164; Ex 595, UNO.0011.0023 at 0070.
- ¹²¹ IIC September report, vol. II, ch. 3, p. 165; Ex 595, UNO.0011.0023 at 0071.
- ¹²² IIC September report, vol. II, ch. 3, p. 161; Ex 595, UNO.0011.0023 at 0067. See also S/AC.25/SR.214, pp. 8–9, 1 March 2001.
- ¹²³ IIC September report, vol. II, ch. 3, p. 161; Ex 595, UNO.0011.0023 at 0067. See also S/AC.25/SR.214, p. 8, 1 March 2001. See also IIC September report, vol. III, ch. 4, p. 83; Ex 595, UNO.0011.0091 at 0112.
- ¹²⁴ IIC September report, vol. III, ch. 4, p. 84; Ex 595, UNO.0011.0091 at 0113.
- ¹²⁵ IIC September report, vol. III, ch. 4, p. 84; Ex 595, UNO.0011.0091 at 0113.
- ¹²⁶ Berke, R. 'Iraq seeking kickbacks from oil-for-food program, diplomats say' *CNN*, 7 March 2001 <<http://archives.cnn.com/2001/WORLD/meast/03/07/un.iraq/index.html>>. See also IIC September report, vol. II, ch. 3, pp. 162–3; Ex 595, UNO.0011.0023 at 0068.
- ¹²⁷ IIC September report, vol. II, ch. 3, p. 163, citing Lederer, M 'Iraq reported to demand illegal kickbacks on humanitarian goods', *Associated Press*, 7 March 2001; Ex 595, UNO.0011.0023 at 0069.
- ¹²⁸ IIC September report, vol. II, ch. 3, p. 163; Ex 595, UNO.0011.0023 at 0069.
- ¹²⁹ IIC September report, vol. III, ch. 4, p. 92; Ex 595, UNO.0011.0091 at 0121.
- ¹³⁰ IIC September report, vol. III, ch. 4, p. 92; Ex 595, UNO.0011.0091 at 0121.
- ¹³¹ IIC September report, vol. II, ch. 3, p. 175; Ex 595, UNO.0011.0023 at 0081. See also S/AC.25/SR.216, p. 3, 5 April 2001.
- ¹³² IIC September report, vol. II, ch. 3, p. 166; Ex 595, UNO.0011.0023 at 0072. See also IIC September report, vol. III, ch. 4, p. 92; Ex 595, UNO.0011.0091 at 0121.
- ¹³³ IIC September report, vol. II, ch. 3, p. 166; Ex 595, UNO.0011.0023 at 0072.
- ¹³⁴ IIC September report, vol. II, ch. 3, p. 166; Ex 595, UNO.0011.0023 at 0072.

5 United Nations investigation into the Oil-for-Food Programme

- 5.1 As discussed in Chapter 1, in 1990, by Security Council Resolution 661, the United Nations imposed sanctions on member states trading with Iraq. In 1996, by Resolution 986, the United Nations established the Oil-for-Food Programme. Under the programme Iraq was permitted to export crude oil to such persons, bodies or companies as it might choose. However, the proceeds of these sales were to be paid by the purchasers to the United Nations and held in an escrow account under the control of the United Nations in a bank account in New York. The funds in the escrow account were to be used for the purchase of humanitarian goods and services, including the purchase of food.
- 5.2 In March 2003 armed forces from certain member states entered Iraq. This led to the toppling of the regime headed by President Saddam Hussein. There became available to the United Nations documents and records relating to trading by the previous Iraqi regime. The United Nations established a committee called the Independent Inquiry Committee into the United Nations Oil-for-Food Programme. The committee was chaired by Mr Paul A Volcker, a former chairman of the US Federal Reserve Bank. The committee prepared and published a number of reports on its inquiries. Its terms of reference were:

The independent inquiry shall collect and examine information relating to the administration and management of the Oil-for-Food Programme, including allegations of fraud and corruption on the part of United Nations officials, personnel and agents, as well as contractors, including entities that have entered into contracts with the United Nations or with Iraq under the Programme:

(a) to determine whether the procedures established by the Organization, including the Security Council and the Security Council Committee established by Resolution 661 (1990) Concerning the Situation between Iraq and Kuwait (hereinafter referred to as the “661 Committee”) for the processing and approval of contracts under the Programme, and the monitoring of the sale and delivery of petroleum and petroleum products and the purchase and delivery of humanitarian goods, were violated, bearing in mind the respective roles of United Nations officials, personnel and agents, as well as entities that have entered into contracts with the United Nations or with Iraq under the Programme;

(b) to determine whether any United Nations officials, personnel, agents or contractors engaged in any illicit or corrupt activities in the carrying out of their respective roles in relation to the Programme, including, for example, bribery in

relation to oil sales, abuses in regard to surcharges on oil sales and illicit payments in regard to purchases of humanitarian goods;

(c) to determine whether the accounts of the Programme were in order and were maintained in accordance with the relevant Financial Regulations and Rules of the United Nations.¹

5.3 The Independent Inquiry Committee's final report, entitled *Manipulation of the Oil-for-Food Programme by the Iraqi Regime*, was issued on 27 October 2005. In its summary the IIC stated:

This report illustrates the manner in which Iraq manipulated the Programme to dispense contracts on the basis of political preference and to derive illicit payments from companies that obtained oil and humanitarian goods contracts ...

Under the Programme, the Government of Iraq sold \$64.2 billion of oil to 248 companies. In turn, 3614 companies sold \$34.5 billion of humanitarian goods to Iraq.²

5.4 The IIC found that in contracts for the sale of oil and in contracts for the purchase of humanitarian goods what were described as 'surcharges' were paid, and in contracts for the purchase of humanitarian goods 'humanitarian kickbacks' were paid to Iraq.³ I will return to the expression 'humanitarian kickbacks'.

5.5 In its summary the IIC stated:

The Committee emphasizes that the identification of a particular company's contract as having been the subject of an illicit payment does not necessarily mean that such company—as opposed to an agent or secondary purchaser with an interest in the transaction—made, authorised or knew about an illicit payment.⁴

5.6 In relation to the sale of oil and 'illicit payments' or 'surcharges', the IIC wrote:

Under the rules of the Programme, Iraq was free to sell its oil so long as it was sold at what the United Nations decided was a fair market price and the proceeds of each sale were deposited to a UN-controlled escrow account, to be used only for humanitarian and other purposes allowed by the Security Council.

It was a basic assumption of the Programme that Iraq—not the United Nations—would choose its oil buyers. Yet the decision to allow Iraq to choose its buyers empowered Iraq with economic and political leverage to advance its broader interest in overturning the sanctions regime. Iraq selected oil recipients in order to influence foreign policy and international public opinion in its favour. Several years into the Programme, Iraq realised that it could generate illicit income outside the United Nations' oversight by requiring its oil buyers to pay 'surcharges' of generally between 10 to 30 cents per barrel of oil ... The surcharge policy started in the autumn of 2000 and lasted through the autumn of 2002. Payments flowed mostly to Iraq-controlled bank accounts in Jordan and Lebanon, as well as by cash deposit to Iraqi embassies in Moscow and elsewhere. The Iraqi

regime ultimately derived \$228.8 million of illicit income from the payment of surcharges in connection with oil contracts under the Programme.⁵

5.7 In relation to the purchase of humanitarian goods and ‘illicit payments’, the IIC reported:

Iraq’s largest source of illicit income from the Programme came from the ‘kickbacks’ paid by companies that it selected to receive contracts for humanitarian goods under the Programme. These payments to the Iraqi Regime were disguised by various subterfuges and were not reported to the United Nations by Iraq or the participating contractors ... Available evidence indicates that Iraq derived more than \$1.5 billion in income from these kickbacks.

As with its selection of oil purchasers, political considerations influenced Iraq’s selection of humanitarian vendors. For the first several years of the Programme’s operation, however, Iraq did not have in place a formal kickback policy. The kickback policy emerged only over time as the Programme extended for a longer period and involved larger amounts than anticipated. The policy began in mid-1999 from Iraq’s effort to recoup the reported costs it incurred to transport goods to inland destinations after their arrival by sea at the Persian Gulf port of Umm Qasr. Rather than seeking approval from the United Nations for compensation of such costs from the Programme’s escrow account, Iraq simply required contractors to make such payments directly to Iraqi-controlled bank accounts or to front companies outside Iraq that, in turn, forwarded the payments to the Government of Iraq. Not only were these side payments not authorised under the Programme, but it was an easy matter for Iraq to impose ‘inland transportation’ fees that far exceeded its actual transportation costs.

By mid-2000, Iraq instituted yet a broader policy to impose generally a ten percent kickback requirement on all humanitarian contractors—including contractors shipping goods by land as well as contractors shipping to Umm Qasr. This broader policy was in addition to the requirement for contractors to pay inland transport fees. Iraq dubbed its more general kickback requirements as an ‘after-sales-service’ fee. After-sales-service provisions often were incorporated into contracts as a basis to inflate prices and permit contractors to recover from the United Nations escrow account amounts they had paid secretly to Iraq in the form of kickbacks. Contractors ordinarily made these payments before their goods were permitted to enter Iraq. For ease of reference, this form of kickback is referred throughout as an after-sales-service fee, although Iraq often collected a ten percent fee without labelling it an ‘after-sales-service’ fee or without inserting an after-sales-service provision in the applicable contract.

Many companies freely went along with Iraq’s demands. Others made payments to third parties or agents while disregarding the likely purpose of these payments or perhaps unwittingly. Kickbacks were paid in connection with the contracts of more than 2200 companies in the form of inland transport fees, after-sales-service fees, or both.⁶

5.8 In a statement issued on behalf of the Secretary-General of the United Nations, Mr Kofi Annan, when the IIC's report was released on 27 October 2005 it was noted:

A vast network of kickbacks and surcharges has been exposed, involving companies registered in a wide range of member states, and certified by them as competent to conduct business under the Programme. He [Dr Annan] hopes that national authorities will take steps to prevent the recurrence of such practices in the future, and that they will take action, where appropriate, against companies falling within their jurisdiction.⁷

5.9 Following that request, the Australian Government established this Inquiry, to determine whether the activities of the Australian companies mentioned in the final report, or persons associated with them, might have breached Commonwealth, State or Territory laws.

5.10 Three Australian companies were mentioned in the IIC's final report:

- AWB Limited, which, through 41 contracts, sold wheat to the Iraqi Grain Board with a face value of US\$2,290,718,296
- Alkaloids of Australia Pty Limited, which by one contract sold hyoscine butyl bromide having a face value of US\$836,252
- Rhine Ruhr Pty Limited (referred to as Distall Rhine Ruhr Pty Limited in the IIC's final report), which by one contract sold parts and equipment that together constituted valve trays for oil and gas refineries having a face value of US\$181,181.⁸

The expressions 'illicit' and 'kickbacks'

5.11 On 21 April 2004 the Security Council adopted Resolution 1538. The preamble to the resolution expressed the Security Council's desire to:

... see a full and fair investigation of efforts by the former Government of Iraq, including through bribery, kickbacks, surcharges on oil sales, and illicit payments in regard to purchases of humanitarian goods, to evade the provisions of Resolution 661 (1990) of 6 August 1990 and subsequent relevant Resolutions ...⁹

5.12 It is apparent from this resolution and from the summary paragraphs quoted that, when the Independent Inquiry Committee wrote in its final report of 'illicit income' and 'illicit payments', it used the expression 'illicit' to mean income or payments that were not within the broad scope or intention of Resolution 661, in particular, and of Resolution 986. The intention of those resolutions was to deprive the Iraqi Government of funds. Any payments that defeated that intention appear to be described by the IIC as 'illicit'.

- 5.13 'Illicit' is defined in the *Macquarie Dictionary* as 'not permitted or authorised; unlicensed; unlawful'. In the *Shorter Oxford Dictionary*, it is defined as 'not authorised or allowed; improper, irregular; not sanctioned by law, rule or custom; unlawful, forbidden'.
- 5.14 The process by which the various payments were made by the three Australian companies forms the factual subject matter of this Inquiry, but it is clear that in respect of the sale of goods to Iraq with which I am concerned the following applied:
- Each contract was submitted to the appropriate UN committee for approval.
 - Each contract was approved by the appropriate UN committee, including as to price, as a contract permitted under the Oil-for-Food Programme.
 - Goods were delivered in accordance with the UN-approved contracts.
 - The goods were checked on arrival in Iraq by companies appointed by the United Nations for the purpose of certifying that the goods were in accordance with the UN-approved contract.
 - UN certification was issued in respect of each contract.
 - The goods were paid for by the United Nations from the Iraq escrow account, the payment being in accordance with the UN-approved and -administered Oil-for-Food Programme.
- 5.15 In no sense can it be said that the contracts for sale of the Australian goods were 'illicit', as being 'not permitted' or 'unlicensed'. The contracts were all approved by the United Nations. Whether payments made by the Australian companies might be 'unlawful' under Australian law is the subject matter of this Inquiry.
- 5.16 The expressions 'kickback' and 'humanitarian kickback' were used by the IIC in a somewhat unusual way. 'Kickbacks' have been described as:

Kickbacks are payments or other types of compensation paid in order to influence and gain profit from an individual or company. Essentially, kickbacks are bribes. An individual or company uses kickbacks to gain an unearned advantage, benefit, or opportunity, even if others are more qualified or offer more competitive prices.¹⁰

The *Macquarie Dictionary* defines 'kickback' as 'any sum paid for favours received or hoped for'.

5.17 The IIC stated, however, but only in a footnote:

The term 'kickback' is used to denote an illicit payment to Iraq by a company contractor made in connection with Iraq's selection of a company to receive a contract to provide humanitarian goods under the Programme. The term 'humanitarian contract' includes contracts for all goods imported into Iraq under the Programme, and the term 'humanitarian kickback' is used as a shorthand reference to kickbacks made in connection with humanitarian contracts. **It is unnecessary to determine whether the illicit payments described in this Chapter were true 'kickbacks' in the strict legal sense that this term may be used in criminal corruption laws.**¹¹ [emphasis added]

5.18 Thus, what the IIC described as 'kickbacks' did not necessarily carry with it any implication of illegality. It was an unfortunate expression to use because it carries with it an overtone of illegality, although the IIC, as the footnote just quoted makes clear, did not intend necessarily to convey that implication.

5.19 The focus of the IIC was on manipulation of the Oil-for-Food Programme by the Iraqi Government in such a way as to enable Iraq to receive some portion of the monies held by the United Nations in the escrow account, which the United Nations intended to be used only for humanitarian purposes. Insofar as the transactions resulted in the payment of monies to Iraq or the inflation of contract prices and subsequent payment to an instrument of the Iraqi Government of a portion of the inflated price, such monies might, perhaps loosely, be described as 'kickbacks'. But that does not necessarily mean that the payment of such monies was illegal. In particular, it does not necessarily mean that payment of any such monies was contrary to any Commonwealth, State or Territory law. It is the purpose of my inquiry to determine whether any such payments as were made to Iraq or its instrumentalities, or any inflation of prices included in UN-approved contracts, might have breached Commonwealth, State or Territory law. In that I include both statute and common law.

The manner of approval of purchasing contracts

5.20 The Independent Inquiry Committee reported:

A company selling humanitarian or other civilian goods under the Programme contracted with a ministry of the Government of Iraq or, for goods intended to be distributed in northern Iraq (other than bulk purchases and oil spare parts), with one of the UN-related agencies. The goods were required to have been identified in advance on the distribution plan approved by the Secretary-General for each phase. The contract was forwarded through the company's home country mission to OIP's Contracts Processing Monitoring Division, where it was subject to review for the details of pricing and value. If the contract's paperwork was in order, the contract was then subject to the 661 Committee's review and approval under a 'no objection' procedure (i.e. the contract was deemed approved if no member of the

661 Committee lodged an objection within a prescribed time period) ... Member states reviewed these contract applications to varying degrees, and, over time, the Security Council authorised OIP to approve an increasing percentage of these applications, specifically those involving humanitarian goods unlikely to trigger any dual use concerns.

Upon approval of a goods contract, the goods could be transported into Iraq. The goods were required to be certified by UN-retained border inspectors (Lloyd's from 1997 to January 1999 and Cotecna from February 1999 to 2003) at one of four main border inspection points: (1) Zakho on the border of Turkey; (2) Trebil on the border of Jordan; (3) Al-Waleed on the border of Syria; or (4) the port of Umm Qasr on the border of the Persian Gulf.

Once the goods were certified the escrow bank (BNP) paid the goods supplier from the escrow account.¹²

Direct financial transactions with the Government of Iraq or Iraqi companies

- 5.21 Resolution 661 required member states to prevent both the import of goods from Iraq and the export of goods to Iraq, except for humanitarian supplies. As the Independent Inquiry Committee reported:

Paragraph four of Resolution 661 barred financial transactions with 'persons or bodies within Iraq ... except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs.¹³

...

However, Resolution 986 and the Iraq-UN [Memorandum of Understanding] explicitly required that all oil proceeds be deposited into the escrow account and that, similarly, payments for the humanitarian supplier come exclusively from the escrow account. Direct financial transactions with Iraq were not authorised under the Programme.¹⁴

- 5.22 When a question arose whether companies could pay Iraq or Iraqi entities for port charges, for example, for the use of Iraqi ports or navigational services in November 1997, the UN Office of Legal Affairs advised the 661 Committee that the payment of port charges to Iraq or Iraqi entities was permissible in connection with lawful shipping activity, so long as the 'fees and charges do not exceed what is customary in such circumstances' and the arrangements otherwise 'exclude economic or financial benefits in favour of Iraqi agencies or companies'.¹⁵
- 5.23 The IIC's final report continued:

In June 1998, OLA extended its earlier opinion on port charges to encompass the payment of inland transportation fees to Iraq (i.e., fees for transporting goods from their points of entry into Iraq to their ultimate destinations within Iraq). OLA

concluded that payments of such fees would not violate the sanctions regime so long as they complied with two restrictions. First, the payments should not 'exceed what is customary and reasonable in the circumstances' and therefore 'represent a source of income to Iraq'. Rather, they should 'be limited to charges for transportation, such as road tolls, levied on a non-discriminatory basis, and to charges which are commensurate with whatever administrative expenses might reasonably be entailed by the occurrence of the transit.' Second, OLA specified that 'any charges should also be payable in Iraqi dinars only.'

... OLA's requirement that payments to Iraq be made only in dinars essentially required companies that were assessed port charges either to violate sanctions or decline to trade with Iraq. Because the Iraqi dinar was a non convertible currency (i.e., not openly traded), the only way to obtain substantial dinars was through a financial transaction with 'persons or bodies within Iraq', which Resolution 661 expressly precluded. Although the 661 Committee discussed this dilemma created by OLA's advice, it ultimately acquiesced in these illegal transactions.

In a memorandum to one of the oil overseers in June 2000, OLA reiterated its view that exporters may pay port fees to Iraq 'so long as the charges ... do not exceed whatever might ... be customary and reasonable and so long as they are paid in Iraqi dinars'. Significantly, however, this OLA memorandum advised also that it would be impermissible for goods suppliers to pay port charges to a Jordanian company alleged to be furnishing port services, Alia for Transportation and General Trade ('Alia'), assuming—as it appeared—that Alia was acting pursuant to an agreement with Iraq to provide such services. OLA clarified that any payment to Alia without the 661 Committee's approval would violate the sanctions regime, which otherwise barred services 'calculated to promote the import from or export to Iraq of products and commodities'. OLA underscored that it was unaware of the Government of Iraq or Alia having sought approval—let alone the 661 Committee ever having approved such an arrangement.

These restrictions were communicated by the United Nations to the Government of Iraq. In a letter dated June 27, 2000, Benon Sevan informed the Government of Iraq that payments of port fees to Iraq must be customary and reasonable in amount and made only in Iraqi dinars. In addition, Mr Sevan explained that payments to Alia required 661 Committee approval if, as it appeared, the Government of Iraq had engaged Alia to provide services in relation to the Programme.

OLA also concluded that the sanctions regime did not bar including after-sales-services in Programme contracts—subject to certain limitations as well as the 661 Committee's or OIP's approval. Although both resolution 986 and the Iraqi-UN MOU explicitly permitted Iraq to import only 'goods', OLA reasoned that this framework included 'the provision of services which are *ancillary* to the supply of those goods. Specifically, OLA advised OIP that services qualified as sufficiently 'ancillary' if 'considered to form part of the supply of an operational and operable product and so be instrumental to the provision, or even to be a constituent element, of the goods which are being supplied.' In OLA's view this encompassed services such as 'assembly, installation and commissioning', but not services for which the goods supplied were merely incidental. OLA further advised that no supplier should be paid for after-sales services until the independent inspection agents provided authenticated confirmation that the relevant services were rendered, and this requirement should be included in Iraq's contracts with goods

suppliers. OLA never concluded that suppliers could make direct payments to the Iraqi regime in lieu of the suppliers providing the after-sales-services contained in approved Programme contracts.¹⁶

- 5.24 The IIC's report does not suggest that the advice of the Office of Legal Affairs, or the substance of its advice, was communicated to any suppliers or, indeed, to member states.
- 5.25 The IIC drew the following conclusion in relation to the humanitarian goods transactions and illicit payments:

In the final analysis, even though instructive to consider OLA's legal opinions, it is unnecessary to rely upon them in understanding why direct payments to the Government of Iraq – not approved by the United Nations – violated the sanctions regime. First and foremost, the relevant resolutions and procedures adopted for the Programme never envisioned direct payments to Iraq or any Iraqi-controlled entity, whether termed 'inland transportation' or 'after-sales-service' fees. Neither the Security Council nor its 661 Committee ever approved such payments outside the escrow account. Second, even accepting OLA's view that it was permissible to pay certain fees to Iraq, OLA required such payments to be reasonable and only in Iraqi dinars ... The inland transportation fees were not reasonable particularly in the later phases of the Programme, when they increased beyond any true cost of transportation, and these fees were paid in USD, euros and other foreign currency; similarly, after-sales-service fees were paid without any justification in terms of corresponding costs incurred by Iraq and were paid in USD, euros and other foreign currency. In any event ... it would have been impossible for companies to pay Iraq in dinars without first violating the sanctions regime. Third, no company has suggested that it relied upon OLA's advice that certain payments were permissible under the sanctions regime and the Programme's rules. Fourth, with regard to payments made by suppliers to companies such as Alia, the Government of Iraq never sought the 661 Committee's approval, even after receiving OIP's letter of June 27, 2000. Accordingly, the types of financial transactions to be discussed in this Chapter involving land transportation and after-sales-service fees were impermissible under the rules governing the Programme.¹⁷

The Government of Iraq's purchasing structure

- 5.26 According to the Independent Inquiry Committee's final report, the Government of Iraq's purchases under the UN Oil-For-Food Programme were organised in a hierarchical structure.¹⁸ At the peak was the Supreme Command Council, which oversaw Iraq's purchases of humanitarian goods. It sat above the Leading Committee, which oversaw allocation of program funds to Iraqi ministries. Beneath the Leading Committee were three committees: the Import Committee, the Technical Committee and the Economic Affairs Committee. According to the report, the Import Committee's function was to supervise ministry expenditures, track the execution of contracts, and account for after-sales-service fees. The function of the Technical Committee was to prepare the distribution plan for each phase and review the technical

specifications of individual contracts. The Economic Affairs Committee was a subsidiary of the Iraqi Council of Ministers and helped to formulate the Iraqi regime's methods and rates of collecting kickbacks.

5.27 Beneath these three committees were state-owned enterprises, one of them being the Iraqi Grain Board. The role of SOEs was to purchase goods for their respective ministries, coordinate tenders, negotiate with suppliers and sign contracts that were to be submitted to the United Nations.

5.28 The IIC's final report stated:

Contracting under the Programme worked in the following manner: at the beginning of each phase, SOEs would advertise tenders for contracts consistent with the specifications of the distribution plan. Once bids had been received, they were assessed and forwarded to ministerial committees for further evaluation. Selected applicants were then invited to negotiate in Baghdad. Following approval by Iraqi authorities, the Central Bank of Iraq would request that BNP New York issue a letter of credit in favour of the supplier.¹⁹

5.29 As described in Chapter 1, the Oil-for-Food Programme was organised into numbered phases. Each phase required a plan of distribution for the purchased goods, and the plan was required to be approved, and was approved, by the United Nations. It was after such approval that contracts for the purchase of humanitarian goods were negotiated. According to the IIC's final report, 'Phases I to V were before the official introduction of the regime's kickback policies during Phases VI-VII, when the inland transportation fees were introduced, and Phases VIII-XIII, which were subject to the broadening of the kickback scheme'.²⁰

5.30 The IIC noted:

Goods imported via Umm Qasr were all transported by vessel and subsequently trucked inland ...

In most contracts for the provision of goods, the unit price negotiated between the supplier and Iraq encompassed the cost of the procured commodity and also specified transportation expenses and related insurance fees. This combination of cost, insurance, and freight was denoted by the standard trade acronym: 'CIF'. Thus, a contract for the supply of 60,000 metric tons of rice to Iraq at a rate of 'CIF \$310.00 per metric ton' reflected not just the value of the rice itself, but also the cost of transporting that rice to a destination mutually agreeable to Iraq and the supplier. The exact values of these inland transportation costs were added to bids submitted by prospective suppliers to Iraqi contracting bodies, but were not quantified explicitly in the contracts submitted to the United Nations.

Vessels berthing at Umm Qasr required the approval of the Iraqi State Company for Water Transport ('ISCWT') before being permitted to discharge. ISCWT was one of over a dozen SOEs overseen by the Ministry of Transportation and Communication ('Ministry of Transportation'). Under Iraqi law, ISCWT had

exclusive authority for all activity at Iraqi ports. Its official function was to arrange and authorize the unloading of cargo and to act as a marine agent for ships carrying procured goods. In addition, it represented to the United Nations that it coordinated transport to internal warehouses and informed Iraqi end-users of inbound goods. However, ISCWT employees did not themselves actually participate in the discharge and handling of cargoes. The Iraqi State Company for Ports, another SOE within the Ministry of Transportation, assumed that responsibility.²¹

Inland transportation costs

5.31 The Independent Inquiry Committee's final report stated:

Neither the Iraq-UN MOU, Resolution 986, nor any subsequent Security Council resolutions specified how goods procured by Iraq were to be transported beyond the designated entry points. Starting in Phase VI, however, Iraq frequently asked suppliers shipping to Umm Qasr to bear responsibility for internal transportation.

According to Iraqi officials interviewed by the Committee, Iraqi authorities ordinarily permitted trucks carrying goods across land borders to continue to Baghdad or to the requested drop-site. By contrast, private entities—apart from a small number of local Iraqi firms—were not allowed to transport goods discharged at Umm Qasr to locations inside Iraq. Through subsidiary SOEs, either the Ministry of Transportation or the Ministry of Trade administered the trucking of these cargoes to internal warehouses. Two Ministry of Transportation SOEs were involved directly in inland transportation: ISCWT and the Iraqi State Company for Land Transportation ('Land Transport'). The majority of transportation provided by the Ministry of Trade was executed by IGB, an SOE responsible for purchasing wheat, rice and other essential foodstuffs. No other bodies of the Government of Iraq had trucking fleets capable of providing services of this nature.

Contracts for humanitarian goods signed during Phases I through V of the Programme reflect the division of transportation responsibilities between goods suppliers and the Government of Iraq ... contracts specifying the delivery of goods to Umm Qasr included unit prices with the designation 'CIF Free out Umm Qasr,' 'CIF Free on board,' or 'CIF Free on truck.' Under these provisions, the supplier was required to finance directly and arrange sea freight to Iraq, but was not responsible for internal transportation. In such cases, Iraq itself bore the costs of inland transportation.²²

Introduction of mandatory transportation charges

5.32 The Independent Inquiry Committee's final report stated:

On June 10, 1999 (Phase VI), the Iraqi Economic Affairs Committee issued a directive ordering ministries to impose non-negotiable 'transportation fees' on all goods requiring inland delivery by Iraqi trucks. This tariff was levied on all cargoes delivered to Umm Qasr and sometimes on cargoes shipped overland to

Iraq. The Economic Affairs Committee set these fees depending on the kind of goods being transported, the form of packaging, the point of entry into Iraq, and the phase in which the contract was signed. The fees were payable to designated Iraqi entities and regime-controlled front companies. Although the Ministry of Transportation oversaw the collection of these funds, a fee schedule was circulated to all Iraqi ministries at the beginning of each phase.²³

...

Significantly, Iraq did not request that suppliers pay this tariff at their own expense. Rather, Iraq incorporated the cost of paying transportation fees into the contracts it signed with suppliers, which were funded from the escrow account. According to suppliers and Iraqi officials interviewed by the Committee, contract negotiations after the imposition of transportation fees normally followed the following sequence: As an initial matter, the purchasing body of the Government of Iraq and the supplier negotiated a unit price, inclusive of insurance and transportation to Iraq, for the commodity being procured. Once a mutually acceptable price had been reached, the purchasing body informed the supplier of the internal transportation fees it would be required to 'pay' directly to Iraq in connection with the contract. If the supplier agreed to these terms, the previously negotiated unit price was increased in accordance with the rates dictated by the Economic Affairs Committee. This revised unit price was included in the final version of the contract signed between the purchasing body and the supplier and submitted to the United Nations for approval and funding from the escrow account.

Following contract approval, an Iraqi entity responsible for the collection of payments contacted the supplier and informed it of the exact amount owed and the designated payment mechanism. Once this entity had confirmed that the supplier had paid, the supplier's goods were permitted to enter Iraq. In this manner, through contractors under the Programme, Iraq illicitly obtained escrow funds, which it could use for its own purposes. The only disadvantage to suppliers under this scheme lay in the timing of contract execution: Because funds were not released from the escrow account until after an inspection agent had authenticated the arrival of goods at the Iraqi border, suppliers typically were obligated to remit transportation fees in advance of their payment by the United Nations.

Over the course of the Programme, contracts signed between Iraq and suppliers increasingly reflected this scheme by specifying the final destination of 'CIF all Iraqi Governates' or 'CIF Baghdad.' This imposed an obligation on the seller to pay for transportation services inside Iraq after its goods had been discharged at Umm Qasr. The specific means by which this internal transportation would be effected were only rarely included in United Nations contracts and, despite occasional discussions and inquiries regarding inland transportation payment, neither the Secretariat nor the 661 Committee ever considered closely whether current arrangements violated the sanctions regime—even as interpreted by OLA.

Sales agents interviewed by the Committee stated that they were aware of the requirement to pay inland transportation fees to Iraqi government agencies.²⁴

Payment mechanisms for internal transportation fees

5.33 The Independent Inquiry Committee's final report stated:

As noted above, when introducing inland transportation fees, the Economic Affairs Committee charged ISCWT with collecting funds derived from this tariff. In practice, fees could be paid in four ways: (1) in cash to an ISCWT representative at Umm Qasr or in Baghdad; (2) in cash to the Rashid Bank or Rafidain Bank in Baghdad; (3) by bank transfer to the ISCWT account at the Amman Branch of Rafidain Bank; or (4) by bank transfer to accounts held by front companies in Jordan or the United Arab Emirates. The Iraqi regime did not favour one particular mechanism. However, because large volumes of cash were difficult and dangerous to transport and suppliers were hesitant to make bank transfers directly to Iraqi authorities, payments through front companies became the preferred method of many suppliers. In some instances, private agents (rather than front companies) facilitated payments to ISCWT's account.

Normally, either the purchasing body of the Government of Iraq or ISCWT informed the supplier which front company to use in connection with a particular contract. When the Iraqi regime introduced the illicit inland transportation scheme, Alia and Amman Shipping, both based in Amman, Jordan, were two of the most frequently used front companies. These companies posed as legitimate providers of transportation services from the port of Umm Qasr, but in practice provided only limited services at port and otherwise functioned as little more than conduits for the payment of transportation fees to ISCWT. In exchange, the companies received a small percentage of the fees they channelled to the regime.

...

All money paid by front companies or suppliers into ISCWT's account at the Amman branch of Rafidain Bank was transferred promptly into the company's account at the Baghdad branch of the same bank. Upon receipt of these funds, Rafidain Bank Baghdad would notify ISCWT. In addition, the front companies themselves would inform ISCWT that a supplier had fulfilled its obligations.

If ISCWT had not received confirmation of a supplier having paid into an Iraqi-controlled bank account, it generally would not permit discharge of the supplier's cargo. In such circumstances, the supplier or vessel chartering company incurred demurrage of thousands of dollars a day.²⁵

Distribution of internal transportation fees

5.34 The Independent Inquiry Committee's final report stated:

... Iraqi representatives initially presented inland transportation fees to suppliers as necessary to fund actual costs. However, this is belied by recent admissions of Iraqi officials familiar with the inland transportation scheme as well as by documentary evidence obtained in this investigation. When interviewed, officials explained that the transportation fees were unusually high and included a generous margin of profit that was transferred to accounts held by the Iraqi Ministry of Finance or CBI. In particular, former Minister of Oil Rashid noted that

the inland transportation fees were introduced to generate supplemental cash and did not relate to internal costs.²⁶

5.35 The IIC also relied on internal Government of Iraq documents obtained after the fall of Saddam Hussein's regime. These documents are said to show allocations of the fees received for inland transport between land transport, port costs, insurance and 'finance'. The documents have been interpreted to mean that the money paid to finance was profit that was available for use by the regime.²⁷

The broadening of the kickback scheme

5.36 The Independent Inquiry Committee's final report stated:

Approximately one year after the Iraqi regime began requiring certain contractors to pay transportation fees to ministerial entities and front companies, it expanded its kickback program to include a mandatory 'after-sale-service fee'. This new tariff, which in most instances was eventually equal to ten percent of the original contract value, applied to all goods purchased by each ministry, regardless of point of entry into Iraq or means of transportation. This obligation was enforced through the final phase of the Programme, often in conjunction with other fees, and had earned the regime more than \$1 billion by spring of 2003.²⁸

Introduction of after-sales service fees

5.37 The Independent Inquiry Committee's final report stated:

On August 3, 2000, two months after the start of Phase VIII, Vice President Ramadan circulated a memorandum to all Iraqi ministries that described a recent meeting of the Command Council. The memorandum stated that the Command Council had ... decided on the following directives:

- 1 Gather all commercial contracts titled ((After Sales Services or any other suitable version that achieves the purpose of the contract and is based on the nature of that contract)).
2. The allocated percentage for bullet (1) above will be as follows:
 - (a) From 2-5% for food and medication (excluding medical tools and equipment)
 - (b) From 5-10% for everything but food and medication.
3. The delegated minister and the head of the entity not related to a ministry are authorized to determine the rate amount in bullet (2) above, based on the nature of the materials that are under contract and at the highest rate whenever possible.

These instructions signalled the imposition of after-sales-service fees, a mandatory kickback to be paid by all suppliers to Iraq. Unlike transportation fees, which were levied based on the weight or size of the procured commodity, after-sales-service fees constituted a fixed percentage of the monetary value of the goods under purchase. This percentage, which was initially suggested at two to five percent for food and medicine and five to ten percent for all other items, could be raised or lowered at the discretion of the minister overseeing the contract in question. In October 2000, the Command Council raised the minimum percentage to ten percent, noting that any after-sales-service fees above this threshold would be viewed as 'commendable'. From this point forward, ten percent was the standard amount levied, but in some instances fees could be as high as thirty percent.

...

As had been the case with transportation fees, Iraq incorporated after-sales-service fees into the contract value that was paid to the supplier out of the escrow account. Accordingly, contract negotiation after the imposition of after-sales-service fees operated in much the same way it had during the period when only transportation fees applied. Iraqi officials across a number of ministries have explained that suppliers were informed or reminded of their obligation to pay the additional percentage after they had participated in a tender process and been selected by a purchasing body to contract under the Programme. If a supplier agreed to these terms, its contract value would be inflated by the percentage demanded by the contracting ministry. Often this upward revision was accomplished by increasing the unit price, but in many instances an explicit after-sales-service fee equal to the levied amount was inserted in the contract. In other instances, the fee was disguised as a performance bond or a maintenance or training expense.

Suppliers initially could pay after-sales-service fees in one lump sum or in instalments corresponding with individual shipments or deliveries of goods. In most cases, these payments had to be executed before the goods in question reached the Iraqi border. Otherwise, ISCWT (for deliveries to Umm Qasr) or ministry officials (for land deliveries) would not permit the goods to be discharged at port or unloaded at warehouses. Certain contractors that Iraqi authorities viewed as reliable were permitted to make payments after goods had arrived in Iraq and funds had been released from the escrow account.²⁹

Expansion of the transportation fee scheme

5.38 The Independent Inquiry Committee's final report stated:

In the same August 2000 memorandum that announced the inauguration of after-sales-service fees, Vice President Ramadan imparted new instructions to the Ministry of Transportation regarding transportation fees. Three days after this announcement, the Economic Affairs Committee circulated a new schedule of transportation fees, raising fees on all goods imported via Umm Qasr for the remainder of Phase VIII. Rates remained at or slightly above these levels for the Programme's duration. As noted above, most of the additional revenues afforded by this augmented tariff were transferred to the Ministry of Finance's account at CBI following collection by ISCWT.

Five months later, Deputy Prime Minister Al-Azzawi distributed a memorandum informing all Iraqi ministries about the mechanisms for paying after-sales-service fees. This memorandum specified that ISCWT was 'in charge of receiving the revenues from after sales services ... in addition to additional and original transportation fees for goods imported via Umm Qasr port...' The memorandum specified also that ISCWT must 'transfer the revenues from the after-sales services arriving in its account to the accounts of Ministries and departments not affiliated with a Ministry ...'

Taken together, these directives reflect the expansion of the inland transportation scheme in the months following the imposition of after-sales-service fees. According to Iraqi officials, in addition to receiving inland transportation fees, ISCWT was also responsible for ensuring the collection of after-sales-service fees levied on goods delivered to Umm Qasr port. These two fees were often collapsed into one very high transportation fee and paid by the same methods that had been used in Phases VI and VII. As a result, payments to ISCWT and to companies such as Alia and Amman Shipping increased dramatically between 2000 and 2002.

...

The funds received from transportation fees, meanwhile, were distributed in a manner generally consistent with the framework for Phase VIII set out in the ISCWT Table. In the case of bulk goods, for example, this amounted to approximately \$9 pmt to Land Transport, \$10 pmt or more to the Ministry of Finance as a cash reserve, and \$0.25 pmt to \$3 pmt for other entities that provided port services.³⁰

Payment mechanisms for after-sales service fees

5.39 The Independent Inquiry Committee's final report stated:

Fees could be paid by several methods: (1) cash payments (in Baghdad or at embassies in foreign capitals); (2) bank transfers; and (3) front companies. There were no set guidelines specifying when a particular payment mechanism was to be employed. In practice, this choice appears to have been at the discretion of the purchasing body or the supplier. Because some companies complained about having to pay illicit fees before receiving funds from the escrow account, the Government of Iraq permitted certain suppliers to obtain bank guarantees instead and then pay their kickbacks after obtaining payment for the goods sold to Iraq.³¹

Front companies

5.40 The Independent Inquiry Committee's final report stated:

Firms desiring to avoid paying to bridge accounts or other CBI-controlled accounts could deposit after-sales-service fees into accounts held by front companies located in Egypt, Lebanon, and the United Arab Emirates. Funds paid to front companies were transferred to bridge accounts in Lebanon and Jordan and then to CBI accounts at Rafidain Bank in Amman. Some of these front

companies were owned partially by the Government of Iraq, whereas others had no relation to it.³²

Alia for Transportation and General Trade

5.41 The Independent Inquiry Committee's final report stated:

Alia was established in August 1994 as a joint venture between Hussain Al-Khawam, an Iraqi businessman, and Iraqi Ministry of Transportation. This arrangement developed from a proposal by Mr Al-Khawam to refurbish Iraqi vessels stranded off the coast of Jordan and to use them for commercial shipping. At the time of Alia's registration, Jordanian law required that at least one owner of a Jordan-registered company be a Jordanian national. As a result Mr Al-Khawam nominated a close associate, Mo'tasset Fawzy Qatishat, to hold fifty-one percent of the company's shares on Mr Al-Khawam's behalf. The Iraqi Ministry of Transportation assigned two of its employees to hold Alia's remaining shares.

In 1999, the Ministry of Transportation arranged with Alia to have it act as ISCWT's collection agent for suppliers' payments for the inland transportation of goods arriving at the port of Umm Qasr. As collection agent, Alia received a small commission on the funds it channelled from suppliers to ISCWT. According to bank records, Alia began receiving fees from suppliers as early as March 2000.

The agent arrangement with Alia was useful to the Government of Iraq ... Alia violated and assisted in violating the United Nations sanctions regime, which prohibited any third party from engaging in financial transactions with the Government of Iraq except as permitted under the Programme or Security Council resolutions. By arranging for suppliers to make illicit payments to a Jordanian company such as Alia – instead of directly to ISCWT or another government entity of Iraq – the Iraqi regime disguised the illicit nature of such payments.

In fact, all transportation services for which Alia received payment from humanitarian suppliers were provided by employees of the Government of Iraq. Transport of goods arriving at Umm Qasr was provided by trucks from the Ministry of Transportation or the Iraqi Grain Board ('IGB') ...

Following the conclusion of contract negotiations between an Iraqi purchasing body and a supplier, ISCWT contacted Alia by fax, letter, or telephone and informed Alia of the amount that was to be received from the supplier. On some occasions, ISCWT contacted the supplier directly to advise the supplier that it should send payments to Alia or sent the same invoice to the supplier that it sent to Alia. On other occasions, Alia sent invoices to suppliers indicating the amounts levied by ISCWT. Representatives of ISCWT came to Alia's office every month to inspect the company's records, and ISCWT also sent an employee to work at Alia.

Suppliers paid their fees in various foreign currencies (not Iraqi dinars) to Alia's accounts at Jordan National Bank and the Egyptian Arab Land Bank. Upon receipt of the funds, Alia informed ISCWT of the amount of the transfer and the corresponding supplier, contract, ship, and letter of credit ...

Shortly after sending such communication, Alia transferred the full payment amount (less a commission between one-quarter percent and one percent) to ISCWT's account at Rafidain Bank in Amman ...³³

5.42 In relation to Alia, the report concluded:

In summary, based on the available evidence, Alia knowingly acted as a front company, serving as a conduit for collecting hundreds of millions of dollars in illicit fees paid by suppliers to the Iraqi regime ...³⁴

5.43 On 8 October 2005 Alia wrote to Counsel for the IIC. The letter, which was included in the final report, stated:

1. The General Agency Agreement with the Iraqi Company For Water Transport in Jordan stipulates and empowers our company (Alia For Transportation and General Trade) to receive the amounts of ocean transport freight charges realised by the aforesaid company's operating vessels or any other amounts involved and have some transferred to Iraqi Company For Transport which represent only a small portion of the shipping agency activities.
2. Our company acts as an Agent for the Iraqi Overland transport company in accordance with an appropriate Agency Agreement likewise, our company maintains the General Sales Agent of Iraqi Airways.
3. As a matter of fact, our company owns several Sea-going vessels and Aircraft as well as a fleet of road trailers. Moreover, we are actively involved in exceptionally large commercial business transactions. All these business activities were and are still being conducted outside the frame work of what you consider a frontal company.³⁵

The final report's findings in relation to AWB

5.44 Following are the Independent Inquiry Committee's findings in relation to AWB:

AWB was established in 1939 as the Australian Wheat Board. Between its founding and 1999, the Australian Wheat Board functioned as a statutory body of the Government of Australia to control the domestic and export marketing of Australian wheat. By July 1999, Australia enacted legislation to transfer control of the Australian Wheat Board to a grower-owned corporate group of companies. In August 2001, AWB Ltd. was placed on the Australian Stock Exchange as a publicly traded company. AWB Ltd. is the exclusive manager and marketer of all Australian bulk wheat exports through a supply pooling system arrangement with Australian wheat growers.

According to AWB, it has sold wheat to Iraq continuously since 1948. It was the single largest provider of humanitarian goods to Iraq under the Programme and participated in all thirteen phases of the Programme from 1997 to 2003—selling a total of 6.8 million tons of wheat to Iraq and receiving a total of over \$2.3 billion in payments from the United Nations escrow account. During each Programme

phase, AWB negotiated several contracts with IGB for up to several hundred thousand metric tons of wheat per contract; each contract ordinarily required up to ten or more individual shipments in ocean freighters from Australia to Iraq's port of Umm Qasr.

For the first five phases of the Programme, AWB's contracts with IGB required shipment of its wheat only up to the point of entry to Iraq. In July 1999, however, AWB and IGB agreed to a new contractual term requiring AWB to assume the cost of inland transportation to points within Iraq from the port of Umm Qasr. The new contract term provided: 'CIF Free on Truck to Silo All Governorates via Umm Qasr Port.' According to AWB, this amended provision was proposed by IGB. The 'inland transportation' provision became standard in all AWB contracts for the remainder of the Programme.

AWB did not have its own trucking fleet in Iraq. And ... goods suppliers such as AWB could not directly pay the Government of Iraq or an Iraqi company for the costs of inland transportation without violating United Nations sanctions and the Programme's rules, which allowed financial transactions with the government and Iraqi entities only through the United Nations escrow account.

... AWB paid its inland transportation fees to Alia Transportation of Jordan. Moreover ... Alia was owned partly by Iraq's Ministry of Transportation and acted as a collection agent for the Government of Iraq's inland transportation payments from certain humanitarian goods suppliers. Transportation of goods from Umm Qasr to inland destinations in fact was provided by Iraqi government employees, not by Alia, and AWB's payments to Alia were tantamount to payments to the Government of Iraq for nominally the provision of inland transportation services.

A more extended discussion of AWB's activities is warranted because of the size of AWB's participation in the Programme and the considerable complexity surrounding AWB's understanding of the nature and disposition of its payments to Alia. The following discussion first describes the payments AWB made to Alia. It then reviews the evidence concerning the extent to which AWB was advised of Alia's relationship to the Iraqi regime and whether AWB was aware that payments to Alia were being channelled to the regime.³⁶

AWB's payments to Alia

AWB paid transportation fees to Alia from December 1999 through the remainder of the Programme. In connection with AWB's first three contracts from late 1999 to mid-2000, transport costs ranged between \$10.80 and \$12 per metric ton ('pmt'). The rates rose to between \$14 and \$15 pmt in 2000, and then sharply increased for contracts from 2001 to the spring of 2003 to between \$45 and \$56 pmt.

This steep increase in inland transportation fees coincided with the expansion of Iraq's humanitarian kickback policies in the second half of 2000. For example, AWB paid a rate of approximately \$14 pmt for the wheat shipped on a contract executed in July 2000. From August to November 2000 ... Iraq increased its demands for kickbacks from suppliers in accordance with official memoranda issued from high-level Iraqi officials to all ministries. After these policy changes went into effect, AWB's next contract with Iraq was signed in November 2000. For

this contract, the transportation fees that AWB paid more than doubled what was previously charged.

When interviewed, Iraq's former Minister of Trade recalled that AWB paid after-sales-service fees on all contracts where such fees had been levied ... Iraq's imposition of kickbacks in the form of after-sales-service fees often were incorporated into pre-existing transportation fees, leading to large increases in the inland transportation costs that ISCWT and its front companies demanded in 2001 and 2002. Records from the Ministry of Transportation relating to the distribution of funds received by Alia indicate that AWB's remittances to Alia in fact did contain an after-sales-services component. One example of such records [is] an accounting receipt relating to funds paid by AWB for the transportation of wheat delivered to Umm Qasr by the vessel *Bei Hai* ... In light of evidence indicating that the actual transportation fees levied by the Ministry of Transportation remained constant at \$25 pmt, the after-sales-service component of AWB's payments to Alia appears to have ranged from \$20 to \$31 pmt.

AWB did not advise the United Nations that it was making payments to Alia for inland transportation costs. When the costs of inland transportation were included first in AWB's contracts during Phase VI, the first several contracts submitted for United Nations review and approval advised that payments of 'discharge costs' up to \$12 pmt would be paid to unnamed 'Maritime Agents'. For contracts from Phase VII and afterwards, AWB did not disclose the payment of any "Maritime Agents." Nor was there disclosure of the amount of such payments, even as the proportion of contract price attributable to transportation fees increased over time.

In total, AWB paid a total of over \$221.7 million in side payments for what it termed inland transportation fees. This corresponds to more than fourteen percent of the illicit funds collected by the Iraqi regime under its kickback schemes.

Knowledge of AWB employees

Little doubt remains that AWB made large numbers of payments to Alia, and these payments in turn were channelled to the Iraqi regime. A closer question, however, concerns the knowledge of AWB employees about Alia's relationship with the Iraqi regime and Alia's practice of remitting funds to the Government of Iraq. On the one hand, AWB has advised the Committee that it believed that Alia was providing actual transportation services. AWB states that it did not know that Alia was owned partially by the Government of Iraq or that payments by AWB to Alia were channelled to the Government of Iraq.

AWB's claims are supported in part by written correspondence from Alia to AWB in which Alia characterized itself as a company providing transportation services in Iraq. For example, on October 20, 1999, Alia wrote a letter of introduction to AWB advising that it was a Jordanian company that specialized in land transportation, that it was an agent of the Government of Iraq, and that it could 'offer our services on the field of transport form [sic] Um Qaser [sic] port in Basrah to the other governorate[s] in Iraq.'

In October 2000, AWB wrote to the Australian Department of Foreign Affairs and Trade ('DFAT'), noting that 'Jordan based trucking companies are responsible for arranging trucks at [the] discharge port' and that it wished to enter into a 'commercial arrangement' with 'the Jordan trucking companies' to 'ensure that

there are enough trucks to enable the prompt discharge of Australian wheat cargoes.’ An official of DFAT replied that it could see ‘no reason from an international legal perspective’ why AWB could not enter into an agreement with a Jordan-based company.

The Committee asked Alia’s owner (Hussain Al-Khawam) and its general manager (Othman Al-Absi) whether they had disclosed the true nature of Alia and its activities to AWB. Mr Al-Absi thought that AWB knew that Alia did not provide actual transportation services at Umm Qasr, but did not claim that he spoke to AWB about this issue. To the contrary, Mr Al-Absi recalled that AWB staff inquired at the outset of the two companies’ relationship about Alia’s operations in great detail, including its experience, the types of vehicles it used, and Alia’s capacity to transport large quantities of wheat. He further recalled that AWB asked the Jordanian government whether Alia was a legitimate shipping company. Both Mr Al-Khawam and Mr Al-Absi stated that Alia did not advise AWB of its partial ownership by Iraq’s Ministry of Trade.

In light of these facts, the evidence does not suffice to conclude that AWB had actual knowledge of Alia’s partial ownership by the Government of Iraq, that it had actual knowledge of the fact that Alia did not actually perform trucking services for AWB’s wheat, or that it had actual knowledge of the fact that Alia remitted the payments it received from AWB to the Government of Iraq. On the other hand, as discussed in detail below, numerous documentary and circumstantial warning signs placed at least some employees of AWB on notice that payments to Alia may have been illicitly funding the Iraqi regime.

First, the relationship between AWB and Alia bore little resemblance to an ordinary arms-length commercial relationship. AWB did not select Alia in the first place to provide transportation services. Instead, as AWB has acknowledged, ‘it was the [Iraq Grain Board] that selected Alia to provide those services.’ Moreover, AWB simply made the requested payments to Alia according to a non-negotiated fee schedule that was issued to AWB each phase. As AWB has acknowledged, ‘AWB did not initiate discussions for or negotiate a contract with Alia concerning the provision by Alia of inland transport services,’ and ‘AWB did not negotiate with Alia either the inland transport services or the fees for those services.’

In view of the sharp increases in transport prices and AWB’s overall commitment of more than \$200 million to Alia, it is difficult to understand AWB’s failure to enter into a formal contract with Alia or to engage in meaningful negotiations with Alia concerning the price and terms of services that Alia provided. AWB has stated that it did not contest the sharp price increases because the change was ‘revenue neutral’ for AWB—it could be incorporated into the price charged and recovered from the escrow account. Yet, although AWB may not have had a pecuniary interest in challenging the price increases, it was aware of the increases and, with knowledge that the Government of Iraq has chosen Alia as transporter, thereby alerted to the prospect that these sudden increases would benefit the Iraqi regime.

Second, AWB was aware that the price for Alia’s transport services was determined by the Government of Iraq, not by Alia. Michael Long, who served from November 2001 as AWB’s General Manager for International Sales and Marketing, explained that he knew that Iraq’s Ministry of Transportation set the price for Alia’s inland transportation charges. He stated that he was informed of the transport price during visits to the Ministry of Transportation. This role of the

Ministry of Transportation in settling the price that Alia charged should have alerted AWB to the probability that the Ministry of Transportation derived some benefit from AWB's payment for transportation fees to Alia.

Third, apart from the letters of Alia to AWB suggesting that it was in the business of providing transport services, a review of documents made available by AWB to the Committee did not disclose further documentation describing logistical details of trucking services rendered by Alia. In particular, the Committee did not come across communications describing the type of logistical challenges that ordinarily would arise in the course of efforts to transport millions of tons of wheat through the countryside.

Fourth, AWB received many documents from Alia and the Government of Iraq suggesting the likelihood that payments made by AWB were made to or for the benefit of ISCWT ... Although AWB notes that many of these documents are written in awkward phrasing by non-native-English speakers, it does not appear that AWB took steps at the time of receiving these documents to investigate or clarify any ambiguous language, notwithstanding the concerns that the document should have raised.

One early example of such correspondence is a fax in November 1999 from Alia to AWB reporting a complaint from ISCWT that AWB had not yet paid its inland transportation charge.

UNO.0003.0154

130

Alia
Alia for Transportation & General Trade

Fax Message
Top Urgent

No. : F/8/334/99
Date : 24/11/1999

To : Australian Wheat Board
Att : Mr. Mark Emmons

document provided to UN IIC
February 2005


Dear Sir,

We have just received a Fax Message from the state Company for Water Transport in Basrah (Iraq) wherein they advise us that whereas the M.V. "Pretty Ruby" is due to arrive at the port of Um Qaser today, your remittance in respect of over-land transportation charges amounting to USD (504,000,-) has not been received yet.

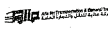
As you are aware, the remittance in question should be received here five days prior to vessel's arrival at Um Qaser, therefore you are kindly requested to follow up the matter with the appropriate Bank here and the Grain Board of Iraq, Baghdad as well as aforesaid Company accordingly and remit the subject funds to them.

Your prompt attention in this matter will be highly appreciated.

Best wishes and kindest regards,


Commercial Manager

CC/ Grain Board of Iraq
CC/ State Co. for water transport



Abdall - Amman Rlrtn - 4th Floor Telefax : 5603102 P.O.Box 911399 Amman - Jordan
IIC-ARC 000297

AWB has not commented specifically on the invoices it received from ISCWT. It has stated repeatedly, however, that IGB informed it of the transportation fees levied on each of its contracts and that these fees were to be paid to Alia in exchange for actual trucking services.

AWB's correspondence with IGB indicates that AWB routinely informed IGB of the timing and details of its transportation fee payments to Alia. In February 2001, for example, AWB faxed a message to the Director of IGB that discussed a recent sale of 500,000 tons of wheat to Iraq and noted in part that 'AWB will pay USD14.00 PMT in equivalent agreed currency for partial payment of transportation fee prior to the vessel arriving from Umm Qasr', and that the '[b]alance of USD31.00 PMT will be paid as final payment of transport fee within 1 week of receipt of UN payment being received by sellers.'

UNO.0003.0115

AWB
LIMITED

AWB LIMITED
ACN 081 890 459
Cereals House
528 Lonsdale Street
Melbourne Vic 3000
GPO Box 4362
Melbourne Vic 3001
Australia
Telephone
03 959 3005
Central Facsimile
03 9870 6539

To	Name: Mr. Yousef A Rahman Company: Grain Board of Iraq Fax: + 9641 414 0860
From	Name: Dominic Hogan Direct Telephone: +613 9209 2035 Direct Fax: +613 9670 6535 E-mail: dhogan@awb.com.au
F pages:	1 of 5 Date: 2nd FEB 2001

Subject: Confirmation for 500,000 tonnes - Australian Wheat

I have not received all the information necessary to process this order. Please contact the sender to provide the missing information and forward order to the recipient. If you have received this document in error please notify us immediately and destroy this copy.

Dear Sir,

AWB Limited document provided to UN IIC
February 2005

We are pleased to confirm the sale of Australian Wheat to you. The following specific terms are agreed:

AWB will pay USD14.00 PMT in equivalent agreed currency for partial payment of transport fee prior to the vessel arriving in Umm Qasr. Balance of USD31.00PMT 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 USD45 PMT in equivalent agreed currency.

Contract to be converted into agreed currency on the 5th of February 2001.

Again, thank you for this business and we will send a short form contract to you from Alia, detailing the agreed currency and contract numbers.

Yours faithfully,
Dominic Hogan
General Manager - Middle East

The Australian Grains Marketers

IIC-ARC 000258

AWB sent IGB other faxes describing its payment or intended payment of transportation fees to Alia. One of these faxes noted that 'an updated payment schedule for inland transport payments' executed in connection with two of AWB's contracts was attached. Another fax included 'a copy of the latest payment situation from the UN to AWB Ltd and from AWB Ltd to Alia Transport Co.' A third fax requested IGB to 'advise' ISCWT about adjustments to inland transportation payments on rejected vessels. This fax also noted that the 'procedure' for transportation payments involved a remittance to Alia. These documents again suggest AWB's awareness of the Government of Iraq's high degree of interest in AWB's payment to Alia.

IGB occasionally reminded AWB of its obligation to pay transportation fees. In May 2002, for example, IGB sent a telex to AWB instructing it to 'contact Alia' in order to 'transfer total amount of inland transport charges' for cargoes specified in an e-mail that AWB had sent to ISCWT. IGB noted that, once these payments had been made, AWB's ships would be permitted to discharge.

UNO.0003.0169

144

WHEAT AA130196
01-05-27 1833 ST+
WHEAT AA130196
=212225 SILOW IK
VIA BAGHDAD
MAY 27 2001 12:39 +
WHEAT AA130196
=212225 SILOW IK

((TOP URGENT))

DD:27/5/2001 NO:776
FM: GRAIN BOARD OF IRAQ
TO: AWB LIMITED

AWB Limited document provided to UN HC
February 2005
: M/V ' HAYDA AND M/V OLYMPIA MIRACLE AND VESPA
AND BELNOR AND PRETTY LADY AND KAMBA AND QUAN ZHOU HAI
AND M/V ASIAN EXCELSIOR

RYB- MAIL DDT 222672001
PLS CONTACT IRAQI TRANSPORT CO. TO TRANSFER TOTAL AMOUNT
OF INLAND TRANSPORT CHARGES OF CARGOS OF VESSELS MENTIONED IN A.M
E- MAIL TO IRAQI STATE CO. FOR WATER TRANSPORT INORDER TO COMMENCE
DISCHARGING

B. REGARDS

=212225 SILOW IK+
WHEAT AA130196

HC-ARC 000312

Another AWB document reflects a communication from one AWB employee to another AWB employee reporting that IGB was 'looking for' inland transportation fees:

AWB
LIMITED

F A C S I M I L E

To	Name: Dominic Hogan Company: Savin Hotel—House Guest (room 1130) Fax: 0016 6821 889 5517
From	Name: Nigel Edmonds-Wilson Direct Fac.: 03 9670 5536 Direct Telephone: 03 9209 2111

No. of pages: 1 **Date:** 28 May 01

Subject: Bobcats / Alia

AWB LIMITED
ACN 081 890 456
Care House
528 Lonsdale Street
Melbourne Vic 3000
IGPO Box 4502
Melbourne Vic 3001
Australia
Telephone
03 9209 2000
Central Facsimile
03 9670 2762

If you have not received all pages please contact the sender. This facsimile is strictly confidential and intended solely for the named addressee. If you have received this document in error please notify us immediately and destroy this copy.

Please see this by Dom. (see attached telefax) Thanks

Please forward to Mr Dominic Hogan of AWB Ltd, a guest in your hotel.

Dom,

I received two faxes from IGB today, one re 8 bobcats, and one re Inland Transport for Alia.

[REDACTED]

AWB Ltd. Inland Transport UN DE 2805

Re: Alia
IGB are looking for remaining payment on inland transport charges for vessels we paid 1 May in order to commence discharging (IGB would not have seen fax I showed you Friday (only able to send today)). Any action necessary before your return?

Please advise.

Thanks.

Nige.

Ext 2111 or fax

The Australian Grains Marketer

IIC-ARC 000248

In addition to the foregoing documents from AWB, Alia has provided the Committee with a copy of a telex that it received from a former AWB employee in Baghdad. In this telex, the AWB employee complained that AWB did not wish 'to be threatened to stop vessel[s] from sailing unless trucking fees received' and warned that 'any discussion/message concerning trucking and trucking fees should be sent only repeat only from your office in Jordan to myself or Mark Emons [another AWB employee] home fax—not by telex to AWB office and not from Basrah.' The AWB employee also noted in the telex that he would send Alia 'wording of 7 letters to cover trucking fees', and that he would send this 'wording' from his home fax and Alia should reply to the same coordinates. Mr Al-Absi of Alia stated that he could not recall the reasons for AWB sending this telex.

The Committee does not have evidence to indicate that the documents discussed above were transmitted to AWB's senior management personnel. Nevertheless, when AWB representatives met with the Committee, they acknowledged that these documents raised at least 'debatable' questions about whether AWB employees should have known that AWB's payments to Alia were channelled to the Government of Iraq.

In summary, based on the available evidence, AWB paid to Alia over \$221.7 million for what it termed inland transport or trucking fees. These payments were channelled to the Government of Iraq by Alia. Both AWB and Alia deny that AWB knew of Iraq's partial ownership of Alia, and there is no evidence to contradict these denials. AWB also denies knowing that Alia did not actually transport its wheat from Umm Qasr and that Alia remitted the money paid by

AWB to the Government of Iraq. On the one hand, there is no evidence that Alia told AWB that it was not performing transport services for AWB's wheat or that it was channelling AWB's payments to the Government of Iraq. On the other hand, numerous aspects of the AWB–Alia relationship, as well as the nature of many of the documents received by AWB ... suggest that some employees of AWB were placed on notice of facts strongly suggesting that AWB's payments were in whole or in part for the benefit of the Government of Iraq. Of particular significance is the degree to which Alia's trucking prices rose sharply beyond what would apparently be a reasonable transportation fee and without other apparent justification. Such increases, in conjunction with AWB's knowledge that Alia had been nominated in the first place by the Government of Iraq, should have signaled AWB officials to the probability that the Government of Iraq stood to illicitly benefit financially from AWB's payments to Alia. In addition, IGB and ISCWT initiated or were party to communications concerning AWB's payment of Alia's fees, and AWB was warned that the Government of Iraq would not allow its ships to unload until Alia was paid.³⁷

AWB's response

5.45 Shortly before the Independent Inquiry Committee's final report was released on 27 October 2005, AWB wrote to Mr Volcker, stating its position. This letter, dated 25 October 2005, was included in the final report³⁸; it is reproduced as Figure 5.1.

Alkaloids of Australia Pty Limited

5.46 The Independent Inquiry Committee's report made no reference to Alkaloids of Australia Pty Limited other than in Tables 6, 7 and 8, which were annexed to the final report.³⁹ The IIC stated:

Tables 6, 7 and 8 provide information on humanitarian goods transactions. When reviewing the information presented in these tables, it is important to note that the Committee has not been able to obtain a complete set of records of kickback levy and payment data from all Iraqi ministries that were involved in the purchase of humanitarian goods under the Programme. Accordingly, these tables reflect a distinction between 'projected' kickback figures and 'actual' kickback figures. A 'projected' kickback figure indicates that the evidentiary basis for the conclusion that there was a kickback paid is Iraq's uniform policy of requiring the payment of kickbacks during certain time periods until July 2003 when the Coalition Provisional Authority reduced all contracts to eliminate estimated kickback amounts. An 'actual' amount reflects the fact that the Committee has acquired contract-specific payment data from the relevant ministry, from a banking institution, or the supplier itself or its collection/shipping agent.⁴⁰

Figure 5.1

Letter from Mr Lindberg and Mr Stewart to Mr Volcker, 25 October 2005


UNO.0005.0402

INDEPENDENT INQUIRY COMMITTEE INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME

REPORT ON PROGRAMME MANIPULATION
CHAPTER THREE
HUMANITARIAN GOODS TRANSACTIONS AND ILLICIT PAYMENTS

C. RESPONSE OF AUSTRALIAN WHEAT BOARD

25/10 2005 21:41 FAX 0398023436 AWB LIMITED OFFICE OF MD 002

 AWB LIMITED ABN: 99 081 870 459 Telephone: 03 9309 2000
180 La Trobe Street, Melbourne, Victoria 3000, Australia Facsimile: 03 9670 2762
GPO Box 4562, Melbourne, Victoria 3001, Australia www.awb.com.au

25 October 2005

Paul A. Volcker, Chairman
Independent Inquiry Committee
825 3rd Avenue
New York, NY 10022

Dear Mr. Volcker,

Thank you for meeting with us on 12 October 2005. By way of summation, and for inclusion in your report, we would like to reiterate the following points on behalf of AWB.

AWB has taken very seriously the Committee's findings that AWB payments to the trucking contractor Alia for Transportation and General Trade Co. ("Alia") were channeled to the government of Iraq and that Alia was a front company for the former regime.

During the OFF Program, AWB did not view Alia to be a front company for the government, nor did AWB know that Alia was not providing trucking services. Indeed, based on what AWB knew about Alia from direct contacts, it still is surprising to now learn that Alia did not truck AWB's wheat inland.

AWB never intended for payments to be channeled to the former Iraqi government. It is nonetheless of serious concern to AWB that any part of the trucking fees paid by AWB in the final phases of the OFF Program were channeled to the government.

It remains the case that AWB never set out at any time to contravene Program requirements. AWB always acted in reliance on the fact that the United Nations had approved the contracts with the Iraqi Grain Board ("IGB") containing the inland transport terms by which AWB paid the inland transport fees to Alia. As the Committee has acknowledged, no evidence indicates that any representative of either the IGB or Alia ever informed anyone at AWB that paying trucking fees meant making illicit payments to the government. Indeed, one would expect the IGB and Alia not to have informed AWB of Alia's internal arrangements with the IGB or the ISCWTC if it had been the government's purpose to induce AWB to unwittingly make payments to the government under the guise of trucking fees.

The Committee in its findings has referred to communications among AWB, the IGB, the ISCWTC, and Alia which AWB voluntarily produced to the IIC. As pointed out in AWB's 22nd April 2005 submission, there is nothing surprising about liaison between AWB (as seller), IGB (as buyer), ISCWTC (as port and vessel agents), and Alia (as the trucking contractor designated by the IGB). All such communications were strictly commercial. None suggests that Alia, the IGB or the ISCWTC ever disclosed to AWB the government's scheme to subvert the OFF Program by collecting inland transport fees. The Committee investigators have extracted from the countless communications between Alia and AWB's operations staff a handful of messages indicating, on close examination, that Alia might have been forwarding AWB's payments to the ISCWTC. Such scattered information, however, lends itself to the interpretation taken by the Committee only if pieced together in hindsight and read in the light of Iraqi documents not known to AWB at the time.

As to the provision by AWB of payment schedules to the IGB, it is to be expected that AWB would document the inland transport fees that the IGB directed AWB to pay to Alia. The IGB was AWB's contract counterparty. Accounting for contractual payments to Alia was from a commercial standpoint altogether

INDEPENDENT INQUIRY COMMITTEE INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME

REPORT ON PROGRAMME MANIPULATION

CHAPTER THREE

HUMANITARIAN GOODS TRANSACTIONS AND ILLICIT PAYMENTS

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normal. AWB was never aware that Alia was not providing a transport service. Numerous communications corroborate AWB's belief that Alia was providing a trucking service. Nor was the fact that the IGB insisted on payment of the fees before ships were unloaded a matter of significance. In the light of the contractual arrangements, transportation arrangements would need to be in place before unloading began.

During the OFF Program, no one told AWB that Alia was a front company for the regime. The inland transport terms of AWB's contracts provided that the IGB would designate the trucking contractor. AWB had no reason to question the IGB's selection of Alia. The IGB had been given authority by the UN to negotiate contracts with suppliers under the OFF Program.

To understand why AWB paid the trucking fees including the increases, it is important to turn the calendar back to the start of the OFF Program, and to see the Program from AWB's perspective, as it evolved from year to year. It would be unfair to judge AWB's actions only in hindsight, and to focus only on the Program's final two years.

AWB is Australia's leading diversified agribusiness and one of the world's largest wheat exporters on behalf of Australia's 30,000 wheat farming families who predominantly own and control AWB. Since 1948, AWB has continually sold wheat to Iraq, dealing exclusively with the IGB, the agency responsible for Iraq's wheat imports. Throughout the OFF Program, AWB contracted only with its longtime counterpart the IGB. All AWB's contracts with the IGB were approved in accordance with the contract-review procedures instituted by the Security Council, including those contracts incorporating the "C.I.F. Free in Truck" term that became the basis for AWB's payments to Alia.

The Committee should also be mindful of what AWB should have known in the context of AWB's Iraq's unique port and transportation infrastructure. Due to the sanctions imposed in 1990, the regime had developed a Public Distribution System managed by the Ministry of Trade to regulate the distribution of foodstuffs throughout the country. As part of the OFF Program, the Iraq government guaranteed to the UN that humanitarian supplies including foodstuffs would be distributed equitably to the Iraqi people. Because the state-controlled Public Distribution System nonetheless remained in place, the equitable distribution of food supplies could be achieved only in the manner permitted by Iraqi infrastructure.

Commencing in June 1999 (in phase 6 of the OFF Program), the IGB invited offers for wheat sales on contract terms that incorporated, for the first time, a price component for inland transport. The contract term used by the IGB—providing for wheat deliveries "Free into Truck to all silos within all Governates of Iraq," and incorporating a "C.I.F. Free in Truck" price—was not itself a cause for concern. AWB had no reason to doubt the bona fides of the IGB, with whom it had been doing business for decades. The inland transport terms were consistent with OFF Program rules guaranteeing the equitable distribution of foodstuffs and with UN resolutions authorizing payments in connection with foodstuffs in humanitarian circumstances. Paying trucking fees in accordance with the inland transport terms did not violate the Iraqi sanctions resolutions, particularly when the 661 Committee approved all contracts that required AWB to include the costs of inland transport in its contracts. Indeed, it appears from the Committee's most recent report that the UN's Office of Legal Affairs did not view inland transport terms to contravene the sanctions resolutions.

The process in respect of each contract for the sale of wheat by AWB under the OFF Program was as follows:

- IGB issued a tender for the supply of grain.
- IGB and AWB agreed on terms of sale.

2

INDEPENDENT INQUIRY COMMITTEE INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME

REPORT ON PROGRAMME MANIPULATION

CHAPTER THREE

HUMANITARIAN GOODS TRANSACTIONS AND ILLICIT PAYMENTS

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- Contract documents were prepared and signed by IGB and AWB.
- The signed contract and notification or request to ship goods were submitted to the Australian Department of Foreign Affairs and Trade ("DFAT") by AWB.
- DFAT submitted the contract to the Australian Mission to the United Nations in New York.
- The Australian Mission then sent the contract to the United Nations OIP in New York.
- United Nations OIP considered and approved the contract and granted permission to export and confirmed eligibility for payment.
- United Nations OIP sent confirmation of approval of the contract to the Australian Mission.
- Australian Mission notified DFAT of the approval of the contract.
- AWB was then notified of the approval of the contract.
- AWB arranged shipment of grain to Iraq. Bill of Lading issued to AWB (as shipper) by the carrier, shipment consigned to the order of the MOT, IGB.
- Notification to United Nations OIP and Banque Nationale de Paris ("BNP") of arrival of vessel at port in Iraq.
- The UN's Secretary-General's designee inspected and certified shipment and issued a certificate for each shipment. This was known as "authentication" and notification was sent to United Nations Treasury.
- AWB presented the documents called for under the letter of credit to BNP (NY) and when in order, payment by the UN from the escrow account to AWB was processed.

In more conventional circumstances, AWB might well have expected to contract directly with a transportation contractor whose costs it would pay, to negotiate those costs, and to monitor the contractor's performance. But there was nothing conventional about conditions in Iraq or how the OFF Program operated. The fact of the matter is that wheat was continually trucked to the interior, in accordance with OFF Program requirements, exciting no concern on AWB's part. AWB always understood that Alia was a commercial company performing transportation services that were arranged directly by the IGB. AWB always acted on the basis that the Security Council had approved the inland transport terms underlying AWB's payments to Alia.

There was plenty of evidence indicating that Alia was an established transportation company performing actual services. AWB and Alia regularly corresponded on a range of commercial issues normally associated with the provision of trucking services, including among other things why truck shortages delayed unloading, AWB's requests for additional trucks to speed up port operations and payment issues. From time to time AWB representatives met Alia representatives in their offices in Jordan or communicated by telephone to discuss expediting wheat shipments through the port to minimize demurrage costs; which unique to the Iraq market were borne by AWB. To all appearances Alia was a busy commercial company operating both in Jordan and Iraq (and remains so today). There was nothing in the relationship between AWB and Alia to suggest to AWB Alia was not performing a service.

AWB's conduct in not questioning the increases in the trucking fees can be understood.

First, AWB viewed the arrangements from the perspective that Alia was a legitimate trucking company and actually providing the inland trucking services.

INDEPENDENT INQUIRY COMMITTEE INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME

REPORT ON PROGRAMME MANIPULATION

CHAPTER THREE

HUMANITARIAN GOODS TRANSACTIONS AND ILLICIT PAYMENTS

25/10 2005 21:43 FAX 0396023436

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Secondly, but for the amount of the fees nothing in the OFF Program changed insofar as AWB was concerned and AWB staff are used to operating in markets where fees fluctuate significantly. No one ever suggested to AWB that the trucking costs included "after sales service fees," and AWB never paid fees characterized in that way. Thirdly, the imposition of the fees was revenue neutral to AWB. Accordingly, those at AWB responsible for making the payments to Alia had little reason to focus on them closely. Fourthly, AWB's expectation was that the UN and in particular the 661 Committee were supervising the OFF Program. That reliance factor cannot be overstated. Hearing no objection from the 661 Committee, AWB continued to do what it was expected to do, namely, provide the large volumes of wheat required by its OFF Program contracts.

The payment of the higher trucking costs occurred entirely in circumstances condoned by the 661 Committee. As the IIC's 7th September 2005 report reveals, the 661 Committee considered the general question of trucking fees in April 2001, at roughly the time AWB started to pay the higher trucking fees. Not only did the 661 Committee take no action, but the history of the 661 Committee reveals the resolve of member countries to block efforts to prevent or even investigate so-called kickbacks under humanitarian contracts. Australia was not a member country of the 661 Committee and so had no way of knowing what the 661 Committee knew at the time.

Moreover, self evidently, AWB was part of an elaborate deception by the regime.

Assuming that it is concluded that some officer of AWB should have suspected that the transportation fees were unreasonable or that they were not being expended on transportation, that does not justify a conclusion that AWB should have known either of these matters. If AWB had made inquiry of Alia or IGB, there is nothing to suggest that inquiry would have discovered what the Committee has discovered after its intensive investigation. AWB had no capacity to investigate the correctness of such response as Alia and IGB might choose to give. And if AWB had made inquiry of the UN, based on findings made to date by the Committee, it most probably would have elicited the response that the payment of high inland transportation fees by suppliers was common and had not attracted any UN response. Accordingly, it would be incorrect to think that the making by AWB of an inquiry would have resulted in the acquisition by AWB of knowledge of wrongdoing. For this reason AWB's failure to make inquiry does not of itself justify a finding that AWB ought to have known what is now known.

On this issue, it is of fundamental importance that the focus of attention is on what was actually known to AWB at the relevant time, not on the facts as they have now been uncovered by the Committee after extensive investigation. A striking illustration of this point is the contrast between Alia as it is now described by the Committee (with the benefit of the knowledge it has acquired) and Alia as it was seen by AWB during the OFF program, as outlined above. The Committee has had access to the extensive records of the Iraqi authorities and other entities. These records were neither known to, nor accessible by, AWB at the material time. It is of note that these records do reveal that in fact part of the monies paid to Alia by way of transport fees were actually expended by the government on transport and related costs.

AWB should not be singled out because the size of its commercial contracts caused AWB to pay so much in trucking fees. AWB paid the largest amount of trucking fees only because it was the largest supplier of foodstuffs under the OFF Program. AWB never acted in a manner suggesting complicity in a wrongful endeavour. It never acted secretly. Not a single instance has emerged of any concealed payment by AWB to anyone in Iraq. All payments were recorded in AWB's books and records as Pool costs incurred in the ordinary course of business. AWB has fully cooperated with the Committee's investigation, making senior

INDEPENDENT INQUIRY COMMITTEE INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME

REPORT ON PROGRAMME MANIPULATION
CHAPTER THREE
HUMANITARIAN GOODS TRANSACTIONS AND ILLICIT PAYMENTS

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officials available for interviews and providing 24,000 pages of documents to the Committee. It is always debatable what someone "should have known" particularly with the benefit of hindsight and after the completion of a thorough and rigorous investigation and analysis of all the circumstances. On balance, the fairest interpretation of the circumstances is that AWB was an unwitting participant in an elaborate scheme of deception devised by the regime.

Yours sincerely,

Andrew Lindberg
 Managing Director

Brendan Stewart
 Chairman

Source: IIC final report, pp. 395–399; Ex 13, UNO.0005.0001 at 0402–0406.

5.47 Table 6 showed that Alkaloids of Australia entered into one contract for the sale of hyoscine butyl bromide with a face value of US\$836,252. It showed contract disbursements of US\$923,867. The table noted that the 'evidence of illicit payments' was based entirely on projections.⁴¹ Table 7 repeated the information in Table 6 but added that there was a 'levied ASSF' (after-sales-service fee) of US\$76,023 and there was 'paid ASSF' of US\$83,988.⁴² The table also stated that the 'company denies that it made payments to the Government of Iraq or its agents in violation of Programme'.⁴³ Table 8 repeated the information in Table 7 but added that the 'projected ASSF' levied or paid was 'based on Government of Iraq policy documents'.⁴⁴

Rhine Ruhr Pty Limited

5.48 The Independent Inquiry Committee's final report made no reference to Rhine Ruhr Pty Limited other than in Tables 6, 7 and 8, annexed to the report. Table 6 indicated that the company entered into one contract for the sale of pipes with a face value of US\$181,181 and that 'contract disbursements' were US\$197,520.⁴⁵ It noted that the figures were 'based in whole or in part on actual data'. Table 7 repeated the data in Table 6 but added that there was 'levied ASSF' of US\$16,470⁴⁶ and there was 'paid ASSF' of US\$16,470; it noted that these reported amounts were 'based entirely on actual data'. It also stated that 'inland transportation fees' of US\$1,500 were paid. It noted that the company had not responded to the Committee's letter of notice.⁴⁷ Table 8 repeated the information in Table 7 but stated that the 'levied ASSF' figure was based on company correspondence and documents, the 'paid ASSF' was based on 'ministry financial data', and the figure for 'inland transportation fees' was based on 'other documents'.⁴⁸

Notes

- ¹ Independent Inquiry Committee into the United Nations Oil-for-Food Programme, 'Terms of Reference', <<http://www.iic-offp.org/reference.htm>>, viewed August 2006.
- ² Final report, p. 1; Ex 13, UNO.0005.0001 at 0008.
- ³ Final report, p. 1; Ex 13, UNO.0005.0001 at 0008.
- ⁴ Final report, p. 1; Ex 13, UNO.0005.0001 at 0008.
- ⁵ Final report, p. 2; Ex 13, UNO.0005.0001 at 0009. All references to dollars are to US dollars.
- ⁶ Final report, pp. 4–5; Ex 13, UNO.0005.0001 at 0011–0012.
- ⁷ Statement attributable to the spokesman for the Secretary-General on the final report of the Independent Inquiry Committee, United Nations <<http://www.un.org/apps/sg/sgstats.asp?nid=1760#>>, viewed August 2006.
- ⁸ Final report, Table 6: Humanitarian goods purchased by the Government of Iraq, by supplier (all amounts in USD), pp. 17, 26, 54; Ex 13, UNO.0005.0001 at 0024, 0033, 0061. Table 6 of the IIC's final report stated that the category of goods supplied by Rhine Ruhr Pty Ltd was pipes.
- ⁹ <www.iic-offp.org/documents/res-1538.htm>, viewed August 2006.
- ¹⁰ <www.whitecollarcrimefyi.com/kickbacks.html>, viewed August 2006.
- ¹¹ Final report, p. 249, fn 387; Ex 13, UNO.0005.0001 at 0256.
- ¹² Final report, pp. 253–4; Ex 13, UNO.0005.0001 at 0260–0261.
- ¹³ Final report, p. 254; Ex 13, UNO.0005.0001 at 0261.
- ¹⁴ Final report, p. 255; Ex 13, UNO.0005.0001 at 0262.
- ¹⁵ Final report, p. 255; Ex 13, UNO.0005.0001 at 0262.
- ¹⁶ Final report, pp. 255–7; Ex 13, UNO.0005.0001 at 0262–0264.
- ¹⁷ Final report, p. 257; Ex 13, UNO.0005.0001 at 0264.
- ¹⁸ Final report, pp. 258–60; Ex 13, UNO.0005.0001 at 0265–0267.
- ¹⁹ Final report, p. 260; Ex 13, UNO.0005.0001 at 0267.
- ²⁰ Final report, p. 261; Ex 13, UNO.0005.0001 at 0268.
- ²¹ Final report, pp. 263–4; Ex 13, UNO.0005.0001 at 0270–0271.
- ²² Final report, pp. 265–6; Ex 13, UNO.0005.0001 at 0272–0273.
- ²³ Final report, p. 266; Ex 13, UNO.0005.0001 at 0273.
- ²⁴ Final report, pp. 269–70; Ex 13, UNO.0005.0001 at 0276–0277.
- ²⁵ Final report, pp. 270–2; Ex 13, UNO.0005.0001 at 0277–0279.
- ²⁶ Final report, p. 273; Ex 13, UNO.0005.0001 at 0280.
- ²⁷ Final report, pp. 273–5; Ex 13, UNO.0005.0001 at 0280–0282.
- ²⁸ Final report, p. 276; Ex 13, UNO.0005.0001 at 0283.
- ²⁹ Final report, pp. 276–8; Ex 13, UNO.0005.0001 at 0283–0285.
- ³⁰ Final report, pp. 280–2; Ex 13, UNO.0005.0001 at 0287–0289.
- ³¹ Final report, p. 285; Ex 13, UNO.0005.0001 at 0292.
- ³² Final report, p. 288; Ex 13, UNO.0005.0001 at 0295.
- ³³ Final report, pp. 302–5; Ex 13, UNO.0005.0001 at 0309–0312.
- ³⁴ Final report, p. 306; Ex 13, UNO.0005.0001 at 0313.
- ³⁵ Final report, pp. 392–3; Ex 13, UNO.0005.0001 at 0399–0400.
- ³⁶ Final report, pp. 311–12; Ex 13, UNO.0005.0001 at 0318–0319.
- ³⁷ Final report, pp. 312–325; Ex 13, UNO.0005.0001 at 0319–0332.
- ³⁸ Final report, pp. 395–9; Ex 13, UNO.0005.0001 at 0402–0406.
- ³⁹ Final report, Table 6: Humanitarian goods purchased by the Government of Iraq by supplier (all amounts in USD), p. 17; Ex 13, UNO.0005.0001 at 0024; Table 7: Actual and projected illicit payment on contracts for humanitarian goods summary, by supplier (all amounts in USD), p. 17; Ex 13, UNO.0005.0001 at 0024; Table 8: Actual and projected illicit payments on contracts for humanitarian goods summary, by supplier and contract (all amounts in USD), p. 37; Ex 13, UNO.0005.0001 at 0044.
- ⁴⁰ Final report, p. 534; Ex 13, UNO.0005.0001 at 0541.
- ⁴¹ Final report, Table 6, p. 17; Ex 13, UNO.0005.0001 at 0024.
- ⁴² Final report, Table 7, pp. 17, 190; Ex 13, UNO.0005.0001 at 0024, 0197.
- ⁴³ Final report, Table 7, pp. 17, 190; Ex 13, UNO.0005.0001 at 0024, 0197.

⁴⁴ Final report, Table 8, p. 37; Ex 13, UNO.0005.0001 at 0044.

⁴⁵ Final report, Table 6, p. 54; Ex 13, UNO.0005.0001 at 0013, 0061. Although Table 6 of the ICC's final report stated that Rhine Ruhr Pty Ltd supplied pipes, in fact it supplied parts and equipment that together constituted value trays for oil and gas refineries.

⁴⁶ Final report, Table 7, pp. 53, 190; Ex 13, UNO.0005.0001 at 00060, 0197.

⁴⁷ Final Report, Table 7, p. 53; Ex 13, UNO.0005.0001 at 0060.

⁴⁸ Final Report, Table 8, p. 106; Ex 13, UNO.0005.0001 at 0113.

6 The Letters Patent

- 6.1 Letters Patent were originally issued on 10 November 2005. Appendix 2 is the Letters Patent in their final form, consolidated to include all subsequent amendments.
- 6.2 On 3 February 2006, having heard evidence relating to a transaction known as the 'Tigris transaction' (also referred to as the 'Tigris debt'), which involved AWB Limited and other companies not referred to in the Independent Inquiry Committee's final report, I gave reasons why I regarded it as appropriate to approach the Attorney-General seeking an extension of the terms of reference to enable me to make findings in relation to all parties involved in the Tigris transaction, not just AWB.¹ On 3 February 2006 I wrote to the Attorney-General enclosing a copy of my statement and a draft of the extended terms of reference sought. Shortly stated, it seemed to me to be incongruous and inappropriate that, in examining the Tigris transaction, which involved three Australian companies, I could make findings regarding one only, as it was the only one of the three referred to in the IIC's final report. Figure 3.1 in Appendix 3 is a copy of the letter and the statement of 3 February 2006 together with the suggested extended terms of reference.
- 6.3 On 6 February 2006 Letters Patent amending the original Letters Patent were issued.
- 6.4 On 3 March 2006 I wrote again to the Attorney-General, requesting an extension of time to report until 30 June 2006 (Figure 3.2 in Appendix 3).
- 6.5 On 10 March 2006 Letters Patent amending the prior Letters Patent by extending the time for reporting to 30 June 2006 were issued.
- 6.6 On 8 March 2006 Senior Counsel for AWB Limited questioned the width of the words 'decision, action, conduct, payment or writing'. He contended that unless such 'decision, action, conduct, payment or writing' was mentioned in the IIC's final report, it was beyond my terms of reference.² He further contended that it was not open to the Inquiry to investigate or report on internal inquiries made by AWB or its employees or consultants, or the response of AWB to the outcome of such inquiries, or the IIC final report. I did not agree with either submission. Nonetheless, for the avoidance of any uncertainty I requested amended Letters Patent to clarify the expressions used.

- 6.7 On 9 March 2006 I wrote to the Attorney-General seeking certain amendments clarifying, and if necessary expanding, the terms of reference to incorporate matters that, in my view, fell within the existing terms of reference. Figure 3.3 in Appendix 3 is a copy of my 9 March 2006 letter.
- 6.8 On 17 March 2006 Letters Patent amending the prior Letters Patent were issued.
- 6.9 On 15 June 2006 I wrote to the Attorney-General requesting an extension of time to report until 29 September 2006 (Figure 3.4 in Appendix 3).
- 6.10 On 22 June 2006 Letters Patent amending the prior Letters Patent by extending the time for reporting to 29 September 2006 were issued.
- 6.11 On 21 September 2006 Letters Patent amending the prior Letters Patent by extending the time for reporting to 24 November 2006 were issued.

Constitutional validity of the Letters Patent

- 6.12 The terms of reference require me to consider whether there might have been breaches of State laws. They also require me to decide whether, should I find there might have been a possible breach of State laws, the question should be referred to the relevant State agency. Section 6P of the *Royal Commissions Act 1902* confers on me a power to communicate information or evidence which the Inquiry may have obtained that 'relates, or that may relate' to a contravention of a law of a State to nominated persons, including the Attorney-General of a State and the Commissioner of Police of a State.
- 6.13 AWB submitted:

The Commission is authorised by its Terms of Reference to investigate possible breaches of Commonwealth, State and Territory laws. As a matter of constitutional law, it is clear that it cannot investigate State offences unless the Commonwealth would have had power to enact that offence.

The authority for the submission was said to be *R v Hughes* (2000) 202 CLR 635. It was not clear whether AWB was submitting that I could not investigate and report on whether there might have been a breach of the State laws referred to in submissions—namely, breaches of the *Crimes Act 1958* (Vic), in particular ss. 82, 194 and 195.

- 6.14 I wrote to the Attorney-General, seeking the Solicitor-General's advice on the constitutional issue perhaps raised. Had AWB raised the issue when the Letters Patent were first read at the commencement of the Inquiry—as it should have if it wished to take such a point—and had it been thought there

was any validity in the submissions, no doubt the Commonwealth would have approached the Government of Victoria, seeking its agreement to confer upon me State Letters Patent in terms identical to those of the Commonwealth. That is the usual practice to resolve any perceived constitutional difficulties.

- 6.15 The Solicitor-General advised that there is no basis to doubt the constitutional validity of either the Letters Patent or the *Royal Commissions Act 1902*.
- 6.16 I agree with that advice and have acted on the basis that both the Letters Patent issued pursuant to the *Royal Commissions Act 1902* and other Commonwealth powers and s.6P of the Act are constitutionally valid exercises of the power of the Commonwealth.

Interpretation of the Letters Patent

- 6.17 The Letters Patent require that I report on whether certain matters ‘might have constituted a breach of any law of the Commonwealth, a State or Territory’. This term is identical to that in the Letters Patent establishing the HHH Royal Commission. Justice Owen, sitting as the Royal Commissioner, wrote:

Paragraph (b) of the terms of reference also refers to conduct that ‘might’ constitute a breach of the law. The question is whether I have the power to make specific findings as to whether, for example, a civil cause of action or a breach of the criminal law has been made out on the evidence. Whatever might be the strict answer to that question, the terms of reference do not specifically require me to make findings of the kind identified. I am not required to decide whether there has been a breach of the law, and I have not done so. The terms of reference require me to determine whether there *might* have been a breach of the law.

There are several reasons for following that course. First, a finding in those terms would not be binding on or enforceable against anybody. It could become binding or enforceable only as a consequence of subsequent proceedings before or actions by other bodies. For example, a finding that the law has been breached is of no effect until it has been made by a court of competent jurisdiction.

Second, specific findings of that type could give rise to the serious risk of inconsistency with subsequent findings by courts or other bodies whose task it is to make binding and enforceable determinations in these areas. The rules of evidence would apply in any subsequent proceedings; they do not apply in this inquiry. The practices and procedures in the courts before which proceedings might subsequently come will be quite different from those adopted in the inquiry and include additional evidentiary and other safeguards. For these reasons alone, the inquiry’s findings of fact may not necessarily be the same as those that a court would make. This explains why, when expressing conclusions that there might have been a breach of the law, I use phrases such as ‘If, as I have found ...’ or, after referring to intermediate findings, ‘On this basis ...’

Third, an expression by me of a concluded view could prejudice any subsequent proceedings. This is especially so because the evidence adduced in the later proceedings may differ from that presented to the inquiry ...

Thus, a finding that a person might have breached the law in a particular respect does not carry with it a finding that the person is guilty of a criminal offence or is liable to a civil penalty. If those charged with responsibility for considering the Royal Commission's findings deem it appropriate to initiate proceedings, it will be up to the relevant court to determine the guilt or civil liability of the person concerned.

In the submissions of some of the parties there was a suggestion that I should be satisfied either beyond reasonable doubt or on the balance of probabilities before concluding that there might have been a breach of the law. This would be contrary to the plain meaning of the terms of reference. For example, if I were to pronounce myself satisfied beyond reasonable doubt that certain conduct satisfied all of the elements of a particular criminal offence, I would in effect be saying there *had* been – not that there *might have* been – such a breach.

There is a further reason for declining to make findings of criminal (or, for that matter, civil) liability. A court makes legally binding determinations and because of that it will not make a finding unless it is satisfied to a specific standard. My determinations are not legally binding and there is no specific standard to which I must be persuaded before making a finding that there might have been a breach of the law.

The use of the word 'might' (rather than, for example, 'may') in paragraph (b) is significant. As a matter of language, 'may' suggests a serious possibility and 'might' a more remote possibility; it is a lower threshold. This distinction has been recognised in the authorities. Further, some parties argue that the words 'may' and 'might' are often used interchangeably. Given the gravity of the matters before me, I did not reduce the level of persuasion on account of the use of the word 'might'. It does, however, reinforce the proposition that it is not my role to find that impugned conduct actually contravenes the law. It follows that the threshold is still short of that required by the criminal or civil standards of proof. Talking in terms of civil or criminal standards of proof – that is, the 'balance of probabilities' or 'beyond reasonable doubt' – is not appropriate: the use of 'might' suggests possibilities (albeit real ones) rather than probabilities. Nor is it appropriate to use tests that are applied in, for example, committal hearings and applications for leave to appeal or for interlocutory injunctions.

Accordingly, phrases with which lawyers are generally familiar – such as 'a prima facie case', 'an arguable case' or 'a serious issue to be tried' – are not apt to describe the intellectual process demanded by the making of findings following an inquiry of this type. In any event, I am reminded of the passage in *A v Hayden* where Dawson J warned against being misled by overly strict application of verbal formulas.

I assessed each matter by looking at the evidence conscientiously and dispassionately and, where there were competing hypotheses, weighing them against the background of all available and relevant material. I then employed a process of inductive reasoning to make findings of fact and draw inferences that are rationally based although not binding in the sense that they do not give rise to

legally enforceable rights and obligations. The purpose of this process was to see whether there was sufficient evidence to warrant consideration of the question of future proceedings. Having completed that process, I formed conclusions—in accordance with the language of the terms of reference—about whether there might have been a breach of the law.

Even though it is not part of my role to see whether the facts so found would justify a conclusion measured against either the criminal or civil standard of proof, I have not acted flippantly or according to whim. I approached the task from the viewpoint that the result must be intellectually sustainable and must be tempered by restraint. To the forefront of my thinking was the passage in the judgment of Dixon J in *Briginshaw v Briginshaw*:

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.

As the High Court made clear in *Neat Holdings Pty Ltd v Karajan Pty Ltd*, there are only two legal standards of proof, and *Briginshaw* does not establish a third. The approach enunciated in the authorities reflects the conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct. Thus, the more serious the allegation the greater the caution needed in deciding whether to make any particular finding. In this instance the relevant findings are those that are necessary to allow me to report whether there might have been a breach of the law.

In looking at each suggested breach of the law, I bore in mind the public interest in alleging illegal activity against an individual only in cases where the circumstances justified it. I was also mindful of the individual's private interest in the protection of reputation. In carrying out the task I took the following steps:

- considered all elements of the law said to have been breached
- reviewed the evidence, as adduced in the course of the Commission's hearings, relevant to each element
- determined whether there is logically probative material on each element that might be accepted
- took into account factors that might influence the possibility that each element could be established in a court.³

6.18 I respectfully agree with that analysis and followed the same reasoning and processes. Only after conducting the process referred to in the four dot points last quoted did I make a determination whether the matters being considered *might* have constituted a breach of the law.

6.19 Paragraph (b) of the terms of reference requires that, if I form the view that there *might* have been a breach of a law of the Commonwealth, a State or a Territory, I consider whether the *question* of criminal or other legal

proceedings should be referred to the relevant Commonwealth, State or Territory agency.

6.20 The use of the phrase ‘the question of’ makes plain that what may be referred is not the bringing of criminal or other legal proceedings but the *question* of whether such proceedings should be brought. Whether such proceedings are to be brought is not a matter for me to decide. That is a decision to be taken by the relevant agency after that agency has considered the question so referred. Referring such a question does not constitute a recommendation that such proceedings be brought. Rather, it means ‘there is sufficient evidence to warrant the agency’s consideration of whether or not to initiate proceedings’.⁴ The ‘evidence’ on which I based my decision to refer a question whether proceedings should be brought was the material placed before the Inquiry, not necessarily evidence that would be admissible in civil or criminal proceedings in a court.

6.21 Many factors were taken into account in reaching a decision to refer to the relevant agency the question whether proceedings should be brought. When a view was formed that there might have been a breach of the law, I had a disposition towards that question being considered by prosecuting authorities. Possible breaches of the law should not go unexamined. However, in reaching my decision I took into account, amongst other factors, the seriousness of the conduct, the seniority of the persons involved, the quality of available evidence, and the public interest in the possibility of successful proceedings being brought.

6.22 AWB submitted that, in reaching my determination whether to refer ‘any of the matters raised by Counsel Assisting’ to a prosecuting authority, I should have regard to certain matters.⁵ The submission erroneously overlooked that what I must decide is not referral of a ‘matter’ or ‘finding’ but rather ‘the question’ of criminal or other legal proceedings. Putting that to one side, it was contended I should have regard to:

- the standard of proof, should prosecuting authorities determine to commence criminal proceedings
- the burden of proof on prosecuting authorities
- the ‘competence and compatibility’ of admissible evidence.

I did not overlook such matters in reaching my conclusions.

6.23 AWB submitted that, if I was of the view that an offence might have been committed and there should be a reference to an appropriate authority, I should not make public that recommended reference.⁶ In this instance I do not

agree with that submission for several reasons. First, the Letters Patent require that I report on that matter. Sound reasons would need to be advanced why my recommendations in that respect should not be included in that portion of the report likely to be tabled in the Parliament. Second, it was not demonstrated that AWB or its officers would be harmed by such publication. Indeed, they may be benefited by publication of my recommendations, which are narrower in compass than the submissions of Counsel Assisting. The Inquiry did not make those submissions available to the media or the public, restricting them to persons who may have had an interest in responding to them. Nonetheless, there was published in the media, contrary to a non-publication order I made, aspects of those submissions. It is important that the true position of my findings and recommendations be clarified. Third, as I repeat, a reference by me to an appropriate authority is not a recommendation that a prosecution be brought. I refer only the question whether such proceedings should be brought. It is for others to decide that question. Whether the prosecuting authorities decide to bring proceedings flowing from references from the Inquiry will be determined by such authorities in accordance with their usual considerations, including difficulties of proof in a court of law.

A commissioner's role: amendment of Letters Patent

6.24 There was much parliamentary and public debate about the scope of the Letters Patent. In particular, there was debate about whether the terms of reference permitted me to make findings of illegality against the Commonwealth or any of its officers. On 3 February 2006 I made a statement that the Letters Patent did not permit me to make such findings (see Figure 3.1 in Appendix 3).⁷

6.25 On 3 February 2006 I said:

The present terms of reference ... do not permit me to make findings of illegality against the Commonwealth or any of its officers.

13. It is not the function of a Commissioner exercising the powers of a Royal Commission to set his terms of reference. That is the function of the Executive Government. However, if in the course of exercising conferred powers, a Commissioner enquiring into possible illegality by nominated companies or persons, encounters material which might constitute illegality by others, it may be appropriate for the Commissioner to suggest to the Executive Government that the terms of reference be expanded to permit the Commissioner to examine that prospective illegality by others.
14. Accordingly, if, during the course of my inquiry, it appears to me that there might have been a breach of any Commonwealth, State or Territory law by

the Commonwealth or any officer of the Commonwealth related to the subject matter of the terms of reference, I will approach the Attorney-General seeking a widening of the terms of reference to permit me to make such a finding.

15. That position has not been reached. The position may change as inquiries continue and evidence is called.⁸

6.26 I closely examined the role of the Commonwealth, and particularly that of the Department of Foreign Affairs and Trade, in relation to the operation of the Oil-for-Food Programme, with particular emphasis on the Department's role in the export of wheat to Iraq by AWB during the programme.

6.27 I found no material that is in any way suggestive of illegal activity by the Commonwealth or any of its officers. There was thus no basis for my seeking any widening of the terms of reference in that respect.

6.28 By letter dated 10 March 2006 the Honourable KM Rudd MP, Shadow Minister for Foreign Affairs, Trade and International Security, wrote to me:

In relation to the scope of the Terms of Reference I respectfully submit that you should seek by way of expansion a change in the Terms of Reference which will give you power to investigate and make findings about compliance by Australia with the international obligations imposed on it by reason of Art 25 of the *Charter of the United Nations* by reason of cl 4 of UNSCR 661, as well as the performance of the Minister of State for Foreign Affairs and Trade and officers of the Commonwealth advising him with respect to the Minister's functions under subreg 13CA(2) of the *Customs (Prohibited Exports) Regulations 1958* – all specifically and only with respect to the conduct of the three Australian companies mentioned in the Volcker Report.⁹

Mr Rudd's letter was accompanied by a submission and opinion of Mr Walker SC.¹⁰

6.29 The solicitor for the Inquiry responded, stating:

As Mr Walker correctly states in his opinion, it is not the function of a commissioner to determine his terms of reference. Seeking amendment to clarify terms of reference, or to address peripheral and anomalous circumstances which arise during the course of an inquiry may be regarded as appropriate conduct by a commissioner. However, it would not be appropriate for a commissioner to seek amendment of the terms of reference to address a matter significantly different to that in the existing terms of reference. The suggestion, implicit and perhaps explicit in the opinion and submission forwarded by you, that the Commissioner should seek amendments to the terms of reference to enable him to determine whether Australia has breached its international obligations, or a Minister has breached obligations imposed upon him by Australian regulations falls, with respect, within the latter category.

It is, of course, open to the executive government to change the terms of reference. That is a different matter to whether it is appropriate for a commissioner to seek such a change.¹¹

- 6.30 In my view, the solicitor for the Inquiry's view expressed in his letter is correct.
- 6.31 Royal commissions and executive commissions of inquiry have a long history, dating back in England almost 500 years.¹² For the last 200 years they have played an important part in government, being a means whereby government can inform itself about matters upon which it may be appropriate for government to consider legislative or executive action. The nature of royal commissions or commissions of inquiry is investigative. It is the function of the executive government to define the scope of that which it wishes to have investigated. To that end, s. 1A of the *Royal Commissions Act 1902* provides that the Governor-General may issue a commission authorising a nominated person 'to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth'.
- 6.32 This makes plain that the obligation of the person receiving the Letters Patent is to inquire into the matter so specified by the Governor-General. The law is clear that terms of reference contained in Letters Patent are not to be narrowly construed, but this does not mean that a 'Commission can go off on a frolic of its own'.¹³ The premise upon which Letters Patent are issued is that the Executive Government knows the subject matter, and the scope of the subject matter, into which it wishes an inquiry to be conducted. It is not for a commissioner appointed to conduct such an inquiry to presume that he or she is the custodian of the public interest or the person authorised to determine the scope of any inquiry that might be related to or connected with the 'peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth'. The *Royal Commissions Act 1902* confers that power on the Executive Government exercised through the Governor-General.
- 6.33 That does not mean that a commissioner conducting an inquiry should not seek an amendment to clarify that which the Executive Government intended or suggest an amendment affecting a matter peripheral to the subject matter the Governor-General has directed to be investigated. Such a request is properly to be regarded as ancillary to the exercise of the powers conferred on the commissioner. It would be altogether a different matter for a commissioner to request the Executive Government to grant him or her

powers to investigate matters materially different from the subject matter the Letters Patent require him to investigate.

6.34 The Letters Patent conclude by requiring me to ‘report the results of your inquiry and such recommendations as you consider appropriate’.

The power to make recommendations does not expand the scope of the Letters Patent or the subject matter on which I must report. It enables me to make recommendations related to that subject matter. Improvements to legislation or administrative procedures that might in the future prevent the occurrence of offences the Inquiry finds might have been committed are recommendations in that category.

Notes

¹ TRH Cole AO RFD QC, *Statement by Commissioner*, <<http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Statements>>, 3 February 2006.

² T.4158.9 and following.

³ HIH Royal Commission, *The Failure of HIH Insurance*, vol. I, Commonwealth of Australia, Canberra, 2003, pp. 10-13.

⁴ HIH Royal Commission, *The Failure of HIH Insurance*, vol. I, Commonwealth of Australian, Canberra, 2003, p. 13.

⁵ AWB submission, para. E1.

⁶ AWB submission, paras D18-19.

⁷ TRH Cole AO RFD QC, *Statement by Commissioner*, <<http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Statements>>, 3 February 2006.

⁸ TRH Cole AO RFD QC, *Statement by Commissioner*, <<http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Statements>>, 3 February 2006.

⁹ Ex 693, INQ.0011.0075.

¹⁰ Ex 693, INQ.0011.0077.

¹¹ Ex 693, INQ.0011.0072.

¹² W Harrison Moore, 'Executive commissions of inquiry', *Columbia Law Review*, 1913, vol. 13, p. 500.

¹³ *Ross v Costigan* (1982)59 FLR 184, 201 (Ellicott J). See also *Harper v Costigan* (1983) 72 FLR 140, 153-4 (Morling J); *Lloyd v Costigan* (No . 2) (1983) 76 FLR 279, 282 (Bowen CJ, Lockhart and Morling JJ); *Lloyd v Costigan* (1983) 77 FLR 294, 304 (Toohey J); and *Kennedy v Lovell* [2002] WASCA 217, [11]-[14] (Malcom CJ, with whom Murray and Steytler JJ agreed).

7 Conduct of the Inquiry: principles and procedures

Independence

7.1 From the time of the release of the Independent Inquiry Committee's final report on 27 October 2005, the involvement of AWB in the Oil-for-Food Programme, the relationship between AWB and the Commonwealth, the role of the Commonwealth in relation to obtaining UN approval of AWB contracts, and the granting of permission to export became matters of political controversy and debate. On several occasions I made it clear that this Inquiry was entirely divorced from the political debate and political considerations. I stressed the importance of my remaining independent of the Commonwealth, its ministers and senior officers, as well as of senior representatives of the Opposition. This Inquiry remained, at all times, independent. Political considerations played no part whatsoever in the conduct of the Inquiry or in the preparation of this report. My function was to perform the task given me by the Letters Patent. That is what I did.

7.2 It was reported in the media that US senators had raised questions about the 'independence' of this Inquiry. For that reason, on 3 February 2006 I clarified my position:

I am independent of the Commonwealth Government. Whilst the Commonwealth Government funds this Inquiry, just as it does the Federal Courts and their judges, Commissioners of Inquiry take no instruction from Government. I was for 10 years a judge of the New South Wales Court of Appeal and the Supreme Court of New South Wales. The New South Wales Court of Appeal is second in stature only to the High Court of Australia. Judges in Australia are not elected but are appointed for their skill, integrity and independence. Because of the principle of independence from Government, once appointed I resolved that I would not speak with Ministers of the Government or any senior officials of the Government. As a judge I swore an oath to decide matters 'without fear or favour, affection or ill will'. As a Commissioner I will adhere to that oath.¹

7.3 It was necessary for me to return to the topic of the independence of this Inquiry towards the end of the public hearings, when counsel for a witness said he wished to make 'remarks' concerning statements made by the Prime Minister in a press conference after the Prime Minister had concluded his oral evidence before the Inquiry. It was contended that the Prime Minister's remarks could be categorised as 'pre-judging' matters I would have to

determine. This was said to destroy the 'perception of independence' that should accompany the Inquiry. Counsel alluded to the fact that the Commonwealth Government established the Inquiry and appointed me. Thus my independence was, indirectly, called into question by the suggestion that I might be influenced by the Prime Minister's statements. I rejected that suggestion. I said:

I have made clear from the outset that this Inquiry is, and will remain, divorced from politics. I have publicly stated that I would not speak with senior members of the Government during the course of the Inquiry, and for similar reasons declined to correspond with Mr Rudd, the Shadow Minister for Foreign Affairs.

There is a bright line to be drawn and maintained between what I shall call the legal aspects of this Inquiry, and the politics and media commentary which accompanies the holding of this Inquiry.

Whilst I am conducting an Inquiry in exercise of the Executive power of the Commonwealth, I operate within legal constraints. The Inquiry and its report are evidence based, although I am not bound by the rules of evidence. Evidence has been sought by those assisting me in many areas. Arising from my construction of the Terms of Reference it has been necessary for persons holding high political office to be called before the Inquiry. The issue which arises is whether there can be the concurrent conduct of political debate, along with the assembling of evidence material to the Terms of Reference and the conduct of an independent inquiry.

Since the release of the final Volcker Report in October 2005 there has been an intense political debate. It has been conducted, on the one hand, by Mr Beazley, the Leader of the Opposition, and Mr Rudd. In correspondence with this Inquiry Mr Rudd has made clear that he has no material, other than that which is in the public domain, which would assist the inquiry I am required to conduct. That has not deterred his side of politics from engaging in political debate. Nor should it.

On the other side of politics, the debate has been conducted principally by the Prime Minister and the Minister for Foreign Affairs. The fact that each was called to give evidence before this Inquiry equally should not exclude them from engaging in the political debate.

There is no reason why a political debate should not be conducted separate and distinct from the conduct by me of an independent inquiry. There is also no reason why there should not be, as there has been, an expansive debate and commentary in the media regarding the conduct of, and evidence given to, this Inquiry.

The result of this intense political debate, and widespread media coverage, has been that I have been offered advice from many fronts. There has been a daily commentary on the Inquiry. I understand the topic has occupied question time for the majority of sittings this year. Politicians have indicated how I should construe my Terms of Reference, whether I should seek expanded terms, and whom I should call as witnesses. In the media, I have received advice from editorial writers, journalists, commentators and from the public as well as from a large number of academics. I have been advised of where the public interest lies, what

the outcome and conclusions of this Inquiry will be, how I should interpret the Terms of Reference, where my duty lies, and how I can fulfil or fail in that duty. There have been statements and articles which might be seen as endeavours to draw this Inquiry into the political debate.

I have observed that Counsel Assisting have been astute in their examination of witnesses to ensure that questioning did not extend to matters beyond the Terms of Reference and into political matters. Similarly, I have been careful to exclude questions which I regarded as encroaching into the political arena.

In the conduct of this Inquiry, and in the writing of my report, I have and will disregard the statements and advice given to me both by politicians and the media. I will conduct this Inquiry, and report, in accordance with the law and the evidence placed before me.²

Investigations and hearings

Sources of information

- 7.4 The Inquiry informed itself by marshalling relevant documents and calling witnesses.
- 7.5 Most documents were obtained by the issue of notices under the *Royal Commissions Act 1902*. Section 2 of that Act permits an inquiry having powers under the Act to issue a notice requiring compulsory production of documents referred to in the notice. At an early time, notices drafted in broad terms were served on AWB, Alkaloids of Australia Pty Ltd and Rhine Ruhr Pty Ltd. It was intended that the broad scope of the notices would recover all material documents. It was contemplated that sensible discussion between the solicitors for the respective parties would clarify particular areas where documents were sought, with a view to those documents being produced promptly. To some extent, discussion and cooperation had this effect. Nonetheless, it was necessary for the Inquiry to issue subsequent notices, particularly to AWB, for the production of documents and records relating to particular topics. In all, 22 notices were issued to AWB for production of documents.
- 7.6 AWB was slow to produce documents. On many occasions when a witness was called, the Inquiry received documents material to his or her examination the night before the witness was to appear; on several occasions documents were received on the morning on which the witness was to appear. This inevitably resulted in delay while counsel considered the documents prior to commencing or concluding examination of the witness.

- 7.7 I do not underestimate the difficulty of the task that confronted AWB and its legal advisers in responding to the notices issued by the Inquiry. The processes involved from AWB's viewpoint are explained in an affidavit of Ms Gillingham.³
- 7.8 AWB initially produced to the Inquiry 79 volumes of documents, being those documents it had produced to the IIC Inquiry. The 79 volumes contained few of the critical documents. Subsequently, many additional volumes of documents were produced. It was necessary for the Inquiry to examine all these volumes for relevance and materiality and slowly to piece together a chronological history of AWB's dealings with Iraq during the Oil-for-Food Programme, with particular reference to the payment of inland transportation fees. This was a slow, tedious and expensive exercise and, as much later became apparent, an exercise that AWB had, in major part, already performed.
- 7.9 The Inquiry served a substantial number of notices on various departments of the Commonwealth with a view to obtaining documents material to any knowledge of the Commonwealth concerning payments made by AWB directly or indirectly to Iraq—in particular, in relation to trucking fees. The notices were couched in wide terms in order to capture all material that might relate to any matters concerning knowledge of the Commonwealth that might constitute a defence to any knowledge-based offence that might be established by the evidence. Notices were served on the following:
- Department of Foreign Affairs and Trade
 - Department of Immigration and Multicultural Affairs
 - Wheat Export Authority
 - Austrade
 - Australian Federal Police
 - Australian Secret Intelligence Service
 - Department of Agriculture, Forestry and Fisheries
 - Department of the Prime Minister and Cabinet
 - Department of Defence
 - Treasury
 - Australian Security Intelligence Organisation

- Defence Signals Directorate
- AusAid
- Office of National Assessments
- Attorney-General's Department
- Australian Customs Service.

7.10 Cooperative arrangements were made with the solicitors for the Commonwealth and its departments and instrumentalities for production of documents pursuant to the summons.

7.11 A third source of documents was the United Nations. The United Nations has established procedures for 'law enforcements bodies' seeking access to information and documents from the IIC. Those procedures are set out in Appendix 4. In a letter dated 23 November 2005, I wrote to Counsel for the IIC requesting certain documents (Figure 5.1 in Appendix 5). On 19 December 2005, following discussion between Counsel for this Inquiry and Counsel for the IIC, I received notification from the Under-Secretary General for Legal Affairs for the United Nations, granting access to certain documents held by the United Nations (Figure 5.2 in Appendix 5). However, documents were only made available in New York. Accordingly, Senior Counsel and a solicitor went to New York in the week preceding Christmas 2005 to inspect and obtain copies of documents they regarded as material to the Inquiry. Further, the documents were made available 'for official use only, and are not to be made public in any form, either in whole or in part, without further express and written authorisation'. On 4 and 10 January 2006 I wrote to the IIC requesting permission to use the material provided by the IIC in public hearings. Confirmation of that authorisation was received by letter dated 13 January 2006 from the Under-Secretary General for Legal Affairs. My request for statements taken from witnesses to be made available and to be used by the Inquiry was declined on 13 January 2006 (Figure 5.3 in Appendix 5). A further letter dated 17 January 2006 was received from the Under-Secretary General for Legal Affairs, advising that, if a formal statement was required from any IIC staff, it would be necessary to obtain 'a limited waiver by the Secretary-General of the immunity afforded to such individuals' (Figure 5.4 in Appendix 5). In order to obtain a statement from Ms Johnston, such a limited waiver was necessary. This was duly obtained from the Secretary-General and communicated to the Inquiry by letter dated 6 April 2006 from Ms Ringler, Counsel to the IIC (Figure 5.5 in Appendix 5).

Memoranda of understanding

- 7.12 The process of obtaining information from permanent government agencies or bodies was facilitated by memoranda of understanding entered into between the Inquiry and those agencies or bodies. Appendix 6 is an example of such a memorandum.
- 7.13 The Inquiry entered into memoranda of understanding with AUSTRAC (the Australian Transaction Reports and Analysis Centre) and the Department of Foreign Affairs and Trade. These memoranda facilitated the receipt of confidential information and documents, although in the event the amount of information and documents so received was limited.

Witnesses

- 7.14 The Inquiry heard oral evidence from 75 witnesses. In addition, statements from a further 130 witnesses were tendered.
- 7.15 Prior to the commencement of public hearings on 16 January 2006, confidential hearings were held on 19, 22 and 23 December 2005 and 5 and 6 January 2006. Each of these hearings involved witnesses who were no longer employees of AWB and were not represented by the solicitors for AWB. Confidential hearings were also held involving two employees of Rhine Ruhr.
- 7.16 Public hearings commenced on 16 January 2006. They occupied 70 sitting days. Appendix 7 is a schedule of the sitting days and the witnesses called on those days. The hearings took place in a purpose-built hearing room within the structures of the Administrative Appeals Tribunal at 55 Market Street, Sydney. The hearing room was established with full electronic facilities, enabling private and public display of documents retrieved from a database. Instantaneous transcript was available. Witnesses were examined by telephone link to Beijing, China, and by video link to Washington DC.
- 7.17 The hearings in respect of Alkaloids of Australia and Rhine Ruhr each occupied one day. The balance of the hearings related to AWB, BHP and Tigris.
- 7.18 The solicitors for AWB were Arnold Bloch Leibler. On 9 December 2005 solicitors for the Inquiry wrote to ABL setting out topics in respect of which information was sought from AWB witnesses. On 12 December 2005 Mr Judd QC made application on behalf of AWB for authorisation to appear 'in relation to so much of the Inquiry as touches upon the AWB, its past and present employees'. In December 2005, prior to the Christmas break, ABL provided to the Inquiry statements from 15 witnesses. The statements were of

a general nature and, in the main, did not address the matters referred to in the letter of 9 December 2005. They were of little assistance to the Inquiry.

7.19 On the first public hearing day, 16 January 2006, Mr Rogers, a former Chief Executive Officer of AWB, gave evidence. He was separately represented by Mr Green SC. On 17 January 2006 Mr Lindberg, the then Chief Executive Officer, was called. No application was made by Mr Judd QC or any other counsel to appear on his behalf, notwithstanding that ABL had prepared his statement and a supplementary statement that was then tendered. His evidence continued through 17, 18 and 19 January. On 19 January the following exchange occurred:

The Commissioner: Mr Judd, that raises another matter which has been concerning me: have you considered the question of whether or not the interests of AWB and the interests of the considerable number of witnesses who will be called who are employees of AWB are a common interest?

Mr Judd: That is a matter which is presently under consideration.

The Commissioner: Thank you.

Mr Judd: I might reconfirm the position that we have that we are briefed on behalf of AWB.

The Commissioner: Yes, you didn't seek leave to appear for any witness and I haven't granted it.

Mr Judd: Correct.

The Commissioner: That leaves those people unrepresented, as I understand it.

Mr Judd: That is being addressed.⁴

7.20 Following this exchange, Mr Agius SC, Senior Counsel Assisting the Inquiry, indicated that the Inquiry had given notice of possible adverse evidence to ABL regarding persons who were employees of AWB and from whom statements had been received from ABL on the basis that no indication had been given by ABL it was not acting for them.⁵

7.21 Subsequently, the employees of AWB were represented by firms of solicitors and counsel different from those representing AWB. In most instances this resulted in new statements being prepared by the new counsel and solicitors for the individual witnesses. The new statements were of much greater assistance to the Inquiry than those previously provided. In every instance where counsel and solicitors sought authorisation to appear for witnesses, it was granted on 'the usual terms'.⁶

Public and private hearings

- 7.22 A commission of inquiry exercising the powers under the *Royal Commissions Act 1902* has discretion whether to conduct hearings in public or in private. Except for a few instances when the process of investigation required confidential hearings, all this Inquiry's hearings were in public. The evidence taken in confidential sessions was subsequently made public.
- 7.23 In exercising the discretion to conduct public hearings, I was conscious that conducting hearings in public had the potential to injure the reputation both of people about whom evidence was given and of people who gave evidence. Often any damage to such a person's reputation resulted from a public disclosure of that person's conduct or a view taken by the media of the quality of the witness's evidence. Counsel for witnesses complained early in the hearings that media commentary about witnesses and their evidence was inaccurate, unfair and damaging to the witnesses' reputation. It was suggested that I should correct inaccuracies in the media reports and make statements designed to correct or remedy any perceived unfairness. I declined to take that course.
- 7.24 There were several reasons for my decision not to intervene in relation to media coverage. First, the media coverage was very extensive, on television and radio and in print. To have assumed the burden of examining all that coverage, determine if it was accurate, slightly inaccurate or greatly inaccurate, and then prepare responses in order to correct any perceived inaccuracy or unfairness would have imposed upon me an impossible task. Second, editorial writers, commentators and politicians delivered daily commentaries not only on the substance of the evidence but also on what they perceived that evidence to mean and consequences that were said to flow from their various interpretations of the evidence. Frequently I disagreed with the analysis by such persons of the substance of the evidence and any consequences to be drawn from the evidence. To have engaged in a process of analysis and correction or the expression of a different view would inevitably have led the Inquiry into debate regarding political aspects associated with the Inquiry. Being determined, to the extent to which I was able, to keep the conduct of the Inquiry removed from any political aspects associated with it, that was a course I was not prepared to undertake. Third, the matters with which the Inquiry was concerned were matters of significant public interest. It is the function and obligation of the media to report such matters in such manner as they regard appropriate. It was not my function to censor the media in the performance of their task. Fourth, it would have been undesirable for me to have commented on evidence when the evidence of a witness may have been incomplete or the evidence in relation to a topic may have been incomplete. Remarks by me could have been misinterpreted as

prejudgment. It was important that my views about the accuracy, weight and consequences of the evidence be conveyed in this report after I had the opportunity to consider the evidence in its totality, to receive submissions from Counsel Assisting, and to receive submissions from companies or persons who might be adversely affected by any findings made.

7.25 The only manner by which, in practical terms, any reputational damage could have been eliminated or minimised would have been to hold the hearings in private. Excluding all the media from an inquiry into a matter of public interest is not a step to be lightly taken. Public hearings are important in enhancing public confidence in commissions of inquiry or royal commissions as they allow the public to see the inquiry at work. As Mason J emphasised in *State of Victoria v Australian Building Construction Employees and Builders Labourers Federation*, conducting a royal commission or commission of inquiry in private ‘seriously undermines the value of the Inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an Inquiry of this kind and of its Report’.⁷

7.26 For these reasons the hearings were held in public and, where held in private, the transcript of private hearings was subsequently made public.

The hearings

7.27 The hearings were conducted in accordance with Practice Note 1 (Appendix 8). Paragraph 1 of that Practice Note made clear the intention to sit Monday to Friday each week from 10.00 am to 1.00 pm and from 2.00 pm to 4.00 pm in Sydney. That had been known since the Practice Note was published on 8 December 2005. Nonetheless, at least in the early stages, all the counsel and solicitors engaged on behalf of AWB and its witnesses were from Melbourne or, in one instance, Adelaide. On 6 February 2006 Mr Judd QC, supported by Mr Forrest SC (Counsel for Messrs Long and Geary and Ms S Scales) and Mr Allen SC (Counsel for Mr Lindberg), made application that the Inquiry sit four days a week, the non-sitting day being Friday. By that time Messrs Lindberg, Long and Geary had all given their evidence, and Ms Scales was the next witness. No other counsel appearing for the individual witnesses put submissions in support of the application. The application was grounded upon the basis that travelling to and from Sydney took considerable time, leaving insufficient time to attend to document management and other matters associated with their clients.

7.28 On 8 February 2006 I rejected the application for reasons then given (Figure 9.1 in Appendix 9). The Inquiry continued to sit five days a week, except on two occasions, when special circumstances made it appropriate not

to sit on a Friday. The Inquiry frequently sat well beyond 4.00 pm, usually until about 5.30 pm each day. This was done in order to reasonably accelerate the hearings, having regard to the constraints of time imposed by the Letters Patent. Had I granted the application, and had normal court sitting hours been adhered to, it is likely that hearings would have taken an additional three to four weeks, with attendant cost.

Examination of witnesses

7.29 All witnesses were called by Counsel Assisting, as contemplated by the Practice Note. After being examined by Counsel Assisting, the witness's own counsel was invited to further examine the witness. Counsel for AWB and other witnesses were then invited to cross-examine the witness, provided application had been made to do so in accordance with directions previously given by me. After any such cross-examination, the witness's own counsel and, finally, Counsel Assisting were invited to further examine the witness.

Cross-examination

7.30 Throughout the hearings there were applications to cross-examine witnesses. There were few applications on behalf of AWB. Most applications were on behalf of Messrs Long and Geary, although counsel for other witnesses made some brief applications.

7.31 I did not always grant the applications. I considered the applications in accordance with paragraph 12 of the Practice Note, which provided:

Any witness who is legally represented who has been examined (including cross-examined) by Counsel Assisting may next be examined by his or her own legal representative and then cross-examined by or on behalf of any person considered by the Inquiry to have sufficient interest in so doing. The witness's own legal representative and finally Counsel Assisting may re-examine. At all times duplication and repetition is to be avoided.⁸

7.32 Witness statements were usually made available to counsel in advance of the witness being called. I required application to cross-examine to be made in writing in advance, with the application specifying the interest of the party seeking to cross-examine, any area of conflict between the witness's evidence and that of the witness sought to be cross-examined, and the topics in respect of which leave to cross-examine was sought. In essence, I followed the procedures approved by the Federal Court in *Kingham v Cole*.⁹ I granted leave to cross-examine only if I was of the view that the cross-examination might assist the Inquiry and that the topic on which cross-examination was sought had not been the subject of examination by Counsel Assisting. It was usually the case that Counsel Assisting examined witnesses on matters of interest to

the Inquiry. Time and monetary constraints dictated that any further cross-examination be limited to matters not so addressed.

7.33 Application on behalf of Messrs Geary and Long to cross-examine Minister Downer brought into focus the respective roles of Counsel Assisting the Inquiry and counsel for a witness. On 10 April 2006 I gave reasons which addressed that application:

7. A Commission of Inquiry exercising the powers under the *Royal Commissions Act 1902* ('the Act'), may inform itself in such manner as it regards as appropriate. It has compulsive powers which enable it to obtain documents and evidence from witnesses. It need not hold hearings at all, and any hearings it does hold need not be held in public. Speaking generally, the restriction on the powers of a Royal Commission is that any person or body who might be adversely affected by its findings must be afforded procedural fairness or natural justice. That usually exhibits itself in such a person being advised of any likely adverse finding and being given an opportunity to respond.
8. The scope and role of a person appearing before an Inquiry or Royal Commission regarding the examination of a witness is addressed by s 6FA of the Act. It provides:

Any legal practitioner appointed by the Attorney-General to assist a Commission, any person authorized by a Commission to appear before it, or any legal practitioner authorized by a Commission to appear before it for the purpose of representing any person, may, so far as the Commission thinks proper, examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by any of the Commissioners, or by the sole Commissioner, as the case may be.

9. Pursuant to s 6FA of the Act, authorisation to appear before a Commission of Inquiry must be sought. It was in all instances by Counsel and solicitors appearing for each witness. The authorisation was granted on the 'usual terms'. Those terms were:
 - (a) this authorisation to appear may be withdrawn, or made subject to altered or additional limitations or conditions at any time; and
 - (b) this authorisation to appear entitles the person to whom it is granted to participate in the proceedings of the Inquiry, subject to the Inquiry's control and to such extent as the Inquiry considers appropriate. In particular, the Inquiry may:
 - (i) limit the particular topics or issues upon which the person may examine and cross-examine;
 - (ii) impose time limits upon examination and cross-examination; and

(iii) require that submissions be presented in writing only.

10. Section 6FA distinguishes between three categories of persons appearing before such a body.
11. First, there are legal practitioners appointed by the Attorney General to assist a Commission. Such Counsel Assisting do not need the authorisation of the Commission to appear. Counsel Assisting have no 'interest' as that term is generally understood. It is the role and function of such persons to investigate and place before a Commissioner *all* material which they consider relevant to the subject matter of the inquiry. That places a broad and heavy burden on Counsel and solicitors assisting. It is because of that burden that Commissioners traditionally require all material to be tendered by, and all witnesses to be called and examined by, Counsel Assisting. That is why the Practice Note provides:
 4. Subject to the control of the Commissioner, Counsel Assisting will determine what witnesses are called, what documents are tendered to the Inquiry, and in what order they will call and examine witnesses....
 9. All witnesses will be called by Counsel Assisting. Any person wishing to have evidence of a witness or witnesses placed before the Inquiry is to notify Senior Counsel Assisting of the names of all such witnesses and provide a signed statement of their expected evidence, if possible in the form of a statutory declaration. Counsel Assisting or Inquiry staff may interview such witnesses and take further statements from such witnesses if considered necessary. It is not necessary that any such interviews or the obtaining of such additional statements occur in the presence of the person, or legal representatives thereof, who sought to have the evidence of such witnesses placed before the Inquiry. The orderly conduct of the Inquiry will be greatly facilitated if this evidence is made available without delay.
10. Application may be made directly to the Commissioner to call witnesses or place documentary material before the Inquiry only in the following circumstances:
 - (a) application has been made to Senior Counsel Assisting to call such witness or tender such documents which application has been refused;
 - (b) thereafter, the applicant has given to Senior Counsel Assisting written notice of the reasons why such witnesses' evidence or documentary material should be placed before the Inquiry;
 - (c) either:
 - (i) Senior Counsel Assisting has reaffirmed his decision not to place the evidence before the Inquiry; or

- (ii) two working days have passed since the notice referred to in (b) has been received by the Inquiry without response from Senior Counsel Assisting.

...

13. A copy of any document proposed to be put to a witness in any examination or cross-examination must be provided to Counsel Assisting the Inquiry as soon as possible after a decision is made to use the document for this purpose, and in all cases prior to its intended use.
12. The examination of witnesses by Counsel Assisting is thus to be broad ranging, covering all aspects of material which, in their view, is material to the Terms of Reference. It involves the testing of witnesses where that is appropriate, and where there is a sensible basis for there being doubt regarding evidence given. If there be conflict between the evidence of witnesses, it is the responsibility of Counsel Assisting to explore that conflict, if resolution of the conflict is material to the Inquiry's consideration of the matters in the Terms of Reference. That is why Counsel Assisting are given the first and last opportunity to examine witnesses.
13. The second category addressed by s 6FA is 'any person authorised by the Commission to appear before it'. Such persons are usually those who may be adversely affected by the Inquiry, or who otherwise may have a material interest in the Inquiry. A wide discretion is conferred upon the Commission to grant such authorisation. Here, AWB Ltd is such a person, as are its officers.
14. The third category addressed by s 6FA is 'any legal practitioner authorised by a Commission to appear before it for the purpose of representing any person'. The role of this category of legal practitioner is different to that of Counsel Assisting. They have a particular 'interest'. Their interest is the narrow one of representing a person or witness.
15. By s 6FA, the Commission retains control over the process of examination or cross-examination. No category of person has an unbounded right of examination or cross-examination. The use of the word 'may' confers a permission to examine or cross-examine 'so far as the Commission thinks proper', and only in relation to 'any matter which the Commission deems relevant to the Inquiry'.
16. Consistent with that provision is cl 12 of the Practice Note:
 12. Any witness who is legally represented who has been examined (including cross-examined) by Counsel Assisting may next be examined by his or her own legal representative and then cross-examined by or on behalf of any person considered by the Inquiry to have sufficient interest in so doing. The witness's own legal representative and finally Counsel Assisting may re-examine. At all times, duplication and repetition is to be avoided.
17. Thus, cross-examination 'may' be permitted where the person on whose behalf it is sought has a 'sufficient interest', in relation to any matter which

the Commission 'deems relevant to the inquiry', and 'so far as the Commission thinks proper'. Duplication of examination would normally not be proper as it would be of no assistance to the Inquiry. If a witness, who seeks to cross-examine another witness, has information or documents relevant to the inquiry, upon which to base a cross-examination, such information or documents ought to have been provided to Counsel Assisting, who could weigh its utility, and if thought appropriate, examine a witness upon it. The area for useful further cross-examination is thus diminished.

18. It is for these reasons that the narrow interest of a witness in challenging or testing the evidence of another witness is usually subsumed in the broader examination of Counsel Assisting.¹⁰ [references omitted]

Assessment of evidence

Emails

- 7.34 A great many emails were tendered in evidence. A problem that arises is what is to be drawn from those emails regarding questions of fact and, in particular, questions of knowledge.
- 7.35 One can assume all emails sent were received by the intended recipient's computer. Sometimes the recipient's staff may have culled emails, in which case it cannot be assumed the intended recipient read the email.
- 7.36 Where a person wrote an email, it can confidently be found that the person had the information and knowledge written. Similarly, where a recipient responded to the email, it can be confidently found that the person replying read and absorbed the content of the received email and had knowledge of that which they wrote in the response. That is so whether or not the writer of an email can now remember writing or receiving the email or its contents.
- 7.37 Where there is no response to an email the position is less clear. Circumstances may make it clear that the recipient is likely to have read and absorbed the contents. The likelihood of that being the case must be assessed by reference to other material or evidence. Circumstances to be considered include:
 - position and seniority of recipient
 - nature and content of the email and relevance to the person's position, duties and responsibilities
 - any evidence as to whether the person was in the office on day of receipt.

However, if an email is addressed to a named individual or individuals, unless circumstances justify a contrary view, one starts with a supposition that the recipient read it.

- 7.38 Where the recipient is a person to whom an email is copied by the sender, rather than addressed to the recipient, the position is less clear still. The sender obviously placed less importance on the copied recipient receiving the information or responding to the material in the email. It may be for the information of the copied recipient, but its interest to the copied recipient may be great or small.
- 7.39 Where the recipient of an email forwards it to another person, one presumes that the sender thought it of interest or important to the secondary recipient. However, the secondary recipient might take a different view.
- 7.40 I mention these circumstances because many emails were widely circulated within AWB. Caution is required in attributing to persons knowledge derived from emails unless the person was the author of the email, responded to the email, forwarded it to others (which assumes it was read and recognised as appropriate to be addressed by others) or circumstances otherwise render it likely that a person derived the information in an email.
- 7.41 I tried to apply these considerations in my assessment of the proper use to be made of the emails before me and their relationship to the frailty of human memory. I also had regard to the likely bulk of emails now received by business people, difficulties associated with the greater flow of information between people than was previously the case, and the likelihood of people remembering receipt of emails.

Legal professional privilege

- 7.42 On 12 January 2006, prior to the commencement of public hearings, AWB provided to the Inquiry a memorandum of its submissions concerning legal professional privilege. It did so on the basis that the Inquiry had summoned Mr Cooper, General Counsel for AWB, to give oral evidence and had served several notices pursuant to s. 2(3A) of the *Royal Commissions Act 1902*, seeking to compel AWB or its employees to produce various categories of documents, including documents over which AWB claimed legal professional privilege. From the commencement of the public hearings AWB claimed, on many occasions, legal professional privilege in respect of documents or portions of documents summoned by the Inquiry. Procedures evolved between the solicitors whereby documents containing materials claimed to be privileged were blanked out, with the balance being produced or, where privilege was

claimed for whole documents, it was noted that the document was not produced because of the claim for legal professional privilege. Where legal professional privilege was claimed it was maintained until a list of all documents not produced in full or in part to the Inquiry could be provided to the Inquiry. Upon production of such a list by AWB, it was intended to develop a process for determining the validity of all the claims for legal professional privilege. The Inquiry sought a complete list from AWB repeatedly from 10 January 2006, but the list was never provided. Ultimately, a document entitled 'Draft statement of contrition – Andrew Lindberg', being Exhibit 665, was tendered on 24 March 2006.¹¹ After it had been tendered and questions had been asked about it without objection from AWB, Senior Counsel for AWB claimed it had been provided to the Inquiry by mistake, and a claim for privilege was belatedly made in respect of it. Subsequently I received evidence and submissions regarding the claim. On 5 April 2006 I gave reasons for rejecting the claim for legal professional privilege for Exhibit 665.¹² Figure 9.2 in Appendix 9 shows my reasons. AWB commenced proceedings in the Federal Court of Australia, seeking orders, in effect, to maintain its claim for legal professional privilege in respect of that document. On 17 May 2006 the Federal Court dismissed AWB's application, holding, on evidence different from that presented to me, that the document was not privileged.

- 7.43 Before me, and before the Federal Court in proceedings seeking to quash my ruling in respect of Exhibit 665, AWB contended that, under the *Royal Commissions Act 1902*, a royal commissioner did not have power to determine claims for legal professional privilege. I rejected that submission. However, it was upheld by the Federal Court in *AWB Limited v Cole (No. 1)* [2006] FCA 571. An appeal from that decision was not possible as the Commonwealth, acting as the contradictor in the Federal Court proceedings – I having filed a submitting appearance in accordance with the decision of the High Court of Australia in *R v Australian Broadcasting Tribunal ex parte Hardiman* (1980) 144 CLR 13 and convention – had been successful.
- 7.44 The decision of the Federal Court upholding the submission regarding the power of a royal commissioner to determine claims for privilege overruled 104 years of practice. In my view, it rendered the efficient conduct of a royal commission impossible. That is because on each occasion a claim for privilege is raised, it would be necessary for the party raising that claim to commence proceedings in the Federal Court seeking a declaration that the claim should be upheld. In each such case the Commonwealth would need to be joined as a contradictor. The delay and expense following from such a process is obvious. It is illustrated by the fact that prior to the Federal Court ruling, AWB had

raised perhaps 30 or 40 claims for legal professional privilege before me concerning more than 1,400 documents.

- 7.45 The decision in *AWB Limited v Cole (No. 1)* was delivered on 17 May 2006. On 19 May 2006 I wrote to the Attorney-General, addressing the difficulties consequent upon the decision and requesting that consideration be given to amending the *Royal Commissions Act 1902* to confer on royal commissioners a power to decide questions of legal professional privilege, with a review of any such decision being available in the Federal Court on application by a dissatisfied party.
- 7.46 On 25 May 2006 there was introduced into the House of Representatives a Bill to amend the *Royal Commissions Act 1902*, to specifically confer such powers. The Bill made plain that the powers so conferred applied to this Inquiry. It did not, however, exclude a person making a claim of privilege from approaching the Federal Court seeking a declaration of privilege, thus leaving it to the discretion of the Federal Court to decide whether it would decide the claim of privilege or whether the claim should be decided by the royal commissioner subject to a review in the Federal Court. The failure to exclude an initial approach to the Federal Court resulted in a delay in the Inquiry's hearings of many months, with attendant cost.
- 7.47 With support from all parties in the Parliament, the Bill was passed by the House of Representatives on 31 May 2006 as a matter of urgency. It was passed by the Senate on 13 June 2006, also as urgent legislation. It was expected to receive Royal Assent on 14 June 2006, and Regulations to prescribe necessary notices were expected to be, and were, promulgated on 22 June 2006.
- 7.48 In order to minimise delay following from the need to amend the law to reverse the effect of *AWB Limited v Cole (No. 1)*, I held a directions hearing on 30 May 2006 with the aim of resolving all outstanding claims for privilege and ensuring that the Inquiry had all the documents to which it was legally entitled. At that hearing AWB announced that it intended to commence proceedings in the Federal Court to have 'any issue that requires a determination dealt with'.¹³ It pretended to do so on the basis that AWB saw the delay in awaiting promulgation as 'unacceptable from our point of view in having this matter resolved – even a number of weeks'.¹⁴
- 7.49 AWB commenced proceedings in the Federal Court on 30 May 2006. On 9 June 2006 a directions hearing of the Federal Court proceedings fixed 17 July 2006 to commence hearing the claims of AWB.

- 7.50 On 15 June 2006 the Inquiry's solicitor wrote to AWB advising that, following Royal Assent to the Bill on 14 June 2006, the Inquiry proposed to exercise the powers conferred by the Parliament on the Commissioner and would commence hearings of the privilege claims on 26 June 2006. The Inquiry could thus have addressed AWB's claims three weeks before the Federal Court could begin to do so. In my view, it was incumbent on me to seek to exercise the powers the Federal Parliament had, as a matter of urgency, conferred on the Inquiry.
- 7.51 AWB immediately sought to restrain me from exercising the powers the Australian Parliament had, as a matter of urgency, conferred on me. Its pretence that it was taking the Federal Court proceedings to avoid delay was exposed as a charade.
- 7.52 In seeking an injunction to restrain me from exercising the powers conferred by the amending Act, AWB advanced three arguments. First, it contended the amending Act was unconstitutional in that, by conferring on a body exercising the executive power of the Commonwealth the power to decide questions of legal professional privilege, it was conferring a judicial power in breach of Chapter III of the Constitution. Second, as AWB had commenced proceedings in the Federal Court, for me to seek to exercise powers conferred on me by the amended Act concurrently with the Federal Court's exercise of its powers might constitute a contempt of the Federal Court. Third, it contended that the Federal Court could, for various reasons, deal with the issues more rapidly, fairly and efficiently than the Inquiry. It was said this was particularly so because AWB would be unlikely to accept any decision I might make adverse to it and would wish then to appeal to the Federal Court.
- 7.53 On 19 June 2006 AWB sought an interlocutory injunction. Surprisingly, on 20 June 2006 the Commonwealth did not oppose grant of that relief. Instead, on 26 June 2006 it sought to have the first two issues raised dealt with separately and in advance of the third issue and, if the answer was unfavourable to AWB, to have the third issue of privilege referred back to the Inquiry for determination. The injunction having been granted on 20 June 2006, the Commonwealth's motion for a separate and prior hearing of the first two issues was adjourned until 17 July 2006, the day fixed for the hearing of the privilege claims.
- 7.54 On 17 July 2006 the Federal Court heard the argument on the Commonwealth's motion. On 18 July 2006 the Court dismissed the motion, holding that it 'was not satisfied that the separate trial of the questions proposed by the Commonwealth would be just and convenient'. The injunction against my exercising the powers conferred by the amending Act was continued.¹⁵

- 7.55 The hearing of the proceedings was subsequently refixed for 7 August 2006. The third issue—namely, had AWB established that the documents were privileged and if so, had the privilege been waived—was the subject of hearings between 7 and 11 August 2006. Prior to this, on 25 July 2006, AWB had provided to the Inquiry seven folders containing 558 documents not previously produced for which privilege was then said no longer to be claimed or pressed. On 7 August 2006 AWB finally produced a list of all documents it claimed were privileged. It then conceded that many documents for which privilege had been claimed were no longer claimed to be privileged. On the first day of the trial (7 August) AWB conceded that claims of privilege for a further eight volumes could no longer be maintained. In consequence, on 14 August 2006 yet another 541 documents were produced to the Inquiry. Ultimately some 900 documents were in contest in the Federal Court.
- 7.56 On 18 September 2006 the Federal Court gave judgment in AWB’s privilege proceedings. It rejected the claims for privilege in relation to Project Rose and the Tigris matter, holding any such claims established had been waived. The claim for privilege in relation to the ‘Iron Filings Claim’ documents was rejected on the basis that ‘the evidence establishes that the transaction was deliberately and dishonestly structured by AWB so as to misrepresent the true nature and purpose of the trucking fees and to work a trickery on the United Nations’.¹⁶
- 7.57 The documents for which the claims of privilege were rejected were received by the Inquiry on 20 September 2006. AWB’s claims for privilege thus delayed completion of hearings for many months.
- 7.58 The principal areas in respect of which legal professional privilege was claimed related to:
- investigation and reports by internal and external lawyers concerning inquiries made within AWB of the factual circumstances associated with the payment of inland trucking fees, and other fees, to Alia for Transportation and Trade, and whether such payments constituted a breach of Commonwealth, State or Territory law. This was known as Project Rose
 - legal advice given in relation to aspects of the Tigris matter
 - legal advice given in relation to the ‘Iron Filings Claim’.
- 7.59 Frequently, legal professional privilege was claimed in respect of a portion of a document but, after discussion in the hearing room or between counsel, review of the claim resulted in the claim not being maintained.

7.60 Legal advice was obtained by AWB from Sir Anthony Mason, Mr Tracey QC, Mr Richter QC, Dr Donaghue, Blake Dawson Waldron and an American, Professor Wippmann. Legal professional privilege was claimed in respect of each of those advices and of the briefs upon which the advices were sought. However, on 7 March 2006 (day 41) and 7 April 2006 (day 62) AWB accepted that, as it had disclosed the substance of the advices of Sir Anthony Mason and Mr Tracey, legal professional privilege in respect of each of those advices was waived. The documents were then produced and tendered at the hearing.

7.61 The brief to Mr Tracey was prepared by Mr Quennell, then of Blake Dawson Waldron. Mr Quennell had been engaged to conduct the factual and legal inquiry that became known as Project Rose. The brief was dated 12 May 2000, although this was a mistyping of 12 May 2004.¹⁷ Instructions to counsel stated:

Between March 1997 and February 2003 AWB exported wheat to the Iraqi Grain Board ('IGB') under the 'Oil for Food' programme administered by the United Nations. From July 1999, AWB's contracts with IGB included a provision whereby a 'trucking fee' (usually expressed in US\$ per metric ton of wheat) was added to the CIF price paid by IGB. AWB then paid the trucking fee to a Jordanian trucking company nominated by IGB.

The Oil for Food programme is currently the subject of four investigations of which instructing solicitors are aware, including an independent inquiry instigated by the UN. It is likely that AWB's trade with IGB will be scrutinised as part of those investigations. In particular, recent media reports suggest that AWB is likely to be subjected to examination of the legitimacy of its payment of the trucking fee.

Counsel is requested to advise, as to whether AWB may have:

- (i) contributed to a contravention by Australia of its obligations under UN Resolution 661 (as to which see below) and
- (ii) contravened any Commonwealth and/or State legislation (including, in particular, the Criminal Code Act 1995).¹⁸

It is to be observed that question (ii) addresses precisely the subject matter of this Inquiry, as set out in the original Letters Patent.

7.62 The import of the brief and the documents contained in it is discussed elsewhere.¹⁹ Suffice it to say that the brief contains a summary statement of:

- procedures for the provision of humanitarian supplies to Iraq
- UN contract approval procedures
- AWB's dealings with the Iraqi Grain Board before July 1999
- the Iraqi Grain Board invitation to tender – 16 June 1999

- contracts A4653, A4654 and A4655, dated 14 July 1999, and contract A4822, dated 14 October 1999
- subsequent contracts
- ‘trucking fee’ payment procedures
- AWB’s approach to the Department of Foreign Affairs and Trade
- comments on the ‘trucking fee’, including reference to various emails in which officers of AWB had made comment ‘as to validity or otherwise of the payment of the trucking fee’.

7.63 The brief also contains what is described as ‘selected AWB correspondence and materials’ for the years 1999, 2000, 2001 and following. In major part, it contains much of the documentary evidence relevant to the subject matter of this Inquiry, assembled in one folder.

7.64 The claim for legal professional privilege in respect of the Project Rose brief to Mr Tracey QC, abandoned on day 62 of the hearings, resulted in great delay and expense to the Inquiry. Had AWB produced the brief earlier, with most of the relevant documents contained in it, the course of this Inquiry would have been different, and its duration and expense much less. Whatever may be said about legal professional privilege flowing from the skill of compiling a brief, it is plain that the original documents copied in the brief were all material to this Inquiry, would have had to be produced in response to notices, and would, after the expenditure of significant time and money, be compiled by the Inquiry to give a chronological picture of the involvement of AWB and its officers in the payment of monies by way of trucking fees. Had there been frankness or real cooperation on the part of AWB, most material documents could have been produced in November 2005.

Reform of the Royal Commissions Act 1902

7.65 Royal Commissions or Commissions of Inquiry exercising powers under the *Royal Commissions Act 1902* are normally established only where a matter of public interest so requires. The purpose is normally to determine factual circumstances and make recommendations. Frequently issues relating to possible breaches of the law arise. Not infrequently, persons or companies involved in matters with which the Royal Commission is concerned have obtained legal advice in relation to relevant matters. Confidentiality may attach to communications between persons and their lawyers.

- 7.66 A conflict thus arises between the public interest in discovery of the truth which is a prime function of a Royal Commission, and the fundamental right of persons to obtain legal advice under conditions of confidentiality. The issue for consideration is whether the public interest in discovering the truth should prevail over the private interest of companies or individuals in maintaining claims for legal professional privilege.
- 7.67 It is not possible to predict generally the circumstances in which it can be said that the public interest in discovering the truth should prevail over the private interest in maintaining legal professional privilege. That decision must depend upon the issues the subject of the Royal Commission.
- 7.68 Consideration should be given to conferring upon the Governor General in Council the power to direct in the Letters Patent that in relation to the whole or certain matters within the Letters Patent legal professional privilege should not apply. That would enable a decision to be made either initially or during the course of the conduct of a Royal Commission whether the circumstances are such that the public interest should prevail over the private interest.

Issue

Circumstances may arise where it is appropriate for the public interest in discovering the truth should prevail over the private interest in the maintenance of legal professional privilege.

Recommendation 4

That consideration be given to amending the Royal Commissions Act 1902 to permit the Governor General in Council by Letters Patent to determine that in relation to the whole or a particular aspect of matters the subject of inquiry, legal professional privilege should not apply.

Public interest immunity claims

- 7.69 The Commonwealth, through the Australian intelligence community, produced to the Inquiry in response to a notice, certain classified documents. It sought orders that there not be published some of the documents so produced or the statutory declarations in support of the application for non-publication. Three statutory declarations, marked Secret 1, 2 and 3, were produced to me. The documents in respect of which the orders for non-publication were sought were in a folder marked Secret 4.
- 7.70 The grounds of the application were that the public interest required that the documents and the statutory declarations remain secret because the documents were highly classified for national security reasons and the

statutory declarations, if disclosed, might reveal information that might defeat the protection of the documents, as sought by the Commonwealth.

7.71 I was satisfied on the basis of the material before me that the claims should be upheld. I was also satisfied that it was appropriate not to make either the affidavits or the documents available to counsel appearing for AWB or witnesses and to make them available only to some counsel assisting the Inquiry. On 14 March 2006 I made orders in the following terms:

- (1) the secret statutory declarations, and secret documents, marked Secret 1, 2, 3 and 4 respectively, not be published save that:
 - a. they may be viewed by the Commissioner and nominated counsel and solicitors assisting the Inquiry being Messrs Agius SC, Wigney, Owbridge and Kamencak;
 - b. witnesses who might be expected to have seen the secret documents at the time they were officers of the Department of Foreign Affairs and Trade may be shown a copy of the secret documents and asked questions about them in a manner that does not disclose, in any way:
 - i. the contents of the documents;
 - ii. the sources of the contents of the documents; or
 - iii. the originating agency of the contents of the documents unless any particular disclosure is specifically authorised by me.²⁰

7.72 My reasons, dated 14 March 2006, are Figure 9.3 in Appendix 9. The orders were made pursuant to s. 6D of the *Royal Commissions Act 1902*.

7.73 Subsequently, it was submitted by Mr Judd QC that questions of public interest immunity should have been addressed in the Federal Court and that a person exercising powers under the *Royal Commissions Act 1902* did not have power to hear or decide such a matter. I received written submissions regarding the orders I had made from Mr Barker QC, on behalf of Mr Flugge; Mr Judd QC, on behalf of AWB; Mr Lacava SC, on behalf of Mr Stott; Mr Forrest SC, on behalf of Messrs Long and Geary and Ms Scales; and Mr Winneke, on behalf of Rhine Ruhr. They asked that I review and reverse my decision of 14 March 2006. Mr Orr QC, for the Commonwealth, provided written submissions in response.

7.74 On 30 March 2006 I gave reasons addressing each of the submissions put to me. I rejected those submissions and remade orders on that date, identical to the orders made on 14 March 2006. My reasons are Figure 9.4 in Appendix 9.

Dissemination of public materials

- 7.75 The Inquiry maintained a website – www.oilforfoodinquiry.gov.au.
- 7.76 Published on the website were notices of hearing dates, the full transcript of public hearings, all public exhibits, all statements and reasons for decisions given by me, details of the manner in which financial assistance might be sought in relation to persons involved in the Inquiry, and links to decisions of the Federal Court related to this Inquiry. Thus all members of the public, nationally and internationally, have available to them the public proceedings of the Inquiry.

The requirements of procedural fairness

- 7.77 In *Annetts v McCann* (1990) 170 CLR 596 Mason CJ, Deane and McHugh JJ said:

... when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment ...²¹

- 7.78 This Inquiry had the power to prejudice rights, interests or legitimate expectations. It is clear that the reputation of a person or organisation is an 'interest' for these purposes.²² There are no provisions in the *Royal Commissions Act 1902* that exclude the application of the principles of procedural fairness. Accordingly, the Inquiry was required to comply with the principles of procedural fairness, and its procedures were established with that in mind.

- 7.79 In *Annetts v McCann*, Mason CJ, Deane and McHugh JJ said:

[The main requirement of procedural fairness in relation to an Inquiry is that it] cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding.²³

- 7.80 Persons who may be affected by an adverse finding have no right to make submissions on the general subject of an Inquiry. Mason CJ and Deane and McHugh JJ held, when speaking of persons who may be affected by an adverse finding, that:

Their legal entitlement is confined to making submissions in respect of matters which may be the subject matter of adverse findings against them personally or against the deceased. This does not mean that their submissions must be perfunctory or limited to assertions or denials. In opposing the making of any

adverse finding, the appellants are entitled to put every rational argument open on the evidence and, where necessary, to refer to and analyse the evidence to support that argument.²⁴

Brennan J observed:

The classes of persons with ‘sufficient interest’ to attend and to be allowed to examine and cross-examine witnesses are, or may well be, larger than the class of persons against whom [an Inquiry] may contemplate making an unfavourable finding. The duty to accord natural justice applies only with respect to the latter class, who alone are entitled to insist on being heard by addressing a submission that an unfavourable finding should not be made.²⁵

And later:

The [Inquiry’s] duty to allow a person to make such a submission arises only when the [Inquiry] has reached the stage of contemplating the making of an unfavourable finding against that person. It is only at that stage that the [Inquiry] is bound to give that person notice of the possible finding and to allow that person an opportunity to submit why the findings should not be made.²⁶

7.81 To assist in the exercise of the right to make submissions, an Inquiry must:

Define the issues in respect of which there exists a possibility that he may make findings adverse to the appellants. By defining those issues he can effectively assist the identification of the topics on which Counsel can relevantly and usefully address and limit the scope of that address.²⁷

7.82 In all of the these passages the High Court focused on the right to make submissions, implying that this was the only right conferred by the rules of procedural fairness in circumstances where there was a risk that adverse findings might be made. The procedure this Inquiry adopted in relation to the possible making of adverse findings, and in relation to submissions, was designed not only to assist me in my fact-finding task but also to comply with the requirements referred to by the High Court in *Annetts v McCann*.

Notification of adverse evidence

7.83 As noted, the Inquiry conducted most of its hearings in public and posted the transcripts and exhibits on its website. Thus any person, whether they had received authorisation to appear or not, could attend public hearings and monitor the evidence given if they were disposed to do so. All persons or organisations who might be adversely affected by evidence given were granted authorisation to appear if such authorisation was sought.

7.84 The submissions of Counsel Assisting were provided to any person against whom an adverse finding was sought. These submissions contained

comprehensive reference to the evidence and documentary material said to support the findings sought. The basis for any findings was thus made apparent, well before the finding was made, to any person who stood to be affected by a finding. All persons against whom Counsel Assisting invited me to make an adverse finding were invited to respond by way of written submissions. Such persons and their counsel had access to all material tendered in the Inquiry in preparing their response.

- 7.85 The rules of procedural fairness do not, in my view, impose on the Inquiry an obligation to notify any person that evidence may be given adverse to their interests before that evidence is called. In *National Companies and Securities Commission v News Corporation Limited* (1984) 156 CLR 296 the High Court upheld the NCSC's decision to refuse to specify the substance of the case News Corporation might be required to face at the hearing, to refuse to direct that legal representatives were entitled to be present throughout the whole of the hearing, or to direct that legal representatives of News Corporation be permitted to cross-examine witnesses called at the hearing. The NCSC was obliged by statute to comply with the rules of natural justice. Regarding whether News Corporation was entitled to be made aware of the evidence against it, Mason, Wilson and Dawson JJ observed:

There comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment ... It would clearly be a denial of natural justice if the Commission in the present hearing received evidence adverse to News Corporation without providing an opportunity to News Corporation to be heard. An effective examination of such persons would require the substance of adverse information received during the investigation to be disclosed to them. Legal representation would be permitted to such witnesses with the opportunity for their further examination by counsel and for submissions to be made touching matters covered by the examination. There is no reason why the Commission should not welcome, time permitting, any request by News Corporation that further persons be called to give evidence. A hearing conducted along these lines ... would in our opinion be fair in all the circumstances.²⁸

- 7.86 Practice Note 1, by paragraphs 2 and 3, provided:

2. The Inquiry's proceedings will be as orderly and expeditious as possible. The Inquiry will endeavour to ensure that those who may be adversely affected by the evidence are treated fairly, while protecting confidentially where that is appropriate.
3. The Inquiry accepts no obligation to notify persons with authorisation to appear or other interested parties of the times and places of its hearings. Details of the public hearings arranged from time to time may be obtained from the Inquiry's Executive Officer or its Media Liaison Officer, or from the Inquiry's website www.oilforfoodinquiry.gov.au.

However, a person who, in the opinion of Counsel Assisting, may be substantially and directly interested in evidence to be produced to the Inquiry at a hearing will, if practicable, be notified prior to that hearing of the fact that it is proposed to produce the evidence to the Inquiry.²⁹

7.87 Absent satisfactory statements from witnesses, it was not possible to give persons who might be adversely affected notice of a proposed witness's evidence. Where statements were obtained from witnesses, they were made available to all persons granted authorisation in advance of witnesses being called. In fact, all persons likely to be adversely affected—except one, who declined to participate—were represented by counsel and solicitors throughout the public hearings and were present during those hearings. They were given the opportunity, where application to do so was made, to cross-examine where it was thought such cross-examination would assist the Inquiry or where otherwise they showed a special interest they wished to protect. All persons against whom Counsel Assisting sought adverse findings were given notice of the intention to seek such findings, accompanied by a detailed statement of the evidence said to support the finding sought. In this manner natural justice and procedural fairness were accorded to any person or organisation likely to be adversely affected.

The nature of an adverse finding

7.88 In the report of the Royal Commission into the Productivity of the Building Industry in NSW, Commissioner Gyles QC, as he then was, wrote:

I do not accept that in this type of Inquiry an adverse finding is the equivalent of a finding of disputed fact, of any criticism of a party, or of the exposure of evidence or material which might reflect badly on a person. Nor do I accept that a warning must be given of all possible ramifications of each piece of evidence before it can be referred to in the Report. I do agree that a party should not be confronted for the first time in the Report with a true adverse finding upon a totally new point or issue which it could not reasonably have anticipated. I do not accept that this anticipation can only come from an express statement or warning by the Commissioner or Counsel Assisting.³⁰

7.89 In the HHH Royal Commission's report, Justice Owen approved of that passage, as did I in the final report of the Royal Commission into the Building and Construction Industry.³¹

7.90 At the conclusion of public hearings I made an order directing that by a given date Counsel Assisting provide to any person against whom an adverse finding was sought submissions specifying the findings of fact that were available and ought to be found and the conclusions it was contended should be drawn from such facts if so found. I also directed that by a specified date

persons wishing to dispute the findings of fact sought, or to have made any additional findings of fact, provide submissions in reply to those of Counsel Assisting concerning conclusions to be drawn from findings of fact and provide such submissions to the solicitor assisting the Commission.

7.91 After all submissions were received, I considered the material placed before me by way of submission and counter-submission. Only after all the submissions were considered did I make any findings of fact or draw any conclusions.

Publication of Counsel Assisting's submissions

7.92 Certain branches of the media published what purported to be recommendations of Counsel Assisting that certain persons might have committed offences against various statutes. Prior to distribution of the submission of Counsel Assisting, I made a non publication order in respect of those submissions. I had publicly stated I would do so and the non publication order was published on the Inquiry's website. The media were thus aware of the non publication order.

7.93 I have referred that publication to the Australian Federal Police to investigate whether there has been a breach of s. 6D *Royal Commissions Act 1902*.

7.94 The reason I made the non publication order was to prevent unfairness to persons referred to in Counsel Assisting's submissions as being possibly the subject of adverse findings. Inevitably some damage to reputation will be occasioned by my findings that offences might have been committed, but that in unavoidable. Were I not to publish the names of those persons referred to in recommendations for referral for consideration by prosecuting authorities, but publish the names of those persons whom I have exonerated from any possible criminal conduct, deduction would readily supply the names of those referred. However those people who have been named in the media as being possibly the subject of adverse submission of Counsel Assisting but whom I have exonerated can justifiably feel aggrieved by the prior publication. That publication should not have occurred. Those persons were entitled to have, as the first publication, my findings of exoneration. I appreciate that would not have been the situation had there been oral submissions; endeavouring to give fairness to those who might be exonerated by me was one of the factors I took into consideration when deciding upon written submissions which I ordered remain confidential.

7.95 Legal advisors for many persons have submitted that the submissions of Counsel Assisting should remain confidential as their publication can only

cause harm to persons named in them. I have decided to accede to those submissions. I have made an order, pursuant to s.6D(3) of the *Royal Commissions Act 1902*, that the submission of Counsel Assisting remain confidential except for such publication to law enforcement authorities as may be necessary for the purposes of any prosecutions.

Costs

- 7.96 The cost of the Inquiry was approximately \$10 million.
- 7.97 The cost was greatly increased by two factors. The first was the non-cooperation of AWB. Since June 2003 it had been assembling relevant documents and statements within Project Rose and Project Water. It had those documents assembled by its lawyers in the usual fashion. It had legal advices on the subject matter of the Inquiry. Had it produced the documents as it had them assembled, together with the statements taken and advices received, the hearings would have been much shorter and thus less costly. Had AWB cooperated I believe the Inquiry could have been completed by the original reporting date of 31 March 2006. Instead, documents were produced only in response to notices and in an indiscriminate order, requiring sorting and analysis.
- 7.98 The second factor was the late production of documents. On day 75—28 September 2006, being the second-last day of hearings—AWB produced Exhibit 1347, an email dated 7 March 2000.³² It explained why and how AWB sought to hide the trucking payments it knew were going to Iraq. As Mr Judd QC, Senior Counsel for AWB, said:
- There is no doubt that this document falls into a category which, plainly, ought to have been provided to the Commission months ago ... it does seem to us that had the email in particular been before this Commission at a very early stage, it may well have shortened some of the Inquiry."³³
- 7.99 Had AWB cooperated with this Inquiry, produced documents it had already assembled, and produced them promptly, there would have been a considerable saving to the Australian taxpayer, the Australian wheat grower and AWB.
- 7.100 Matters related to the administration of this Inquiry are addressed in Appendix 10.

Appreciation

7.101 I wish to record my appreciation to all those who have assisted me in this Inquiry.

Notes

- ¹ TRH Cole AO RFD QC, *Statement by Commissioner*, <<http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Statements>>, 3 February 2005, para. 23.
- ² TRH Cole AO RFD QC, *Statement by Commissioner*, <<http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Statements>>, 27 April 2005, paras 7–15.
- ³ Ex 806, WST.0030.0020_R-0013_R.
- ⁴ T 900.17–39.
- ⁵ T 900.43 – T 901.23.
- ⁶ See T 4 for a definition of the ‘usual terms’. Also see below.
- ⁷ *State of Victoria and Commonwealth of Australia v Australian Building and Construction Employees and Labourers Federation* (1982) 152 CLR 25, 97. See also *Independent Commission Against Corruption v Chaffey* (1993) 30 NSW LR 21, 30, 53–54.
- ⁸ Practice Note No. 1, <http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Practice_notes>, 8 December 2005, para. 12.
- ⁹ *Kingham v Cole* [2002] FCA 45.
- ¹⁰ Reasons, Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme, <<http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Statements>>, 10 April 2006, paras 7–18.
- ¹¹ AWB.0332.0344.
- ¹² TRH Cole AO RFD QC, Reasons <<http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Statements>>, 5 April 2006.
- ¹³ T 6796.33.
- ¹⁴ T 6794.44.
- ¹⁵ *AWB Limited v Cole* [2006] FCA 913.
- ¹⁶ *AWB Ltd v Honourable TRH Cole (No. 5)* [2006] FCA 1234, [229] (Young J).
- ¹⁷ T 6319.7.
- ¹⁸ Ex 748, AWB.0416.0001_R.
- ¹⁹ See Chapter 8.
- ²⁰ Reasons, Inquiry into Certain Australian Companies in Relation to the Un Oil-for-Food Programme, <<http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Statements>>, 14 March 2006, [13].
- ²¹ *Annetts v McCann* (1990) 170 CLR 596, 598.
- ²² *Annetts v McCann* (1990) 170 CLR 596, 608, approved in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578, 592. See also *NSW v Canellis* (1994) 181 CLR 309, 330.
- ²³ *Annetts v McCann* (1990) 170 CLR 596, 600–1, 609–10, 619. See also *Ainsworth v Criminal Justice Commissions* (1992) 175 CLR 564, 581. See generally discussion in final report of the Royal Commission into the Building and Construction Industry: Royal Commission into the Building and Construction Industry, *Final Report*, vol. 2, Commonwealth of Australia, Canberra, 2003, pp. 53ff.
- ²⁴ *Annetts v McCann* (1990) 170 CLR 596, 601.
- ²⁵ *Annetts v McCann* (1990) 170 CLR 596, 609–10.
- ²⁶ *Annetts v McCann* (1990) 170 CLR, 596, 610.
- ²⁷ *Annetts v McCann* (1990) 170 CLR 596, 601.
- ²⁸ *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 324.
- ²⁹ Practice Note no. 1, <http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Practice_notes>, 8 February 2005.
- ³⁰ Royal Commission into the Productivity of the Building Industry, *Final Report*, vol. 7, Government of New South Wales, Sydney, 1992, p. 129.

³¹ Commonwealth, The HIH Royal Commission, *Final Report*, vol. 1, Commonwealth of Australia, Canberra, 2003, p. 19; Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report*, vol. 2, Commonwealth of Australia, Canberra, 2003, p. 56.

³² Ex 1347, AWB.0469.0108.

³³ T 7446.

8 AWB's approach to investigation and disclosure

- 8.1 The Inquiry's terms of reference were widened to permit and require the Inquiry to report on whether conduct of AWB in relation to or consequential upon any complaint, inquiry, investigation or allegation, or response thereto, concerning its dealings with Iraq might have constituted a breach of any law of the Commonwealth, a State or Territory.
- 8.2 It is to be expected that, when an inquiry or complaint is made regarding conduct that might be adverse to the reputation of a prominent public company, the board and management of that company would respond by requiring that the inquiry or complaint be properly investigated. Such a course is necessary to maintain the reputation of a company, its board, its management and employees. It enables the company to respond properly to the inquiry or complaint. It is also to be expected that, in endeavouring to ascertain the factual and legal circumstances material to the inquiry or complaint, a company would engage appropriate personnel and resources, including legal resources.
- 8.3 Having determined, as best it can, the factual and legal circumstances material to the inquiry or complaint, a company must then determine the approach it will adopt regarding disclosure of that which it has ascertained. The approach it adopts may be indicative of the attitude of its board or senior management and may be indicative of an open or closed culture within the company.
- 8.4 AWB professed an open, frank and cooperative culture. In the introduction to the company's Code of Conduct, Mr Andrew Lindberg, the then Managing Director, wrote:

It has become an essential element of good business practice for the Board and Executive of commercial organisations to provide a clear set of 'values' that emphasise a culture encompassing strong corporate governance, sound business practices and good ethical conduct.

...

At AWB we promote and demonstrate clearly that our business affairs and operations are at all times being conducted legally, ethically and in accordance with the highest standards of integrity and propriety. This is a fundamental principle of AWB's operations and business affairs.

...

Adherence at all times to these values and standards is essential. It will ensure that AWB maintains a reputation for high standards of business conduct, professionalism and integrity. We will ensure that AWB is proud of what it stands for as an organisation. No employee should ever feel that his or her conduct could not survive the test of public scrutiny.¹

8.5 The conduct of AWB has been the subject of ‘public scrutiny’ or questioning on four significant occasions:

- the Canadian complaint in January to March 2000²
- the US Wheat Associates complaint in June 2003³
- the UN Independent Inquiry Committee inquiry in 2004 and 2005⁴
- this Inquiry in 2005 and 2006.

The Canadian complaint: January to March 2000

8.6 In January 2000 Canada informed the United Nations that the Canadian Wheat Board had been asked to pay a deposit of US\$700,000 into a Jordanian bank account to cover ‘transport costs’ in Iraq for wheat. It was suggested by Canada that AWB had concluded contracts that included terms similar to those proposed to the Canadian Wheat Board. This led the United Nations to ask the Australian permanent mission to the United Nations to make inquiries of AWB regarding the matter. Ms Moules, First Secretary at the Australian mission, cabled the Department of Foreign Affairs and Trade in Canberra, asking that an inquiry be made of AWB. Mr Bowker (Department of Foreign Affairs and Trade) in prior general discussions with Mr Officer, AWB’s General Manager, Global Sales and Marketing, had been informed that AWB was ‘fully aware of, and respected, the obligations of the Australian Government and would continue to act appropriately’.⁵ On 18 January 2000 Mr Bowker raised the detail of the Canadian query with Mr McConville, AWB’s Government Relations officer. Without making any inquiry, Mr McConville responded, ‘This is bullshit’.⁶ He further rejected the allegations, saying, ‘AWB would continue to uphold its responsibilities towards the Australian Government in Iraq’.⁷

8.7 There is no evidence that Mr McConville made any inquiry of anyone in AWB before responding to Mr Bowker; nor is there any evidence that Mr McConville made any inquiry of anyone in AWB following his conversation with Mr Bowker. Had he made any inquiry of those with responsibility for the Iraq contracts – Mr Emons, Mr Hogan, Mr Officer or Mr

Watson—or had he looked at the contracts entered into after July 1999, or the conditions of tendering for such contracts, he would have observed that AWB had indeed entered into contracts containing clauses similar to those proposed to the Canadian Wheat Board. He also would have learnt that AWB had agreed to pay ‘discharge’, or inland transport, costs of US\$12.00 or \$14.00 per tonne.

8.8 The matter was again raised on 9 March 2000, at a meeting between Mr Nicholas (Austrade) and Mr Flugge (AWB’s then Chairman), Mr McConville and Mr Snowball in Washington. Ms Johnston (United Nations) had earlier raised with Mr Nicholas the matter of ‘irregularities’ in AWB’s contracts and the question whether there were contracts ‘parallel’ to those submitted to the United Nations. Mr Nicholas told the three AWB representatives that Ms Johnston had said a third country was concerned that AWB was making irregular payments required by the Iraqi Grain Board. AWB immediately assured Mr Nicholas that there were no irregularities in its dealings with Iraq. Although Mr Snowball was of the view that it was unnecessary to do so, Messrs Flugge and McConville agreed that the matter should be taken seriously and a full response be given to the United Nations.

8.9 In truth, the matter *was* of concern to AWB. Mr Snowball discussed it with Mr Emons, who on 15 March 2000 sent a facsimile to Mr Abdul Rahman (IGB):

We wish to advise that the office of AWB Limited 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 visits Iraq in April.⁸

8.10 On the same day Mr Snowball emailed Mr Emons, advising him that when the matter was raised by Mr Nicholas ‘we played down the issue’.⁹ He also wrote:

Bronte [Moules] confirmed that the UN were asking for information on the contract clause ... 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 contracts then I think we have nothing to worry about. We should ensure that we do provide something to DFAT when they contact you.¹⁰

- 8.11 The matter was resolved by Ms Moules providing to Ms Johnston a copy of the standard terms and conditions.¹¹ However, such terms and conditions were supplied only after that course had been agreed by Mr Emons and Mr McConville.¹²
- 8.12 AWB's attitude to this complaint was no doubt influenced by the knowledge that the complaint was made by the Canadian Wheat Board. Nonetheless, what should have been addressed was whether AWB, in agreeing to the payment of inland trucking fees through a Jordanian trucking company, was acting otherwise than in accordance with UN resolutions. Mr Emons was concerned that the method of payment of trucking fees would be discovered, and he sought the Iraqi Grain Board's cooperation in not making information available to the United Nations. Mr Snowball knew from his involvement in email correspondence in June 1999, and subsequently, that AWB was in fact paying a US dollar sum per tonne for trucking fees and that the fee was paid to the Iraqis via their maritime agents because all Iraqi accounts were frozen. Undoubtedly he knew that the Canadian complaint raised the propriety of making such payment. It was against that background knowledge that he wrote, 'If all the UN wants is some understanding on standard terms and conditions in AWB contracts then I think we have nothing to worry about'.¹³
- 8.13 It is apparent that Mr Nicholas must have raised the question of payment of trucking fees with Messrs Flugge, McConville and Snowball at a meeting on 9 March 2000 because after the meeting Mr Snowball both spoke to and emailed Mr Emons, expressing concern about the UN inquiries relating to the payment of trucking fees. This resulted in Mr Emons faxing the Iraqi Grain Board, requesting secrecy about trucking arrangements. Each must therefore have known that the United Nations regarded arrangements for payment of trucking fees as possibly breaching sanctions. Notwithstanding Messrs Flugge and McConville informing Mr Nicholas that the UN inquiries would be taken seriously, Messrs Flugge, McConville and Snowball did nothing to inquire into such transport arrangements or to determine whether such arrangements were in breach of UN sanctions.

The US Wheat Associates complaint: June 2003

- 8.14 On 3 June 2003 the President of US Wheat Associates, Mr Tracy, wrote to Mr Powell, the then US Secretary of State¹⁴:

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.¹⁵

- 8.15 Mr Lindberg responded to the allegations by letter dated 12 June 2003, addressed to Mr Tracy:

All contracts entered into between AWB and the Iraqi Grains Board were made and executed in accordance with the United Nations (UN) sanctioned Oil-For-Food Programme. Each and every contract for the supply of wheat by AWB under the Oil-For-Food Programme has been examined by the UN Office of the Iraq Programme to determine its conformity with the provisions of Security Council Resolution 1284 (1999) and all related procedures and guidelines. In particular, the price and value of the wheat shipped under each contract has been considered and found by the UN to be reasonable and acceptable.¹⁶

Project Rose

- 8.16 Following publication of the US Wheat Associates complaint, Mr Lindberg asked Mr Cooper (AWB's General Counsel) to investigate the matters alleged in the letter and to provide legal advice to the AWB Executive Leadership Group on the issues raised.¹⁷ Initially, the investigation had no particular name, but in May 2004 it became known as 'Project Rose'.¹⁸
- 8.17 Mr Cooper was responsible for managing Project Rose from its commencement until late July 2004, when Mr Hargreaves, Stakeholder

Relations Manager, was given management responsibility for it by Mr Lindberg.¹⁹ Following the announcement of this Inquiry, the project was renamed 'Project Lilac', and Ms Gillingham was made responsible for it.²⁰

8.18 Mr Cooper instructed Mr Quennell, from Blake Dawson Waldron, to conduct a factual review designed to gather together all AWB documents in order to establish the relevant facts.²¹ After undertaking the factual review, Mr Quennell was to advise AWB on the legal consequences of the facts that had been found.²²

8.19 Mr Quennell did not receive a written brief in June 2003. He was given 'an open ended instruction to ... come into the company and undertake this review and report back on his findings from time to time'.²³ He was given a copy of the US Wheat Associates letter of 12 June 2003 and was directed to all the sources of information he would need. Those sources included electronic records of AWB and the names of persons he would need to interview. At that time Mr Quennell acquired all of the Iraq hard-copy files from AWB's International Sales and Marketing division.²⁴

8.20 From June 2003, before the factual review had begun, Mr Cooper had an awareness of the type of legal issues that might arise from facts Mr Quennell might find. Mr Cooper's evidence was that:

... very early on in the piece in June, we identified the broad legal issues that could be raised by these facts, and so in June of 2003 we knew the overall legal headings, if you like that we needed to research, such as the UN sanctions and whether they had been complied with, the foreign corrupt practices provisions in the Commonwealth Criminal Code ...²⁵

8.21 In June 2003 Mr Quennell and his staff set about gathering documents and information in relation to all the AWB contracts dealing with the Oil-for-Food Programme and the inland trucking component of those contracts.²⁶ His initial review of AWB materials was substantial, covering the six months from June to December 2003.²⁷ He reviewed email records and paper files. In March and April 2004 AWB personnel were interviewed; they were questioned specifically on documents.²⁸

8.22 From time to time Mr Cooper and Mr Quennell provided briefings to members of the Executive Leadership Group and the AWB and AWBI Boards regarding Project Rose.

8.23 The first of these briefings was on 12 June 2003, when Mr Quennell gave a presentation to the Executive Leadership Group. The presentation was in both hard-copy and oral form. It identified a number of factual and legal matters requiring investigation and legal analysis.²⁹ AWB claimed legal professional

privilege over the presentation, which claim was ultimately rejected by the Federal Court of Australia.

8.24 It is now known that on 12 June 2003, the following matters were drawn to the attention of the Executive Leadership Group within AWB:

- In June 1999 the Iraqi Grain Board had imposed a tender condition changing terms of trade from 'CIF Free out Umm Qasr' to 'CIF free on truck to silo at all Governorates. Cost of discharge at Umm Qasr and land transport will be US\$12 per m.t to be paid to the land transport co. For more details contract Iraqi Maritime in Basrah'.³⁰
- AWB agreed to pay internal trucking costs to 'Alia for Transportation and Trade', a Jordanian company.³¹
- Notwithstanding the terms of the tender, the contract terms between AWB and IGB provided, 'The cargo will be discharged free into truck to all silos within all Governorates of Iraq at the average rate of 3000 mt in day ... The discharge costs will be a maximum of US\$12.00 and shall be paid by Sellers to the nominated Maritime agents in Iraq. This clause is subject to the UN approval of the Iraq distribution plan.'³²
- Documents were submitted to the United Nations and approval was given.³³
- Three draft contracts in January 2000 included a provision that 'the discharge cost will be a maximum amount (for example, US\$15 per tonne) and will be paid by the sellers to the maritime agents in Iraq, the clause being subject to UN approval of the Iraq distribution plan. However, the three 'signed contracts ... as submitted to the UN do not include the above provision. Instead the shipment clause makes no reference to the discharge cost'.³⁴
- Since January 2000 all AWB contracts submitted to the UN followed the same format—that is, the shipment terms being described as free into truck to all silos within all governorates of Iraq followed by a CIF free in truck price, with no mention of a 'discharge cost'.³⁵
- The inland transport component had increased from US\$12 to US\$47.75 per mt.³⁶
- AWB would have committed a breach of s. 70.2 of the Commonwealth Criminal Code 'if AWB provided a benefit to Alia with the intention of influencing the director of the GBI in the exercise of his duties at GBI to commit GBI to buy Australian wheat'.³⁷ However, 'as along as the

payments to Alia were legitimately due, no s. 70.2 offence has been committed'.³⁸

- UN approval was given on the basis of contracts stating, 'The wheat will be discharged free into truck to all silos within all Governorates of Iraq'. 'However, the contract document submitted to the UN did not spell out in clear terms (a) the kinds of freight the price covered, and (b) the mechanism for refunding part of the price to Alia in Jordan.'³⁹ If payment of the trucking fees is considered 'borderline', it 'must be arguable even if it is not clear that the UN Committee expressly approved the payment of the trucking freight, it would have done so in any event'.⁴⁰

8.25 AWB never told the Australian Government, or the Independent Inquiry Committee, of this advice or of its reservations. No doubt that is one reason why it wished to keep hidden from this Inquiry the details of the presentation.

8.26 On 15 August 2003 Mr Quennell provided to Mr Cooper a draft advice entitled 'Wheat exports to Iraq—trucking fees'.⁴¹ AWB claimed legal professional privilege over the advice, which claim was also ultimately rejected by the Federal Court. Mr Cooper told Mr Lindberg of the advice, but the Board was not informed, and Mr Cooper was instructed to obtain Senior Counsel's advice on the same topic.⁴²

8.27 The advice from Mr Quennell and Blake Dawson Waldron was:

In our view:

- It is possible that AWB and/or certain of its employees have committed breaches of the Criminal Code Act 1995 (C'th);
- It is possible that AWB and/or certain of its employees have committed breaches of the Crimes Act 1958 (Vic);
- It is possible that AWB's conduct has resulted in a contravention by Australia of UN Resolution 986 (1995).⁴³

8.28 Apart from the conclusions just quoted, the advice contained at least two telling paragraphs:

What was AWB's intention in making payment of trucking charges to Alia? Was it to influence persons at GBI in order to obtain business? In a broad sense it was, since the truck transport component was necessary to effect delivery of wheat, and presumably, unless inland delivery could be accomplished, GBI may not have wished to buy Australian wheat. (This hypothesis assumes that the truck transport charge was a genuine component in the first place.)⁴⁴

and

AWB has not remitted funds to persons or bodies within Iraq. It may have infringed the first part of paragraph 4 [of Resolution 661] if it has ‘made available a financial or economic resource’ to GBI by paying its agent to provide a service that GBI would otherwise have had to procure and meet the cost of itself. Further, AWB is likely to have contravened Resolution 661 if it remitted funds to Alia in the knowledge that such funds would ultimately be placed at the disposal of the Iraqi regime. On the basis of the documentary evidence which we have examined to date it can at least be said that it is arguable that AWB did not know how the funds remitted to Alia would be ultimately disbursed.⁴⁵

- 8.29 These passages called into serious question whether the ‘trucking transport charge’ was a genuine trucking fee and whether AWB truly believed the payments to Alia were for the purpose of trucking by Alia or would be passed on to Iraq.
- 8.30 This advice—and the reservations it expressed—was never conveyed to the Australian Government or the Independent Inquiry Committee and is inconsistent with the position AWB has taken publicly. No doubt that is one reason why AWB sought to prevent public disclosure of the advice.
- 8.31 On 6 May 2004, after the United Nations had in April announced an inquiry into the Oil-for-Food Programme, Mr Lindberg wrote a memorandum to the AWB and AWBI (AWB (International) Limited) directors, notifying them of AWB’s investigation of its Oil-for-Food contracts with Iraq:

Introduction

Media speculation regarding AWB’s contracts with Iraq under the Oil for Food Program is increasing and is expected to intensify over the coming months.

Attached is a report from ABC national rural radio news today that KPMG has been appointed to investigate claims that AWB overpriced the wheat sold to the Iraqi Grains Board ...

Action already undertaken

Last year we commenced a detailed review of the facts surrounding AWB’s Oil For Food Contracts with Iraq. This has involved reviewing over 30,000 emails, many files and interviewing AWB management. The process has been led by Chris Quennell, Trade & Transport lawyer with Blake Dawson Waldron, Melbourne.

A report on the factual findings will be tabled with AWB management tomorrow and I will be in a position to brief you next week.

We anticipated this enquiry over 12 months ago and put in place this process to establish the facts and to manage AWB’s risk. The enquiry has been rigorous and very detailed. Although substantially complete, the enquiry will take a further few weeks to fully complete.⁴⁶

8.32 On 12 May 2004, on Mr Cooper's instructions, Mr Quennell briefed Mr Tracey QC on Project Rose. Mr Quennell provided to Mr Tracey QC a memorandum of instructions⁴⁷, together with an accompanying volume of documents.⁴⁸ Mr Tracey QC was asked to advise on:

... whether AWB may have

- (i) contributed to a contravention by Australia of its obligations under UN Resolution 661 ... and
- (ii) contravened any Commonwealth and/or State legislation (including, in particular, the Criminal Code Act 1995).⁴⁹

8.33 AWB claimed legal professional privilege over Mr Tracey's advice. On 7 April 2006 (day 62 of the Inquiry's hearings) AWB conceded, after submissions from Counsel Assisting, that privilege for Mr Tracey's advice had been waived in 2005 because of disclosure of that advice. The brief thus became available to the Inquiry. It showed that many of the material documents had been assembled by advisors to AWB in one folder in May 2004.

8.34 The memorandum of instructions set out the procedures for the provision of humanitarian supplies to Iraq and the UN contract approval procedure.⁵⁰ It noted that prior to July 1999 AWB's contracts with the Iraqi Grain Board were concluded on a CIF free out Umm Qasr basis.⁵¹ It set out the inclusion in the tender dated June 1999 of the following clause:

10 – PRICE

CIF free on truck to silo at all Governorate [sic]. 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 [sic] in Basrah.⁵²

The memorandum then summarised the history of the introduction of the trucking fee into the three contracts, A4653, A4654 and A4655, concluded on 14 July 1999, and contract A4822, concluded on 14 October 1999.⁵³

8.35 It noted the inclusion in the short-form contract A4653 of the following clause:

SHIPMENT The cargo will be discharged Free in to Truck to all silos within all Governates of Iraq at the average rate of ... The discharge cost will be a maximum of US\$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.

PRICE The CIF, Free in Truck price per tonne of 1,000 kilos is ... UNITED [States] of America dollars is as follows [deleted for confidentiality].⁵⁴

And it specifically noted, 'The 'discharge cost' of US\$12 per m.t. was added to the sale price of the wheat. There is no specific reference to "land transport"'.⁵⁵

8.36 The memorandum continued:

Subsequent contracts between AWB and IGB (eg A4970, A4971 and A4972 dated 20 January 2000) ... continued to include a provision to the effect that the discharge costs would be a maximum amount (eg US\$15 per m.t.) and was to be paid by the sellers to the nominated maritime agents in Iraq, the clause being 'subject to UN approval of the Iraq distribution plan'. However, the signed contracts (eg A4970, A4971 and A4972) as submitted to the UN ... did not include the above provision. Instead, the shipment clause made no reference to the 'discharge costs' and merely stated:

*'The cargo will be discharged free into truck to all silos within all Governates of Iraq at he [sic] average rate of 3000 m.t. per day.'*⁵⁶ [original emphasis]

It noted that all AWB contracts submitted to the UN from January 2000 made no reference to a payment of a discharge cost or a trucking fee and stated, 'The trucking fee was increased from time to time, eg contract A1441 dated 23 June 2002 was for a total of [deleted for confidentiality] CIF Free in Truck to all Governates Iraq with a trucking fee of US\$47.45 per m.t'.⁵⁷

8.37 In respect of the mechanism for payment of the trucking fee, the memorandum stated:

The trucking fee in respect of contracts A4653, A4654, A4655 and A4822 was paid directly by AWB to a Jordanian company, Alia for Transportation and Trade ('Alia').

In relation to subsequent contracts, payment of the trucking fee was for a time effected by whichever shipping company had undertaken to provide the ocean carriage of the particular shipment. However, as appears from an email from Charles Stott ... on 25 July 2000 ... the procedure was then changed so that AWB remitted the funds direct to Alia.⁵⁸

It made no mention of the suspicions current in AWB at the time that Alia was part-owned by the Iraqi Ministry of Trade.

8.38 The memorandum then set out the substance of Mr Stott's letter of 30 October 2000 to Ms Courtney of the Department of Foreign Affairs and Trade⁵⁹ and of Ms Drake-Brockman's reply of 2 November 2000⁶⁰, noting, '... as at 30 October 2000 the arrangements for the payment of the trucking fee had already been in place for approximately 8 months'.⁶¹

8.39 Mr Tracey QC was then instructed:

The documents which instructing solicitors have examined do not indicate whether the trucking fees paid by AWB to Alia can be regarded as a genuine

payment for the provision of inland freight services actually provided by Alia. We have not seen any contract between AWB and Alia. We have seen no evidence to indicate whether or not the trucks used to transport wheat after its discharge at Umm Qasr were provided by Alia. We have seen no explanation as to how the trucking fee was calculated or the basis upon which the trucking fee was subsequently increased. The trucking fee does not appear to have been calculated with regard to the differing distances between Umm Qasr and the various Governorates ...⁶²

He was then referred to some internal AWB emails in which the trucking fee was discussed.

8.40 The memorandum contained no reference to the after-sales-service fee of 10 per cent, the ownership of Alia, the negotiation of contracts A1670 and A1680 to include an 'uplift' in price to cover the Tigris debt, or the proposed payment via the trucking fee of the 'Iron Filings' compensation.

8.41 Mr Tracey QC gave oral advice in conference on 25 May 2004.⁶³ On the same day Mr Cooper and Mr Quennell gave a briefing to a joint information session attended by the directors of AWB and AWBI. The PowerPoint presentation given at the briefing noted Mr Tracey QC's oral advice, as follows:

Richard Tracey QC has been briefed and advised in conference today:

1. no evidence of breach of relevant UN Resolution on sanctions (661)
2. no evidence of breach of Australian domestic law

RT is maintaining a watching brief and can advise at short notice if the matter develops further (eg by commencement of some form of inquiry).⁶⁴

8.42 The minutes of the AWB Board meeting held on 26 May 2004 summarised the Project Rose briefing:

Project Rose

The Board noted it had received a briefing on Project Rose (attended also by directors of AWB (International) Limited) on Tuesday 25 May 2004 and had also received a memorandum on this matter from the Managing Director on 6 May 2004. Project Rose is the code-name for the AWB Group's internal investigation of AWB's wheat exports to Iraq and AWB's involvement in the United Nations Oil for Food Program (OFF) in regard to which allegations of impropriety had been made in the public arena.

The briefing session was addressed by Mr Jim Cooper, General Counsel, and Mr Chris Quennell, trade and transport lawyer of Blake Dawson Waldron. (The Board noted that a copy of the briefing presentation would be filed with the Board papers).

The Board noted the following with regard to the Project Rose briefing:

- (a) the allegations of impropriety had commenced with correspondence from the US Wheat Associates to the US Secretary of State, Mr Colin Powell, on 3 June 2003. There had been sporadic media commentary since that time, and a number of inquiries (all of which remain unconfirmed) had been reported as follows: UN independent inquiry into the OFF program; Interim Iraqi Governing Council Investigation (reportedly to be conducted by KPMG); US House of Representatives investigation; and a US Senate Committee on Foreign Relations investigation.
- (b) The Project Rose investigation commenced in June 2003 and has involved a comprehensive review of all contract arrangements for the export of wheat by AWB to Iraq from mid 1999 to 2002, including the inland freight arrangements within Iraq.
- (c) The findings to date of the Project Rose investigation are as follows:
 1. all AWB contracts were approved by the Office of the Iraq Program at the United Nations;
 2. no evidence has been identified of any AWB knowledge that money paid to the Jordanian transport firm, Alia, was unpaid to the Iraq regime;
 3. no evidence has been identified of payment of funds by AWB to any other person in relation to the OFF shipments; and
 4. no evidence has been identified of payment of funds to any AWB employee by any other person in relation to OFF shipments.
- (d) That the Board would be kept informed of any additional findings that may emerge from the Project Rose investigations.⁶⁵

8.43 Thus, between June 2003 and May 2004 AWB conducted a detailed review of its sales to Iraq under the Oil-for-Food Programme. The review examined most relevant emails, and statements were taken from relevant employees. The Executive Leadership Group received at least some reports on progress of the investigation, and in May 2004 the Board was briefed on the investigation and its outcomes to date.

8.44 Having conducted this investigation and obtained legal advice about whether AWB had participated in any breach of UN sanctions or breached any Commonwealth, State or Territory law by paying trucking fees to Alia—the advice being that it had not—AWB, apparently through resolutions of its board, determined that it would not provide the details of its internal examination to those who might be inquiring into the very matter it had investigated. Most of the relevant documents compiled as a result of Project Rose and included in the brief to counsel were not provided to the Independent Inquiry Committee; nor was the IIC provided with statements that had been taken from relevant witnesses. AWB negotiated with the IIC an arrangement whereby it was obliged to produce not ‘all relevant documents’

but only those documents the IIC requested. Of the 164 documents identified by its own lawyers as relevant, and briefed to counsel, AWB provided only 45 to the IIC.

8.45 Similarly, although AWB had collected in a volume most of the relevant documentary material for the purpose of briefing counsel, it did not provide that compilation to this Inquiry until obliged to do so following the concession on day 62 of hearings that legal professional privilege for Mr Tracey's advice could not be maintained because it had been waived. Similarly, legal professional privilege was initially claimed in relation to the slide presentations made to the board concerning Project Rose until this claim was also withdrawn on day 62 and the slides were made available.⁶⁶

8.46 On 4 June 2004 Mr Tracey QC asked Mr Quennell:

- (1) whether there was any commercial justification for the [10%] increase;
- (2) why the IGB [or its successor] agreed to a reduction after the fall of the Iraqi regime and, in particular, whether there was any commercial justification for the reduction.⁶⁷

Mr Tracey QC was instructed that there was no commercial justification for the 10 per cent increase and that the 10 per cent reduction in contracts A1670 and A1680 had been 'unilaterally imposed'.⁶⁸

8.47 On 8 June 2004 Mr Tracey QC advised Mr Quennell:

In the absence of commercial justification for the introduction, increases and decreases in the trucking fee and the lack of specific approval for the fee and its quantum by the UN there is reason to suspect that the fee (or part of it) was used as a kick-back to the IGB or persons associated with it. Whether the money was so used can only be determined by an investigation of the finances of the Jordanian trucking company which was the recipient of the trucking fees.

A further reason for suspecting the efficacy of the fee is Hogan's assertion that UN approval for its payment had been obtained. If this was not the case then a question arises as to why the assertion was made. Was it a deliberate attempt to mislead AWB management or did he make an honest mistake?

None of this establishes that the AWB or any of its employees is guilty of any offence or of breaching UN resolutions. What it does suggest is the need for further enquiries (if this is possible) to determine all the facts surrounding the payment of the trucking fee and, in particular, whether any part of it found its way to the IGB or any Iraqi officials.⁶⁹

8.48 By October 2004 AWB was concerned about the legality of the Tigris transaction and whether it could pay the money collected from the escrow account to Tigris. On 13 October 2004 Dr Donaghue of counsel advised in a draft memorandum of advice:

- (1) Neither AWB nor any of its employees participated in or contributed to a breach by Australia of Security Council Resolution 661 as a result of their participation in the Tigris transaction;
- (2) It is possible that both AWB and some of its employees (including but not necessarily limited to Long, Whitwell and Hogan) have breached:
 - (a) Section 70.2 of the Criminal Code Act 1995 (Cth); and
 - (b) Section 81(1) of the Crimes Act 1958 (Vic).
- (3) In these circumstances, AWB should not pay the US\$8 million that it received in the course of the transaction to Tigris, as to do so may involve the commission of a further offence against S.88 of the Crimes Act 1958 (Vic).⁷⁰

8.49 Immediately AWB sought the advice of two senior counsel.⁷¹ Mr Tracey QC was asked to advise on a statement of facts later verified by Messrs Stott, Long and Whitwell whether the Tigris transaction had resulted in AWB and/or any of its employees participating in and/or contributing to a breach by Australia of its obligations under Resolution 661. He advised on 26 October 2004, as had Dr. Donaghue, that it had not.⁷²

8.50 Mr Richter QC, with Dr Donaghue, was asked to advise on the assumed facts arising from the Tigris matter whether:

- AWB and/or any of its employees had committed any offence under Australian federal or State legislation
- AWB should now pay to Tigris the US\$8 million it received in the course of the transaction.

They advised that no offence had been committed and thus the money could be paid to Tigris. The advice stated:

... while we consider it possible that the AWB employees who structured the Tigris transaction might be found to have engaged in misleading conduct for certain purposes, this is not sufficient to establish the offence. There must be a causal link between the obtaining of the property and the deception—it must be obtained by deception. It does not follow from the fact that a deception might have been carried out that that deception caused the obtaining of property in the required sense.⁷³

8.51 In March 2005 Mr Tracey QC was asked to consider further documents relating to port fees.⁷⁴ Having done so, he advised:

Some of the documents also contain evidence of attempts by Iraqi Government agencies to obtain direct payment for port fees and payments through Alia for inland transportation (for example, faxes under tabs 8, 9 and 14). The terms of

these communications add to the concern which I expressed in my email of 8 June 2004. However, I note my instructions that there is no evidence of any payments of the kind contemplated in the documents briefed having been made. There is also some comfort for AWB in the repeated refusals of its officers to agree to the paying of US50¢ per metric ton port fees as demanded by Iraqi authorities (for example, documents collected under tabs 8 and 8A) but AWB's position was subsequently undermined by its agreement to incorporate the port fees into the inland transport fee which it paid to Alia (see under tab 11A).⁷⁵

8.52 In July 2005 Mr Tracey QC was asked to confirm his opinion in writing. His advice, dated 12 August 2005, expressed severe doubts and reservations about factual matters on which he was asked to advise:

19. The passages in the various documents to which reference has just been made are suggestive of the possibility that the trucking fee was, in fact, a payment by the AWB to the IGB in contravention of Resolution 661. The correspondence suggests that the payments started being made, not because of any commercial concern of the AWB about demurrage costs, but rather because of a demand made by President Hussein. Thereafter steps were taken to disguise the true nature of the payments by directing them through Alia. When the Canadian authorities raised the issue at the United Nations the AWB reaction was that payments should cease. Not only that, the IGB was asked not to supply details of the payments to the UN. All this is suggestive of attempts by the AWB to meet the Iraqi demand for payment but to do so in a way in which it was 'not apparent that the funds were going into Iraq'. It is notable that none of this history was recounted to the Department of Foreign Affairs and Trade later in 2000 when its advice was sought as to the efficacy of the trucking fee. The Department was told that the fee was necessary in order to secure quick clearance of Australian wheat from the wharves at Umm Qasr. No doubt, as a result of the comfort provided by the response, payments continued to be made to Alia at least until mid 2002.

...

22. It is also to be observed that the documents fail to provide evidence about a number of matters which it would be necessary to establish in order to prove a breach or breaches of Resolution 661. Some of the omissions might also add to the suspicion that breaches may have occurred. I am instructed that the documents examined by my instructing solicitor do not indicate whether the trucking fees paid by AWB to Alia can be regarded as a genuine payment for the provision of inland freight services actually provided by Alia. No contract between AWB and Alia appears in the papers. There is no documentary evidence to indicate whether or not the trucks used to transport wheat from Umm Qasr to the various inland destinations within Iraq were provided by Alia. No documentary explanation appears as to the basis for the calculation of the trucking fee which was originally charged or subsequent increases to it. The information which does not [sic] emerge from the document is, in a number of instances, equivocal insofar as it may have a bearing on the present enquiries. The absence of any documentation evidencing the commercial basis for the fixing of the trucking fee at various rates and the absence of any contract with Alia may be taken as suggesting the existence of a bogus arrangement under which money was paid through Alia to Iraqi authorities for a purpose other than payment for the provision of trucking services. On the other hand, it may be that the payments were in the nature of an incentive to make it worth the while of Alia to provide more trucks to clear the

wheat. I recall it being said at a conference about this matter last year that, after trucking fees were paid, the time taken to clear wheat from the Port of Umm Qasr improved considerably. This could have occurred as a result of the payments. That said, the absence of a contract between AWB and Alia is surprising. However, the evidence does not go so far as to suggest that none was ever entered into.

23. It is also of concern that the Department of Foreign Affairs and Trade was not told, when its advice was sought in late 2000, about these pre-existing events. The AWB gave the Department the impression that the demurrage problem had only recently arisen and that the trucking fee solution was about to become the subject of negotiations with Alia. This is not, however, necessarily indicative of misconduct. By the time the Department's advice was sought, the trucking fee had been paid for almost a year. It had been referred to in some of the contracts which had been forwarded to the United Nations through the Australian Diplomatic Mission. It is therefore conceivable that the author of the 30 October 2000 letter was able to assume a certain level of background knowledge on the part of the Department which didn't require rehearsal. It is possible that the \$US12.00 payments which had been made were not producing the desired result of quick clearance from the port because they appeared in the contract and, as a result, limited the scope for the negotiation of incentives for the provision of more trucks by Alia.⁷⁶

Mr Tracey QC concluded:

24. Ultimately, however, the question that I was asked to advise on was whether there was evidence that AWB may have contributed to a contravention by Australia of its obligations under Resolution 661. A breach of that resolution would only have occurred if the trucking fees had been paid to the IGB or the Iraqi Government and then only if it was not paid for a legitimate commercial purpose. Whilst some of the material with which I have been briefed raises suspicions that there may have been a perception within AWB that any payment of the trucking fee may have contravened Resolution 661 and that it was necessary to make the payment to Alia in order to avoid any suggestion that the payments, if made directly to the IGB, would have been in breach of the Resolution, there is absolutely no evidence in the material provided to me that any of the money paid by the AWB to Alia was ever forwarded to the IGB or any other arm of the Iraqi government. It was for this reason, that, despite some misgivings I answered the question posed for advice in the negative.⁷⁷

8.53 Regarding Australian domestic law, Mr Tracey QC concluded:

25. I considered the possibility that some of the conduct appearing in the documents, although it occurred outside Australia, may have been suggestive of criminal conduct in breach of the *Commonwealth Crimes Act*. I was unable to identify any offence arising from the conduct of any individual AWB officer or the AWB itself disclosed by the documentary material.

26. I have not conducted an exhaustive search of Commonwealth legislation with a view to negating the possibility of other breaches of Australian law. I will, of course, be pleased to examine the possibility of a breach of any specific Australian law to which my attention is directed.⁷⁸

8.54 In September 2005 Mr Tracey QC was asked to give further advice but on different assumptions and in respect of different questions. The questions were:

(1) Did UN Resolution 661 and/or Resolution 986 prohibit the AWB from paying, out of funds obtained from the escrow account, established by clause 7 of Resolution 986, fees charged by Alia for Transportation and General Trade (“Alia”) for the inland transport of wheat sold by the AWB under UN approved contracts?

...

(2) Does payment, out of funds obtained from the escrow account, of fees charged by Alia for the inland transport of wheat sold by the AWB under UN approved contracts contravene any Australian law?⁷⁹

The advice then sought was on the premise that the fees charged by Alia were in fact for the transport of wheat in Iraq and in the absence of any evidence that ‘payments made to Alia were, or might have been, remitted to the Saddam regime or individuals of the regime’.⁸⁰ Mr Tracey QC was instructed, ‘The AWB engaged Alia, a company registered and based in Jordan, to provide the necessary trucking services’.⁸¹ On the basis of those assumptions, Mr Tracey QC answered each question in the negative:

14. On the facts and assumptions on which I have been asked to advise no breach of the prohibition on the making available of funds to Iraq has occurred. All payments were made to Alia in Jordan. AWB has no reason to believe that any of those funds might have been remitted to the Iraqi regime or any individuals within it.⁸²

...

18. I am not aware of any Australian law which would have been contravened by the AWB or any individual by reason of the payments made to Alia for the provision of trucking services. On the facts and assumptions on which I have been asked to advise, the payments were made pursuant to bona fide commercial arrangements.⁸³

8.55 AWB also sought, from a Professor Wippman in the United States, advice about whether payment of inland trucking fees was permissible under the Oil-for-Food Programme. As is apparent, Professor Wippman’s advice was given on the false basis that AWB had a contract with Alia for the provision of trucking service. The overview advice was:

The UN resolutions establishing and maintaining a sanctions regime on Iraq do not, on their face, provide a clear answer to the question whether in-land trucking fees may be paid in hard currency to a Jordanian company. Paragraph 4 of Resolution 661 prohibits payments to the Iraqi government or any commercial undertaking in Iraq, but contains a humanitarian exception. Read in light of subsequent practice and the escrow account system created by resolution 687, it

appears that the sanctions regime was designed to preclude suppliers from making hard currency payments to the Government of Iraq (GOI) or other entities in Iraq, either directly or through third parties, even for trucking services that were essential to providing foodstuffs to the locations where they were needed in Iraq, and even if the costs charged for trucking were reasonable and customary. However, the imprecise nature of the resolutions prompted various inquiries to the Office of Iraq Programme (OIP) and the 661 Committee. Decisions of the committee, though not equivalent in authority to decisions of the Security Council, carry great weight, and decisions of the OIP are also significant as aids to interpretation. Since both the OIP and the 661 committee considered the acceptability of contracts containing in-land trucking provisions, and did not place holds on such contracts or otherwise block them, and since AWB's contracts on their face included payments to a third party nominated by the GOI for in-land transportation and were approved by OIP, AWB could reasonably interpret the sanctions regime to permit payment of reasonable and customary in-land transportation fees.⁸⁴

8.56 Importantly, Professor Wippman wrote:

According to the Secretary-General's November 25, 1996 interim report, the distribution of humanitarian supplies is to be done by the GOI through 'a decentralized network of food warehouses and distribution centres that supply rations to private retail stores, which in turn distribute rations to households within their areas.' Further, 'transportation of these rations from warehouses to the retail stores is provided by the private sector and paid for by the Government.' The distribution plan submitted by Iraq and approved by the Secretary-General is contained in Annex I to the Interim Report. A small amount of money is set aside for logistics, but it is not clear how that is to be used. However, the distribution plan states that 'all items purchased under the Plan will be transported to and stored in specifically designated silos and warehouses,' including wheat. Further, 'retail ration agents shall receive the monthly food quota for the population residing within their designated areas upon presentation of ration coupons ... against payment of a standard nominal fee as a contribution towards internal transportation, handling, and distribution.' Thus, it appears that Iraq agreed to handle internal transportation costs and planned to charge recipients internally a 'standard nominal fee' for such costs, presumably in local currency.

This seems to have been the procedure actually followed. According to the Secretary General's June 2, 1997 report, 'in Trebil and Umm Qasr, government offices ("reception centres") are responsible for dispatching trucks using a computerized system aligned to the Ministry of Trade's allocation plan.' The Ministry 'uses 45,693 food and flour retail agents from the private sector to distribute commodities to beneficiaries.' In turn, 'a nominal fee of 105 Iraqi dinars is paid by each food beneficiary towards transport and administrative cost.' Moreover, the system seemed to work adequately. According to the Secretary-General's report, 'with minor exceptions ... the commodities have been transported efficiently throughout the country ...' (para. 44). (See also S/1997/685, Sept. 8, 1997 ('once food arrives at any of the three entry points, dispatch and distribution is efficient'). In fact, the system seemed to improve as time went on. (See S/1998/477, June 5, 1998, para. 48 (time for delivery of wheat from points of entry to governorate warehouses reduced to 3-4 days)). It does not follow that a different arrangement would violate the Security Council resolutions, but hard

currency payments to private contractors would have departed from the approved distribution plan at this point in time.⁸⁵

And later he wrote:

However, a major goal of the sanctions regime was to prevent hard currency from flowing to the GOI outside of the escrow account. Hard currency payments to a GOI-nominated company outside of the escrow account run counter to this goal if the payments are high relative to the actual cost of the service at issue. Even if the payments are not high enough to permit a kickback, the structure of the program seems to require payment from the escrow account, at least for services rendered in Iraq. Thus, AWB's contracts with Alia probably should have been structured as separate contracts between Alia and the GOI, subject to 661 committee approval and payment from the escrow account. This seems to have been the gist of the advice given by Jon Almstrom to the CWB in December 1999 (IIC vol. 3, p. 73-74).⁸⁶

As will become apparent, AWB did not have a contract with Alia for the trucking of wheat throughout the Oil-for-Food Programme.

8.57 In the days before the release of the Independent Inquiry Committee's final report, on 27 October 2005, AWB sought and obtained an expert opinion of Sir Anthony Mason. Sir Anthony expressly declined to express a view on whether AWB's payments to Alia contravened UN sanctions since he did not have available to him the material collected by the IIC.⁸⁷ The material before him did not 'establish or suggest that AWB or its officers, more particularly its senior executives, knew that the fees [paid to Alia] 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'.⁸⁸

8.58 Against that background, Sir Anthony Mason advised:

- (i) Did the inclusion, on the insistence of the Iraqi Grain Board (IGB), of an inland delivery payment term in its wheat contracts with AWB violate the UN sanctions against Iraq that started with Resolution 661 in 1990 and continued until the Oil-for-Food Program ended in 2003?

Answer: No, so long as the price stipulated was reasonable.

- (ii) Did the UN Sanctions Resolution prohibit AWB from paying fees for the inland delivery of wheat to a transport company?

Answer: So long as the fees were reasonable AWB could reasonably conclude that the payment of such fees was consistent with the Sanctions Resolutions.

- (iii) Whether the payment of inland transport fees by AWB could fall within cl. 4 of Resolution 661.

Answer: The payment of unreasonable fees could fall within the prohibition contained in cl. 4 of Resolution 661.

- (iv) Do the materials presented to me support a finding that AWB knew or ought to have known that the payments of inland transportation fees which it made were illicit payments to, or for the benefit of, the Iraqi Government?

Answer: As to actual knowledge, no. As to 'ought to have known', the position is not as clear. Although the evidence of steep increases in transportation fees invites suspicion, there are strong arguments that it should not be inferred that AWB ought to have known that the payments were being channelled to the Iraqi Government.⁸⁹

- 8.59 Although no inference is available from the claiming of legal professional privilege, the concept that 'no employee should ever feel that his or her conduct could not survive the test of public scrutiny' was not adhered to by AWB or its Board. AWB chose, as it was entitled to do, to seek to prevent public scrutiny of its dealings with Iraq under the Oil-for-Food Programme. Even though it had investigated its dealings with Iraq under the Programme and been advised, at least on some occasions on the material briefed to counsel, that it had not acted in breach of sanctions or illegally, the Board determined to try to keep confidential the inquiries and their outcome. This is not indicative of a culture 'encompassing strong corporate governance, sound business practices and good ethical conduct'.

The UN Independent Inquiry Committee inquiry: 2004 and 2005

- 8.60 AWB's approach to disclosure to the Independent Inquiry Committee is a further indication of a closed, obstructive culture and approach.
- 8.61 On 21 April 2004 UN Secretary-General Kofi Annan announced the formation of an independent panel to conduct an inquiry into allegations of impropriety in the administration and management of the Oil-for-Food Programme.
- 8.62 On 6 May 2004 Mr Lindberg wrote a memorandum to the AWB and AWBI directors, notifying them of AWB's investigation of its Oil-for-Food contracts with Iraq.⁹⁰
- 8.63 By the end of May 2004 AWB had substantially completed a major review of documentary evidence held by it in relation to dealings with Iraq under the Oil-for-Food Programme and had taken statements from relevant witnesses. The documents had been assembled in a brief for counsel, and legal advice had been obtained from Mr Tracey QC regarding:

... whether AWB may have:

- (i) contributed to a contravention by Australia of its obligations under UN Resolution 661 ... and

- (ii) contravened any Commonwealth and/or State legislation (including, in particular, the Criminal Code Act 1995).⁹¹

8.64 On 26 July 2004 Mr Thomas emailed Mr Hargreaves and Mr Trewin, with a copy to Mr Cooper and Mr McKinlay, about Project Rose:

Jim gave a good overview to the ELG [Executive Leadership Group] on where things are up to regarding Rose. Discussion took place. AL and Jim will present to the Board on Wed.

In summary, the view is that we should take a 'passive cooperative approach' – i.e. assist where asked and provide appropriate responses – but not much upside in being actively co-operative.⁹²

8.65 Thus, the senior executives of AWB agreed to respond to queries put to the company, but no more. As will appear when discussing the basis on which they would 'cooperate' with the Independent Inquiry Committee, AWB sought to narrow and restrict that which it was prepared to provide by way of information and witnesses.

8.66 On 22 December 2004 an IIC investigator wrote to Mr Hargreaves, seeking access to documentation and interviews with relevant AWB staff.⁹³ The investigator initially sought the following information from AWB:

- a) Copies of all documents relating to contracts awarded under the UN's Oil-for-Food Programme to the Australian Wheat Board/AWB Limited, including letters of credit and bank transfers.
- b) Details of any handling agents or transportation companies used by the Australian Wheat Board/AWB Limited in connection with the delivery of wheat to Iraq. This has been discussed in the press by the AWB (the Jordanian trucking company) and we request full details:
 - Details of the transportation company, details of payments, copies of all correspondence, copies of all documents relating to financial agreements or transfers;
 - We would also request interviews with AWB representatives who dealt with the transportation company.
- c) Interviews with AWB staff who were involved in discussions with Iraqi authorities including Andrew Lindberg, Michael Long, Trevor Flugge and Dominic Hogan.
- d) Any documents from the Australian Wheat Board/AWB Limited Audit Committee relating to the audit or general oversight of contracts with Iraq.
- e) All documents relating to any internal or external investigation conducted in relation to contracts under the Oil-For-Food Programme.

- f) Assistance in arranging interviews with any other personnel from AWB Limited and personnel from the former Australian Wheat Board, including members of the Audit Committee of both organizations who may have information of assistance to the inquiry.⁹⁴

Point (e) relates directly to the Project Rose investigation and the documents and statements obtained in that investigation.

8.67 Mr Hargreaves responded to the IIC investigator's email on 20 January 2005.⁹⁵ That email did not provide an answer to the investigator's request but stated that AWB was continuing to 'explore what would be the most appropriate way to assist the inquiry'.⁹⁶ Mr Hargreaves wrote that he understood that the IIC investigator intended to travel to Australia in 'early February' 2005; he offered to meet with the IIC investigator along with Mr Cooper.

8.68 On 27 January 2005 the IIC investigator again wrote to Mr Hargreaves⁹⁷, noting that he planned to be 'in Australia during the week commencing 7 February'.⁹⁸ In the light of this planned trip, the investigator asked whether access to the material requested in his email of 22 December 2004 would be granted. He also asked whether details he had asked for would be provided.

8.69 On 31 January 2005 Mr Hargreaves responded to the investigator's email of 27 January:

We struggle to see how there would be any benefit in duplicating the chain of documentation regarding our trade with Iraq under the OFF program given you are already accessing this information through the United Nations, but would be prepared to discuss this with you.

Further, given the effluxion of time and company policy it would not be our intention to offer AWB representatives for interview but would consider a process for answering questions on notice.⁹⁹

8.70 On 1 February 2005 the IIC investigator responded to Mr Hargreaves' email of 31 January 2005: 'In consideration of the expense and time required to travel to Australia, the limitations placed on access to AWB information do not justify the journey at this point in time'.¹⁰⁰

8.71 On 9 February 2005 Mr Hargreaves wrote to the IIC investigator, informing him of his and Mr Cooper's plans to be in the United States during February.¹⁰¹ Mr Hargreaves sought a meeting with the investigator to explore 'a mutually acceptable process by which AWB could assist the IIC in its inquiries'.¹⁰²

8.72 On 9 February 2005 the Minister for Trade, the Hon. Mark Vaile MP, telephoned the AWB Chairman, Mr Stewart.¹⁰³ He informed Mr Stewart that Mr Volcker had expressed concern about AWB's lack of cooperation with the

IIC. Mr Vaile said it was the Government's view that the company ought to fully and expeditiously assist in the investigations.¹⁰⁴ This was reinforced by a letter from Mr Vaile to Mr Stewart dated 10 February 2005:

It is the Government's strong view that censure of AWB Limited by the Volcker panel would be seriously damaging to the reputation and standing of the company. For this reason, I urge you in the strongest possible terms to fully and expeditiously assist the IIC in its investigations.

The IIC has proposed an MOU with the Australian Government which contains appropriate protections against improper use or release of confidential information passed by the Government to the IIC. In the Department of Foreign Affairs and Trade's previous correspondence with AWB Limited it indicated that AWB Limited should seek its own legal counsel. This remains the Government's view, including in relation to any interest AWB Limited may have in seeking appropriate assurances from the IIC regarding the improper use of AWB Limited information. That said, given the seriousness of the concerns raised by the IIC Chair, I am strongly of the view that it is in your interests to cooperate fully and supply the requested documentation.¹⁰⁵

8.73 On 10 February 2005 the IIC investigator responded to Mr Hargreaves' email of 9 February:

In terms of 'a mutually acceptable process by which AWB could assist the IIC in its inquiries', the AWB was a leading contractor under the United Nations Oil-For-Food Programme (OFFP). The IIC has been tasked with conducting an investigation of the OFFP. As part of that investigation the IIC will be investigating the very public allegations made against AWB. In order to conduct a proper investigation it is necessary for the IIC to have access to all relevant documentation and to conduct interviews with AWB staff who have relevant information. The documentation that we request access to and the substance of the interviews relate directly to AWB contracts under the United Nations Oil-For-Food Programme.¹⁰⁶

8.74 The IIC investigator then set out the information sought. In substance, it was the same as that originally asked for in the investigator's email of 22 December 2004. The material differences were that, in addition to the information originally sought, the IIC investigator also requested:

- 'details of each shipment of grain to Iraq under the United Nations Oil-For-Food Programme'¹⁰⁷
- 'details of all funds transfers to local transportation companies and agents including dates, amounts, bank reference details and account numbers and access to all related documents'.¹⁰⁸ Although details of funds transfers were requested by the IIC investigator in his original request for information of 22 December 2004, this request was more specific: it asked for 'dates, amounts, bank reference details and account numbers'¹⁰⁹

- access to all correspondence related to the United Nations Oil-for-Food Programme between AWB and the following:
 - the Department of Foreign Affairs and Trade
 - the Australian mission to the United Nations
 - the United Nations.¹¹⁰

The IIC investigator concluded his email thus: ‘It would be helpful if you would indicate in advance the extent of cooperation AWB will consider and any specific matters that you wish to discuss’.¹¹¹

8.75 On 16 February 2005 Mr Lindberg rang Mr Volcker.¹¹² On 17 February he wrote to Mr Volcker ‘in response to matters discussed during our telephone conference on 16 February 2005 regarding the Independent Inquiry Committee’s (IIC’s) work and your request for assistance from AWB Limited (AWB)’.¹¹³ The letter assured Mr Volcker that ‘AWB will cooperate’ with his inquiry.¹¹⁴ It stated:

I believe that this discussion was very helpful in clarifying both the IIC’s and AWB’s position and correcting the misunderstanding that had developed between our two organisations on the question of cooperation. I hope that you have been assured that AWB will cooperate with your inquiry and naturally seeks a framework in which this cooperation can occur.¹¹⁵

The letter summarised the main points of discussion, and agreement, between Mr Lindberg and Mr Volcker. Among the main points were the following:

1. AWB will review the requests for information forwarded to us via the Australian Department of Foreign Affairs and Trade (DFAT) and those forwarded by your Senior Investigator ...;
2. AWB will, to the best of its ability, meet your requests for access to documents, information and relevant persons;
3. AWB will establish a data room in Melbourne and provide access to your Senior Investigator ... to review documents¹¹⁶...

8.76 Mr Lindberg also set out the arrangement for interviews with AWB representatives. He confirmed, amongst other things, that:

- ‘all interviews and briefings are “on the record and attributable”’¹¹⁷
- ‘AWB will not consent to the tape recording of interviews’¹¹⁸
- ‘AWB will require reasonable notice of those people you wish to interview and a list of questions in advance of an interview’¹¹⁹

- ‘AWB staff will be accompanied by their manager and our Company Secretary, Mr Jim Cooper’.¹²⁰

8.77 On 17 February 2005 Mr Lindberg also wrote to Mr Blazey, head of DFAT’s Iraq Task Force.¹²¹ Copies of the letter were sent to Ministers Downer and Vaile.¹²² In his letter Mr Lindberg referred to his discussion with Mr Volcker and said he had ‘reassured him that AWB Limited will be cooperating with the IIC’¹²³ and proposed that:

DFAT and AWB immediately establish a framework for cooperation on this project whereby:

1. as an ongoing process both parties consult on the most appropriate manner in which to fulfil requests from the IIC; and
2. in general terms, no AWB related documents are released without having first been inspected by AWB representatives.¹²⁴

Mr Lindberg also requested ‘details of any documents that are copied by IIC’.¹²⁵

8.78 On 17 February 2005 Mr Taylor of the Wheat Export Authority wrote to Ms Scales (AWBI) seeking ‘AWB(I)’s written consent to provide any relevant material held by the WEA’ to DFAT, which Mr Taylor expected would, in turn, be passed on to the IIC.¹²⁶

8.79 On 18 February 2005 Ms Scales replied to Mr Taylor’s letter of 17 February.¹²⁷ Her reply proposed that the Wheat Export Authority and AWB establish a ‘co-ordinated approach’ to the provision of information to the IIC, through DFAT, in the same terms as those proposed in Mr Lindberg’s 17 February 2005 letter to DFAT.¹²⁸

8.80 On 18 February 2005 AWB forwarded a draft ‘confidentiality agreement’ to the IIC.¹²⁹

8.81 On 18 February 2005 Ms Ringler, counsel to the IIC, wrote to Mr Lindberg¹³⁰, informing him that the IIC was unable to accept AWB’s proposed confidentiality agreement. Ms Ringler attached a draft memorandum of understanding that embodied the ‘protections’ the IIC was ‘willing to extend to AWB’.¹³¹

8.82 On 22 February 2005 Mr Lindberg wrote to Mr Volcker, noting Ms Ringler’s letter of 18 February.¹³² Mr Lindberg proposed that the ‘respective legal advisors settle ... [the] framework [for cooperation]’.¹³³ He stated, ‘Clearly there needs to be an acceptable balance between your requirement for a full,

fair and transparent investigation and AWB's concerns and responsibilities for due process, confidentiality and media comment'.¹³⁴

8.83 On 22 February 2005 Mr Cooper wrote to Ms Ringler and attached a revised confidentiality agreement.¹³⁵

8.84 On 23 February 2005 Ms Ringler replied to Mr Cooper's 22 February email that had attached to it AWB's revised confidentiality agreement. She stated:

Based upon my reading of this agreement, it appears to be for the most part the original confidentiality agreement you forwarded to us several days ago. This is somewhat disappointing in light of our numerous discussions regarding the problems with such an agreement. If what you have proposed is not open for discussion or negotiation, please advise.¹³⁶

8.85 On 23 February 2005 Ms Ringler emailed Mr Cooper, attaching her own 22 February letter in which she acknowledged that she had received 'AWB's proposed agreement'.¹³⁷ Ms Ringler attached a memorandum of understanding, which, 'consistent with the IIC's practices ... would be the format of any agreement or understanding reached between the Committee and AWB'.¹³⁸ The attached memorandum 'attempted to address the major areas of concern for AWB'.¹³⁹ She stated, however, that:

... there are a number of matters that the IIC cannot negotiate:

...

2. The AWB will not have the authority to veto the IIC's decision to include the name of a current or former AWB staff person in its report; and
3. If cooperation is terminated by AWB at some point prior to the completion of the investigation, the IIC will not be required to return to AWB all AWB documents or materials, witness interviews, and notes. In other words, the IIC can use, in accordance with the MOU provisions, what has already been provided by the AWB. At the completion of the investigation, the AWB documents and information will be returned or destroyed in accordance with the MOU.¹⁴⁰

8.86 On 23 February 2005 Mr Lindberg wrote to Mr Blazey to inform him that AWB was 'still negotiating with the IIC regarding the framework of cooperation between the AWB and the IIC, including the confidentiality agreement'.¹⁴¹ The letter also stated:

Unfortunately until this is finalised, AWB is not in a position to consent to the release of any AWB documents outside those documents specified in my letter to you dated 17 February 2005. I understand that DFAT has requested that the Wheat Export Authority ('WEA') provide to DFAT copies of relevant documentation. Given the current situation, AWB is not yet in a position to consent to the release by DFAT of any AWB documents provided by the WEA to DFAT.¹⁴²

8.87 On 23 February 2005 Mr Cooper forwarded to Ms Ringler, by email, a 'red-lined version of the MOU'.¹⁴³

8.88 Significantly, the 'Document production and confidentiality' clause had been amended to provide that AWB would give the IIC access only to 'scheduled documents'¹⁴⁴, rather than 'all relevant documents'.¹⁴⁵ This had the effect of narrowing the ambit of the documents available to the IIC for review as part of its investigation. It obviated the need for AWB to provide to the IIC the documents that had been assembled by Project Rose and were regarded by AWB's lawyers as sufficiently material to be briefed to counsel. The other significant amendment was to the 'termination of cooperation' clause, whereby any breach by the IIC of its obligations under the agreement would result in it being denied the right to use any of the documents or evidence it had gathered from AWB in any report.

8.89 On 24 February 2005 Ms Ringler emailed Mr Cooper, attaching a letter dated 23 February 2005 in relation to the proposed memorandum of understanding between AWB and the IIC.¹⁴⁶ In the letter Ms Ringler stated:

Your proposed changes at paragraph #2, 'Document Production and Confidentiality,' raise some fundamental questions that I would like us to resolve before proceeding with our MOU discussions. I am unclear what is meant by 'scheduled documents.' More broadly, your proposed language at paragraph #2 suggests that AWB already may have decided to withhold certain categories of documents from the IIC. If this is the case, it is something that needs to be fully discussed.¹⁴⁷

8.90 On 24 February 2005 Mr Cooper replied to Ms Ringler's email of 24 February 2005:

In relation to clause 2 of the MOU, the 'schedule of documents' we refer to is a schedule of specific documents we intend to provide to the IIC representatives when they are in Melbourne based on the specific information requests the IIC has already sent through to us.¹⁴⁸

8.91 On 25 February 2005 Ms Ringler emailed Mr Cooper, attaching a revised memorandum of understanding.¹⁴⁹ She subsequently forwarded to Mr Cooper, by email, a 'redlined' version of this revised memorandum of understanding, which reflected changes the IIC proposed to make to the version forwarded by Mr Cooper on 23 February 2005.¹⁵⁰

Ms Ringler had made a number of amendments to Mr Cooper's version of the memorandum of understanding, among them striking out the reference to 'scheduled documents' and replacing it with 'AWB documents, relevant to the Programme which the IIC has requested'.¹⁵¹

8.92 On 25 February 2005 Mr Cooper emailed Ms Ringler, attaching documents entitled 'MOU between the IIC and AWB Limited on cooperation and confidentiality', 'Schedule of AWB documents' and 'Dataroom protocol'.¹⁵² The attached memorandum of understanding reinserted the reference to 'scheduled documents'.¹⁵³

8.93 The attached schedule listed 12 categories of documents, access to which or details of which would be provided by AWB to the IIC:

1. Access to documents relating to contracts awarded under the UN's Oil-For-Food Programme to Australian Wheat Board/AWB Limited including letters of credit and bank transfers.
2. Details of each shipment of grain by Australian Wheat Board/AWB Limited to Iraq under the United Nations Oil-For-Food Programme.
3. Details of any handling agents or transportation companies used by the Australian Wheat Board/AWB Limited in connection with the delivery of wheat to Iraq.
4. Access to all communication with local Iraq transportation companies and agents.
5. Details of all payments to local (Iraq) transportation companies and agents.
6. Access to all contracts with local (Iraq) transportation companies and agents.
7. Access to documents relating to financial arrangements with local (Iraq) transportation companies and agents.
8. Details of funds transfers to local (Iraq) transportation companies and agents including:
 - dates,
 - amounts,
 - bank reference details
 - account numbers
 - access to all related documents.
9. Access to all correspondence between the Department of Foreign Affairs and Trade and the Australian Wheat Board/AWB Limited related to the United Nations Oil-For-Food Programme.
10. Access to all correspondence between the Australian Mission to the United Nations and the Australian Wheat Board/AWB Limited related to the United Nations Oil-For-Food Programme.
11. Access to all correspondence between the United Nations and the Australian Wheat Board/AWB Limited related to the United Nations Oil-For-Food Programme.

12. Access to any documents from the Australian Wheat Board/AWB Limited Audit Committee relating to the audit or general oversight of contracts with Iraq.¹⁵⁴

8.94 By agreeing to provide to the IIC only the documents listed in the schedule, AWB limited the ambit of documents available for the IIC's inspection. Many relevant documents AWB held as a result of the Project Rose investigation, and knew it held, were not included in the 'scheduled documents'.

8.95 On 25 February 2005 Ms Ringler forwarded to Mr Cooper, by email, an amended copy of the 'data room protocol'.¹⁵⁵ The protocol set out the rules and procedures under which the IIC and its authorised representatives would be given access to the AWB data room.¹⁵⁶ It provided that IIC representatives could ask that documents be copied. All requests for documents to be copied would be referred to Mr Hargreaves, who would 'consider each request and either give his written consent to or reject the request'.¹⁵⁷

8.96 On 25 February 2005 Ms Ringler emailed Mr Cooper in relation to the data room protocol. The email stated:

Under the terms of the protocol you require that any AWB document that the IIC wants copied will need to be individually vetted and either approved or disapproved for copying. The reasons that you gave for this process, was AWB's concerns about having AWB documents on US soil rather than any claims of privilege, commercial sensitivity, etc. The IIC expects that under the provisions of paragraph two of the MOU, if the IIC requests copies of documents reviewed they will be provided to us, unless AWB is claiming a legal reason for not providing copies ... If it is the position of AWB that no AWB documents may be copied and provided to the IIC for its use outside of Australia, then the IIC will need to consider whether and how it will want to proceed with the MOU.¹⁵⁸

8.97 On 25 February 2005 Mr Cooper responded to Ms Ringler's email of that day in relation to the copying of documents in the AWB data room. The email stated:

What we are concerned about is confidentiality of the documents. We are concerned that a blanket agreement by AWB that the IIC may copy and take all documents in the dataroom back to the US could result in thousands of AWB documents being out of AWB's control in the US. Many of these documents will be commercially sensitive and could cause significant commercial damage to our business if disclosed to third parties.

As you know we have had questions about the IIC's status and the immunity it may enjoy. Our advice is that the IIC's immunity is not guaranteed and thus you cannot guarantee confidentiality of AWB's documents if they are held by the IIC in the US. As you know, we have asked 3 times for written confirmation from you on the IIC's immunity and you have not responded. This does not fill AWB with confidence that the IIC could resist a subpoena from another inquiry for AWB's documents.¹⁵⁹

8.98 On 26 February 2005 Ms Ringler responded to Mr Cooper's email of 25 February.¹⁶⁰ Specifically, she responded to the question of privileges and immunities enjoyed by the IIC, reiterating the position, communicated in other emails on this topic, that the IIC enjoyed the same privileges and immunities as the United Nations.¹⁶¹

8.99 On 26 February 2005 Ms Ringler also forwarded to Mr Cooper, by email, a revised memorandum of understanding.¹⁶² Her email stated:

In order to proceed with a cooperation MOU, the IIC will require a commitment from AWB that copies of any documents responsive to IIC's requests and made available for IIC review, will be copied for IIC use if requested by the IIC. The MOU at paragraph two amply protects copies of AWB documents provided to the IIC ...¹⁶³

To this end, clause 2 of the revised memorandum of understanding attached to Ms Ringler's email included the sentence: 'At the IIC's request AWB will furnish the IIC with copies of any documents that the IIC reviews in the AWB Data Room and determines are necessary for purposes of its inquiry'.¹⁶⁴

8.100 Again on 26 February 2005 Ms Ringler emailed Mr Cooper in relation to 'AWB's position on the MOU language relating to the copying of AWB documents for the IIC'.¹⁶⁵ The email stated:

Both Justice Goldstone and Mark Pieth insist that copies of AWB documents requested by the IIC be provided, unless there are exceptional reasons for not providing a copy of a document to the IIC ...

I am forwarding to you the MOU that has been approved by Justice Goldstone and Mark Pieth. They have advised me to convey to you that these are the circumstances under which the Committee will enter into a cooperation MOU with AWB. The Data Room Protocol will need to be conformed to the MOU language.¹⁶⁶

Clause 2 of the memorandum of understanding attached to Ms Ringler's email of 26 February 2005 included the sentence:

At the IIC's request, except in exceptional circumstances (addressed in paragraph 7), AWB will furnish the IIC with copies of documents that the IIC reviews in the AWB Data Room and determines are necessary for purposes of its inquiry.¹⁶⁷

8.101 On 26 February 2005 Ms Ringler forwarded to Mr Cooper, by email, signed copies of the memorandum of understanding and data room protocol negotiated between AWB and the IIC.¹⁶⁸

8.102 On 26 February 2005 Mr Cooper faxed Ms Ringler a copy of the memorandum of understanding, which he had signed on AWB's behalf.¹⁶⁹ The memorandum of understanding contained the following key provisions:

2. **Document Production and Confidentiality**—AWB will provide the IIC with access to scheduled AWB documents (see attached). The IIC may request, in writing, further documents that it considers relevant. In responding to the IIC's document requests, AWB has advised that it may take into account that certain documents may be commercially sensitive, subject to legal professional privilege, or expose AWB or its employees, officers or representatives (past or present) to breaches of Australian law. In the event that AWB decides to withhold documents for any of the aforementioned reasons, it will so advise the IIC in writing, and the parties may agree to additional terms for production. The IIC's review of all documents provided by AWB will be governed by the AWB Data Room Protocol, a copy of which is attached to this memorandum. At the IIC's request, except in exceptional circumstances (addressed further in paragraph 7), AWB will furnish the IIC with copies of documents that the IIC reviews in the AWB Data Room and determines are necessary for purposes of its inquiry. The IIC will maintain in strict confidence the documents provided by AWB, and it will not provide copies of documents to third parties. However, AWB agrees that the IIC may use documents provided by AWB for the purposes of its investigation and for any report. Documents provided by AWB will be maintained securely by the IIC and will be accessed only by IIC staff, all of whom have signed confidentiality agreements as a condition of their employment. At the conclusion of its investigation, and at AWB's choosing, the IIC either will return to AWB or destroy all documents that AWB provided the IIC. Any IIC work product relating to AWB will be maintained securely at all times, during and after termination of the IIC's investigation, and will be destroyed as soon as practicable after the inquiry concludes.

3. **Witness Interviews and Confidentiality**—The IIC will maintain in strict confidence the information gathered in the course of these interviews, and it will not provide any records of this information to third parties. However, AWB agrees that the IIC may use information that it gathers in the course of AWB interviews as well as the fact of these interviews for the purposes of its investigation and for any report. The IIC will provide AWB with reasonable notice of its request to interview any current AWB employee, officer, or representative as well as reasonable notice of any former AWB employee, officer, or representative for whom the IIC desires AWB's assistance in locating and interview. With respect to the IIC's interview of a person who worked for AWB in connection with the Programme, the parties understand that each interview will be on the record and for attribution. In advance of the interview, the IIC will submit a list of subject areas to be addressed with the witness. At each interview, two representatives of the IIC will be present. A witness may have—at the witness's choosing—a person of legal counsel. In addition, if the witness agrees, up to two representatives of AWB may be present at each interview. A witness will advise the IIC prior to the interview who will be present on his behalf.

- ...

5. **Naming of Past or Current Employees in any Report**—Where the IIC determines that identification of an AWB officer, employee, or representative (past or present) is necessary to make clear that there has been a full, fair, and transparent investigation into the Programme, such an individual's name may be included in an IIC report. However, the IIC will balance its

obligations with AWB's preference that its officers, employees, and representatives not be identified by name.

6. **Adverse Findings**—Consistent with the IIC's Investigations Guidelines, a copy of which is attached to this Memorandum, if the IIC proposed to make an adverse finding against AWB or one of its employees, officers, representatives (past or present), and that individual and/or AWB has cooperated with the investigation by providing documents or information, the subject of the adverse finding shall be informed of the proposed finding and the information upon which it is based and may make representations thereon personally, or with a legal representative, to place before the Committee relevant additional information or written submissions with regard to the proposed adverse finding. With the consent of the person or company against whom an adverse finding will be made, the person's or company's written submissions will be appended to the IIC's report or, if lengthy, posted on the IIC's website. The obligations pursuant to this paragraph shall survive termination under paragraph 8 if prior to AWB's termination of its cooperation AWB has provided the scheduled documents for the IIC's review and copying or the IIC has interviewed the AWB witnesses.¹⁷⁰

8.103 On 28 February 2005 Mr Cooper emailed an IIC investigator, noting matters that had arisen in relation to the IIC investigator's use of the data room. In part, the email stated:

... all documents you wish to be copied and to take with you are to be tagged, and AWB will consider them all in one bundle ... prior to your departure ...

...

Copy typing documents

I note our conversation this afternoon about copy typing information from documents you and [another IIC investigator] onto your laptop computers. You noted today that you have copy typed certain paragraphs from AWB's documents. It was not AWB's understanding in entering the MOU that you would be doing this, only that you would use your laptop computers for taking notes and paraphrasing. As I explained to you today, AWB has an issue with you copy typing complete sections of AWB documents. This is an issue which will be considered by AWB in reviewing the documents to be released.¹⁷¹

8.104 On 1 March 2005 Mr Cooper emailed Ms Ringler to finalise arrangements for copying and the provision of documents to the IIC. The email confirmed the following:

- AWB would provide to the IIC investigators copies of the documents that had been tagged by the investigators and that AWB had agreed to release.
- AWB would prepare and provide to the IIC investigators a schedule of documents that had been tagged by the IIC investigators but that AWB had not agreed to release.¹⁷²

- 8.105 On 2 March 2005 Ms Ringler replied to Mr Cooper's email of 1 March 2005. She clarified that the IIC had 'requested payment records that AWB had refused to release'.¹⁷³
- 8.106 On 11 March 2005 Ms Ringler wrote to Mr Cooper, enclosing summaries of interviews conducted by IIC investigators with Mr Lindberg, Mr Long and Mr Flugge.¹⁷⁴
- 8.107 On 1 April 2005 Mr Cooper responded to Ms Ringler's letter of 11 March 2005, expressing AWB's concern 'about the way the interviews will be conveyed to the IIC should these summaries stand, unchallenged in their present form'.¹⁷⁵ He said AWB intended to make a submission to the IIC about its concerns.
- 8.108 On 6 April 2005 Ms Ringler responded to Mr Cooper's letter of 1 April 2005, refuting each of his criticisms.¹⁷⁶ She also requested further information, the particulars of which she set out, as well as AWB's assistance in making arrangements for Mr Whitwell, Mr Watson, Mr Emons, Mr Stott and Mr Edmonds-Wilson to be interviewed by the IIC.
- 8.109 On 12 April 2005 Mr Cooper replied to Ms Ringler's letter of 6 April 2005. In response to her notification that the IIC planned to interview Messrs Whitwell, Watson, Emons, Stott and Edmonds-Wilson, Mr Cooper stated:
- In considering your request it would be helpful to understand their relevance to your inquiries. Therefore in accordance with the agreed protocols for the previous examinations, can you please provide me with a list of topics for each of the proposed interviews of all those persons named. Would you also provide me with copies of any documents that the investigators intend to put to each of those persons.¹⁷⁷
- 8.110 On 22 April 2005 Mr Lindberg wrote to Mr Volcker, attaching a 'detailed submission', as foreshadowed in Mr Cooper's letter of 1 April 2005, in relation to the IIC investigators' summaries of interviews, which Ms Ringler had forwarded to AWB on 11 March 2005.¹⁷⁸
- 8.111 On 29 June 2005 Mr Cooper responded to Ms Ringler's request for further information, as had been set out in her letter dated 6 April 2005.¹⁷⁹

Conclusion

- 8.112 It is to be observed that, by the time of the negotiations with the IIC, AWB had collected many relevant documents as a result of Project Rose. It did not simply make those documents available to the IIC. By negotiation, it managed to diminish the list of documents it provided and the witnesses it made available. Most of the documents that had been assembled by Mr Quennell as being relevant documents with which to brief counsel for the obtaining of

advice were not made available to the IIC. Plainly, AWB knew that such documents were relevant.

- 8.113 Further, in resisting the request to interview Messrs Whitwell, Watson, Emons, Stott and Edmonds-Wilson, AWB, in professing a desire to know of ‘their relevance to your inquiries’, was, at best, being disingenuous. Their relevance was obvious. Mr Quennell had taken statements from Messrs Whitwell, Stott and Edmonds-Wilson in about September 2004.¹⁸⁰
- 8.114 In truth, there was no full cooperation with the IIC. AWB engaged in a strategy of ‘passive cooperation’, providing only what was specifically asked for and, by using the memorandum of understanding with the United Nations, negotiating to restrict the documents sought. Had AWB been frank with the IIC, it would have provided to the IIC at least the material it had provided to its own counsel as being the relevant documents. It did not do so.
- 8.115 AWB’s response to the Canadian complaint, the United States Wheat Associates complaint and the IIC inquiry was one of restricted disclosure and absence of true cooperation. It was indicative of a closed corporate culture that did not accord with the statements in AWB’s Code of Conduct. However, such a response was not a breach of any Commonwealth, State or Territory law.

This Inquiry: 2005 and 2006

- 8.116 I record AWB’s response to this Inquiry not for the purpose of determining whether the response was a breach of any Commonwealth, State or Territory law—for in my view consideration of this response for the purpose of determining whether it constitutes a breach of the law is not within the terms of reference of this Inquiry—but so that there may be a full understanding of the difficulties I and those assisting me encountered in the conduct of the Inquiry. The AWB response is also indicative of the culture within AWB from board level down.
- 8.117 AWB presented a façade of cooperation with the Inquiry. In truth, it did not cooperate at all.
- 8.118 AWB had collected what it had regarded as the relevant documents in the brief to counsel in May 2004. It did not make those documents available to this Inquiry until obliged to do so after 63 days of hearings. Instead, it provided to the Inquiry the initial 79 volumes of documents it had provided to the United Nations. Thereafter, pursuant to mandatory notices, it produced

a great number of documents that this Inquiry had to search and assemble in some sensible order.

- 8.119 After the announcement of this Inquiry, AWB renamed Project Rose as Project Lilac. Project Lilac was to be managed by Mr Lindberg, Ms Gillingham and Mr Cooper. On 21 November 2005 Mr Lindberg, Ms Gillingham, Mr Cooper, Mr Zwier and Ms Thompson (the last two from Arnold Bloch Leibler) briefed the boards of AWB and AWBI about the Inquiry.¹⁸¹ Legal professional privilege was claimed in respect of that briefing.¹⁸² In the Federal Court, the Commonwealth did not oppose this claim for privilege.
- 8.120 On 13 December 2005 Mr Lindberg gave to the joint boards a verbal update on Project Lilac. The minutes do not disclose what was said.¹⁸³ There was a further briefing of the joint boards on 12 January 2006 by Mr Lindberg, Ms Gillingham, Mr Cooper, Mr Judd QC, Mr Zwier and Ms Thompson, as well as by Mr Ian Smith of Gavin Anderson & Company.¹⁸⁴
- 8.121 Prior to Christmas 2005 the solicitors for AWB, Arnold Bloch Leibler, provided to the Inquiry statements from 15 prospective witnesses, all being AWB executives. The statements were in general form and did not address a four-page list of matters the Inquiry sought to have addressed, the list having been provided to Arnold Bloch Leibler on 9 December 2005. The statements provided were of no use to the Inquiry, as AWB and its legal advisors must have known would be the case. It was then not known that in September 2004 lawyers for AWB had taken statements from many witnesses addressing the precise issues the subject of this Inquiry. AWB's lawyers were thus in a position to provide useful statements had they wished to do so. AWB chose not to. When proceedings commenced, Senior Counsel sought leave to appear for AWB and AWBI but not for any of the witnesses in respect of whom his instructing solicitors had provided statements. Those witnesses were thus initially unrepresented. I raised this matter. Subsequently the witnesses were represented by other solicitors and counsel.
- 8.122 On 25 January 2006 I raised the question of cooperation by AWB. Mr Judd QC responded to my remarks on 30 January 2006. I gave reasons in relation to this topic on 2 February 2006. The portions of my reasons relevant to cooperation are as follows:

1. On 25 January I stated:

Mr Judd, there is one matter I want to raise with you, and that relates to the cooperation that this inquiry is receiving from AWB. There have been a great number of statements made either by the chairman or on behalf of the chairman of the board that AWB would cooperate fully with this inquiry. Indeed, I think such a statement appears in the annual

report which was recently released. The question that's concerning me is whether in fact the Inquiry is receiving that absolute cooperation. I would have expected that AWB would have had an analysis done of all of the documents which are in their possession. I would have expected that AWB would have consulted with all of the witnesses who are likely to be called in this Inquiry, and I would have expected that the statements that would be given to this Inquiry would address both the matters which are the subject of this Inquiry and the documents that relate to it.

What in fact has happened is that the Inquiry was initially given I think the 79 volumes that were given to the United Nations and subsequently, as a result of notices which were served on AWB, and no doubt as a result of discussions between the various solicitors, we received some 80 or more additional volumes.

The Inquiry has also received some—I don't know—15 or 20 statements from witnesses proposed to be called, all of which statements have been prepared with the assistance of your instructing solicitors. I do not think it's unfair to say that those statements tell this inquiry nothing. They don't address the issues with which I'm concerned. They are, as this witness said, high-level statements. They don't address any of the documents which have been laboriously tendered throughout this Inquiry and which I would have expected would have been the subject matter of evidence provided in statement form to the Inquiry. There is no point in giving this Inquiry statements which simply don't address the issues I must consider.

The result of that is at least twofold. One is that we have to go through this laborious process of calling witnesses and putting to them all this material which, in my view, ought to have been the subject of their statements. That process is long and tedious and expensive. This will continue as long as is necessary for me to understand fully the factual issues.

The second consequence is that, as it seems to me, the process is doing AWB immeasurable harm from a reputational point of view and a measurable harm from an economic point of view.

The reason I raise it is because this morning this witness said his understanding was that this was just to be a high-level statement, and the reason I raise it now is because we're about to adjourn until next Monday, so far as AWB is concerned, at the conclusion of today, which gives your clients a chance to review the approach they wish to take, and, no doubt, will give the witnesses a chance to review the statements that they have to date provided to the Commission.

On any view of the material, that which has been tendered to date requires significant response, and it simply must be addressed. At present, it hasn't been. Unless it is addressed in such statements, this process that we're now going through will just have to continue.

I raise those matters for your consideration and the consideration of Mr Forrest because, as I said, I do not think that we are receiving the full cooperation that the board has indicated we would receive. Rather it seems to me we are receiving some façade of cooperation. I don't mean in any way to reflect on your performance in this inquiry. You have been cooperative. I'm more concerned with the substantive circumstance that we are simply not receiving statements from people addressing the issues I must inquire into.¹⁸⁵

2. On 30 January 2006 Senior Counsel for AWB addressed the Inquiry. Although the purpose of that address was said to be to respond to my remarks, it went far beyond that. In substance Senior Counsel for AWB addressed three matters. The first was a response to my remarks regarding lack of full cooperation. The second was submissions regarding legal professional privilege. The third was submissions regarding an asserted lack of fairness in the way in which the Inquiry was being conducted.

...

Façade of cooperation

6. Mr Judd QC contended that my expectation that there would have been an analysis of relevant documents, that there would have been consultation with all relevant witnesses, and that accordingly the statements would have addressed the matters the subject of this Inquiry and documents relevant to those matters, was unreasonable. Further, he contended that I had intimated that damage occurring to AWB, reputationally and financially, was due to the failure to produce detailed statements. He said that his instructing solicitors, Messrs Arnold Bloch Leibler, had stated in correspondence to the solicitor for the Inquiry that the statements were 'a general overview of the person's role and responsibility and involvement with the Iraq market'.¹⁸⁶ It was submitted that the Inquiry had not been provided with 'what was intended to be a substitute for the whole of the evidence to be given by the individual'.¹⁸⁷ It was explained that the decision to provide statements in this form was due to a number of factors. The first was the limited time available. The second was the restricted availability of the documents, and the third was that it would have been 'irresponsible' to descend to detail, or to have witnesses swear 'outside of the protection of the Commission, detailed responses to documents about which it is inevitable that [the] witness is going to be examined and examined on contentious issues. It seemed to us that the only prudent course was to allow that examination to occur before this Commission, and the Commission staff were so informed'.¹⁸⁸
7. It is thus apparent that a conscious decision was taken, presumably for the reasons given, not to provide witnesses' statements which would be of any material assistance to this Inquiry. This was so notwithstanding that by letter dated 9 December 2005 the solicitor assisting the Inquiry had written to AWB's solicitors setting out, over four pages, the topics which it was sought to have the witnesses address. Mr Judd's response to this letter was that it did not address matters which had become important to the Inquiry, namely, the Tigris issue, the iron filings issue, or the Arthur Andersen report.

8. Senior Counsel assisting the Inquiry, in response, indicated that the reason why the list of 9 December did not address those three matters, but did nonetheless address other matters of interest to the Inquiry, was that:
 - (1) the Tigris issue was not brought to the Inquiry's attention, and documents relating to it were not provided to the Inquiry, until 12 December 2005;
 - (2) no documents had been provided to the Inquiry in relation to the iron filings claim by 9 December 2005; and
 - (3) the Arthur Andersen report had not been provided to the Inquiry by 9 December 2005.
9. Mr Agius SC also responded that not one of the 15 statements provided by the solicitors for AWB from prospective witnesses who are current employees of AWB addressed the issues in the letter of 9 December.
10. AWB is not obliged to cooperate with this Inquiry. I have no power to make it do so. However, if the company and its board maintain in public statements that it is 'fully cooperating' with this Inquiry, I would have expected to receive more than statements from witnesses giving a 'general overview of that person's role, responsibility and involvement in the Iraqi market'. Such statements are of minimal assistance to the Inquiry. The reasons why the statements were in such a restricted and unhelpful form have been explained. Accepting the explanations given necessarily means that, for the reasons advanced by Mr Judd QC, AWB was not in a position to provide statements from witnesses which were likely to be of material assistance to this Inquiry.
11. I appreciate the volume of documents which had to be examined and analysed by AWB and provided to this Inquiry. I also appreciate the ongoing nature of that task and that obligation. Nonetheless, I would have expected that, at least since early 2005, if not earlier, AWB would have marshalled all relevant documents in order that it could satisfy the requirements of the United Nations Volcker Inquiry, and to satisfy itself that statements made by AWB were accurate. I infer from Mr Judd's remarks that that did not occur and that his instructing solicitors, although involved in preparing the response to the Volcker Inquiry and report, were not involved in that task of assembling and analysing those documents. This, no doubt, is another reason why the analysis of documents and provision of statements addressing those documents from relevant witnesses which would have been of material assistance to this Inquiry has not been forthcoming.
12. For the reasons I have given, I do not think that the AWB has 'fully cooperated' with this Inquiry. It may have cooperated to the extent that it is able, but it has been restricted in providing useful cooperation for the reasons given by Mr Judd.¹⁸⁹

8.123 As is apparent, I then accepted that amongst the reasons advanced for not providing statements addressing the matters of relevance to this Inquiry was, first, the limited time available and, second, the 'restricted availability of the documents'. At that time I did not know that in fact AWB had collected most

of the relevant documents in a volume to brief counsel in May 2004. Nor did I know that during 2004 AWB's lawyers had taken statements from many material witnesses on topics of relevance. Had there been cooperation, statements addressing the documentary material tendered on the first day of hearings could have been provided. The issues were well understood because Senior Counsel had been asked to advise on the very terms of reference into which I was to inquire as early as May 2004. The reasons advanced by Mr Judd QC for the absence of cooperation were not factually accurate.

8.124 At no time did AWB make a statement of its position before this Inquiry, otherwise than in relation to its claim for legal professional privilege. That meant that all factual and legal issues had to be addressed by evidence. AWB had the right to adopt that position. However, it is not consistent with cooperation when it is now apparent that AWB had collated much of the relevant material more than 18 months before the Inquiry began, yet chose not to produce it to the Inquiry until compelled to do so, and then not in its assembled form.

8.125 I address AWB's claims for legal professional privilege in Chapter 7. The AWB Chairman and Board, so I was told¹⁹⁰, decided to claim legal professional privilege for its internal investigation of AWB's trading with Iraq during the Oil-for-Food Programme.

8.126 In their written submissions AWB and its directors sought to explain their decision to maintain legal professional privilege. They acknowledged that by the commencement of the Inquiry AWB's lawyers had conducted the lengthy 'legal review' known as Project Rose, had conducted interviews with 16 AWB executives and taken statements from seven, had conducted the investigation known as Project Water into the Tigris matter, and had obtained legal advice from solicitors from senior and junior counsel, and that the Board had been briefed on these matters on several occasions. They submitted that because of the 'interests of the company as a whole', as distinct from the directors' 'own self interest', they resolved to claim privilege over that material. The 'interests of the company as a whole' were said to include:

... protecting the company's interests in the event of civil or criminal proceedings, protecting the legitimate interests of employees in the event of civil or criminal proceedings, and maintaining an environment where employees will not be dissuaded from seeking internal or external legal advice in relation to the company's business because of concern that the Board would act in its own self interest deciding whether or not to maintain any privilege attaching to such communications.¹⁹¹

8.127 Further, they submitted that, once there was pressure from both the Inquiry and the media and public to waive the privilege, it became not possible to

waive privilege because it would ‘attach criticism as one made for self interest and in breach of duty’.¹⁹²

8.128 I am not able to accept these extraordinary submissions. They are built on the premise that the Board of AWB considered the results of two-and-a-half years of investigations, recognised that disclosure of the facts, material and advice obtained during that process would be deleterious to AWB and its employees, and then resolved that it was in the ‘best interests of the company as a whole’ to try to keep secret that damaging material—even from a lawfully constituted Inquiry established by the Commonwealth of Australia to inquire into the very matter investigated. Reduced to simple terms, the directors decided to try and prevent disclosure of damaging documents. Of course, if the material was not damaging there could be no reason to try to prevent its disclosure. Furthermore, at the same time AWB and its directors stated repeatedly that they were cooperating with the Inquiry, knowing they were not, and maintained the public position of absence of any wrongdoing.

8.129 Unashamedly, AWB and its directors then submitted that, because they chose to seek to keep hidden the damaging documents, and because I would not accept their claims for privilege without their putting on evidence and my hearing argument, AWB was then obliged to resort to the Federal Court to have privilege decided. There, so it was argued, the matter was more expeditiously resolved than before me. Thus, the submissions concluded, it could ‘not be reasonably contended the refusal by AWB to waive privilege caused any significant delay’.¹⁹³

8.130 I do not doubt that the decision to seek to keep secret the damaging material was taken by AWB and its directors because of the awkwardness of AWB’s position. If support for that view is needed it is found in the judgment of Justice Young in the Federal Court, who, having looked at certain documents for which privilege was claimed, wrote:

I am satisfied that these 10 documents are not privileged. The documents were, prima facie, brought into existence in furtherance of an improper and dishonest purpose, viz. inflating the prices of contracts A1670 and A1680 so as to extract payments out of the United Nations’ escrow account that would then be utilised, in part, to satisfy a compensation claim by GBI [the Iraqi Grain Board]. Prima facie, the evidence establishes the transaction was deliberately and dishonestly structured by AWB so as to misrepresent the true nature and purpose of the trucking fees and to work a trickery on the United Nations.¹⁹⁴

8.131 AWB’s submission in relation to legal professional privilege has no substance whatsoever. It ignores the facts of what happened. Those facts are set out in Chapter 7, under the heading ‘Legal professional privilege’.

8.132 AWB maintained in its public statements three basic propositions:

- AWB believed that payments to Alia were for the provision by Alia of trucking services in Iraq.
- AWB did not know that payments to Alia were payments to Iraq or Iraqi entities.
- AWB's legal advice was that in making payments to Alia it had not acted contrary to UN sanctions and, further, that it had not breached any Australian law.

Disclosure of AWB's internal review of factual circumstances, including the documents reviewed and statements taken from witnesses, would at the very least cast serious doubt on the first two propositions. Disclosure of the legal advice received would make public the advice received contrary to the third proposition and make apparent the many reservations and qualifications AWB's legal advisors had raised, and disclose the narrow basis upon which the advice was given—in the case of Mr Tracey QC because, 'on the assumptions on which I have been asked to advise, the payments were made pursuant to bona fide commercial arrangements'¹⁹⁵ and in the case of Mr Richter QC, regarding Tigris, because although 'we consider it possible that AWB employees who structured the Tigris transaction might be found to have engaged in misleading conduct for certain purposes, that is not sufficient to establish the offence because of the absence of a causal link'.¹⁹⁶

8.133 Thus AWB, its Chairman, Deputy Chairman and its Board decided to try to maintain the logically absurd public position that AWB had not breached any sanctions or laws and had strong legal advice to establish that position but would not disclose that advice or the factual basis established by AWB on which it was based. The strategy was, from the outset, bound to fail once its claim for privilege was challenged because of the doctrine of waiver, as the Federal Court found.

8.134 AWB's response to this Inquiry was one of non-cooperation, lack of frankness, and resort to litigation to endeavour to keep from disclosure documents and material relevant to this Inquiry. The decision to adopt that approach was made by the Chairman and Board of AWB. It has caused inestimable reputational harm to AWB.

Conclusion

- 8.135 Although AWB's approach to the investigations and inquiries with which it was confronted might be indicative of a closed corporate culture and was plainly contrary to the spirit, if not the letter, of its own Code of Conduct, such approach and conduct did not constitute a breach of any Commonwealth, State or Territory law. Rather, it was reflective of an attitude, established at the highest level in the company, that bodies with a legitimate interest in whether AWB's activities accorded with proper standards of commercial conduct should be resisted in their endeavours to inquire into that issue. Whilst AWB was entitled to take such steps as it regarded appropriate to protect its legitimate commercial interest, in determining what were proper steps to be taken in that regard AWB appears to have overlooked the reputational consequences of its approach.

Notes

- ¹ Ex 22, AWB0131.0023 at 0024.
- ² For a full discussion of the Canadian complaint, see Chapter 16.
- ³ See Chapter 28.
- ⁴ See Chapter 28.
- ⁵ T 4581.42-4.
- ⁶ Ex 565, DFT.0013.0057 at 0058, para. 7.
- ⁷ Ex 565, DFT.0013.0057 at 0058, para. 7.
- ⁸ Ex 122, AWB.0136.0524.
- ⁹ Ex 121, MAE.0002.0091.
- ¹⁰ Ex 121, MAE.0002.0091.
- ¹¹ Ex 489, DFT.0001.0437.
- ¹² Ex 123, AWB.5117.0226.
- ¹³ Ex 121, MAE.0002.0091.
- ¹⁴ Ex 1021, BJS.0003.0052.
- ¹⁵ Ex 88, AWB.0214.0001.
- ¹⁶ Ex 88, AWB.0214.0001 at 0002.
- ¹⁷ Ex 408, WST.0001.0350 at 0354, para. 22.
- ¹⁸ Ex 681, JMC.0002.0001 at 0002, para. 4.
- ¹⁹ Ex 681, JMC.0002.0001 at 0002, para. 5.
- ²⁰ Ex 681, JMC.0002.0001 at 0002, paras 4-5.
- ²¹ T 3297.7-21; T3297.41 – T 3298.3.
- ²² T 3297.7-21.
- ²³ T 3259.31-4.
- ²⁴ T 3291.19-23.
- ²⁵ T 3297.27-33.
- ²⁶ T 3259.4-11.
- ²⁷ Ex 681, JMC.0002.0001 at 0004, para. 12.
- ²⁸ T 3297.45 – T 3298.3.
- ²⁹ Ex 681, JMC.0002.0001 at 0003, para. 9.
- ³⁰ Ex 1276, AWB.9000.0043 at 0046.
- ³¹ Ex 1276, AWB.9000.0043 at 0046.
- ³² Ex 1276, AWB.9000.0043 at 0047.
- ³³ Ex 1276, AWB.9000.0043 at 0047.
- ³⁴ Ex 1276, AWB.9000.0043 at 0048.
- ³⁵ Ex 1276, AWB.9000.0043 at 0049.
- ³⁶ Ex 1276, AWB.9000.0043 at 0049.
- ³⁷ Ex 1276, AWB.9000.0043 at 0051.
- ³⁸ Ex 1276, AWB.9000.0043 at 0051.
- ³⁹ Ex 1276, AWB.9000.0043 at 0053.
- ⁴⁰ Ex 1276, AWB.9000.0043 at 0053.
- ⁴¹ Ex 409, WJT.0010.0076 at 0077, para. 8.
- ⁴² T 3250.31-5.
- ⁴³ Ex 1276, AWB.9000.0095.
- ⁴⁴ Ex 1276, AWB.9000.0095 at 0101.
- ⁴⁵ Ex 1276, AWB.9000.0103.
- ⁴⁶ Ex 498, AWB.0338.0050.
- ⁴⁷ Ex 995, AWB.0420.0003_R.
- ⁴⁸ Ex 995, AWB.0420.0003_R at 0013_R-0390_R.
- ⁴⁹ Ex 995, AWB.0420.0003_R.
- ⁵⁰ Ex 995, AWB.0420.0003_R at 0003_R-0005_R.

- ⁵¹ Ex 995, AWB.0420.0003_R at 0005_R.
⁵² Ex 995, AWB.0420.0003_R at 0005_R.
⁵³ Ex 995, AWB.0420.0003_R at 0005_R-0006_R.
⁵⁴ Ex 995, AWB.0420.0003_R at 0006_R.
⁵⁵ Ex 995, AWB.0420.0003_R at 0006_R.
⁵⁶ Ex 995, AWB.0420.0003_R at 0006_R.
⁵⁷ Ex 995, AWB.0420.0003_R at 0006_R.
⁵⁸ Ex 995, AWB.0420.0003_R at 0006_R.
⁵⁹ Ex 581, AWB.0106.0111.
⁶⁰ Ex 582, DFT.0001.0011 at 0013.
⁶¹ Ex 995, AWB.0420.0003_R at 0007_R.
⁶² Ex 995, AWB.0420.0003_R at 0008_R.
⁶³ Ex 749, AWB.0416.0011_R.
⁶⁴ Ex 768, AWB.0413.0177 at 0182.
⁶⁵ Ex 337, AWB.0157.0417 at 0422-3. See also minutes of AWBI board meeting of 25 May 2004, which record a similar note (Ex 1421, JMC.0002.0076-0081).
⁶⁶ T 6243.3-29.
⁶⁷ Ex 1276, AWB.0416.0015_R at 0016_R.
⁶⁸ Ex 1276, AWB.0416.0015_R.
⁶⁹ Ex 1276, AWB.0416.0015_R.
⁷⁰ Ex 1276, AWB.9001.0311 at 0312-0313.
⁷¹ Ex 1276, AWB.9002.0084; Ex 1276, AWB.9001.0337.
⁷² Ex 1276, AWB.9001.0362.
⁷³ Ex 1351, AWB.0470.0089 at 0090.
⁷⁴ Ex 1276, AWB.0416.0047_R.
⁷⁵ Ex 1276, AWB.0416.0018_R at 0019_R.
⁷⁶ Ex 751, AWB.0416.0020 at 0027-0030.
⁷⁷ Ex 751, AWB.0416.0020 at 0030.
⁷⁸ Ex 751, AWB.0416.0020 at 0030-0031.
⁷⁹ Ex 1276, AWB.9002.0395 at 0415.
⁸⁰ Ex 1370, AWB.9002.0426 at 0431.
⁸¹ Ex 1370, AWB.9002.0426 at 0434.
⁸² Ex 1370, AWB.9002.0426 at 0435-0436.
⁸³ Ex 1370, AWB.9002.0426 at 0437.
⁸⁴ Ex 1276, AWB.9003.0005.
⁸⁵ Ex 1276, AWB.9003.0005 at 0010-0011.
⁸⁶ Ex 1276, AWB.9003.0005 at 0013.
⁸⁷ Ex 1276, AWB.0338.0150_R at 0170_R, para. 54.
⁸⁸ Ex 1276, AWB.0338.0150_R at 0171_R, para. 58.
⁸⁹ Ex 1276, AWB.0338.0150_R at 0173_R - 0174_R.
⁹⁰ Ex 498, AWB.0338.0050.
⁹¹ Ex 995, AWB.0420.0003_R.
⁹² Ex 971, AWB.0413.0057 at 0058.
⁹³ Ex 956, AWB.0085.0016_R.
⁹⁴ Ex 956, AWB.0085.0016_R at 0016_R-0017_R.
⁹⁵ Ex 956, AWB.0085.0016_R.
⁹⁶ Ex 956, AWB.0085.0016_R.
⁹⁷ Ex 956, AWB.0085.0022_R.
⁹⁸ Ex 956, AWB.0085.0022_R.
⁹⁹ Ex 956, AWB.0085.0026_R.
¹⁰⁰ Ex 956, AWB.0085.0030_R.
¹⁰¹ Ex 956, AWB.0085.0043_R.
¹⁰² Ex 956, AWB.0085.0043_R.
¹⁰³ Ex 497, WST.0019.0046_R at 0075_R, para. 130.

- ¹⁰⁴ Ex 497, WST.0019.0046_R at 0075_R, para. 130.
- ¹⁰⁵ Ex 845, DFT.0026.0158 at 0159.
- ¹⁰⁶ Ex 956, AWB.0085.0042_R.
- ¹⁰⁷ Ex 956, AWB.0085.0042_R.
- ¹⁰⁸ Ex 956, AWB.0085.0042_R.
- ¹⁰⁹ Ex 956, AWB.0085.0042_R.
- ¹¹⁰ Ex 956, AWB.0085.0042_R.
- ¹¹¹ Ex 956, AWB.0085.0042_R.
- ¹¹² Ex 956, AWB.0085.0063_R.
- ¹¹³ Ex 956, AWB.0085.0063_R.
- ¹¹⁴ Ex 956, AWB.0085.0063_R.
- ¹¹⁵ Ex 956, AWB.0085.0063_R.
- ¹¹⁶ Ex 956, AWB.0085.0063_R.
- ¹¹⁷ Ex 956, AWB.0085.0063_R at 0064_R.
- ¹¹⁸ Ex 956, AWB.0085.0063_R at 0064_R.
- ¹¹⁹ Ex 956, AWB.0085.0063_R at 0064_R.
- ¹²⁰ Ex 956, AWB.0085.0063_R at 0064_R.
- ¹²¹ Ex 956, DFT.0022.0025_R.
- ¹²² Ex 956, DFT.0022.0025_R at 0026_R.
- ¹²³ Ex 956, DFT.0022.0025_R.
- ¹²⁴ Ex 956, DFT.0022.0025_R.
- ¹²⁵ Ex 956, DFT.0022.0025_R.
- ¹²⁶ Ex 956, AWB.0295.0103_R.
- ¹²⁷ Ex 956, AWB.0295.0101_R.
- ¹²⁸ Ex 956, AWB.0295.0101_R.
- ¹²⁹ Ex 956, AWB.0394.0237; see Ex 956, AWB. 0085.0067_R.
- ¹³⁰ Ex 956, AWB.0085.0067_R.
- ¹³¹ Ex 956, AWB.0085.0067_R.
- ¹³² Ex 956, AWB.0085.0097_R.
- ¹³³ Ex 956, AWB.0085.0097_R.
- ¹³⁴ Ex 956, AWB.0085.0097_R.
- ¹³⁵ Ex 956, AWB.0085.0098_R; Ex 956, AWB.0280.0205_R.
- ¹³⁶ Ex 956, AWB.0085.0098_R.
- ¹³⁷ Ex 1507, AWB.0085.0120_R; Ex 956, AWB.0085.0126_R.
- ¹³⁸ Ex 956, AWB.0085.0126_R.
- ¹³⁹ Ex 956, AWB.0085.0126_R.
- ¹⁴⁰ Ex 956, AWB.0085.0126_R-0127_R.
- ¹⁴¹ Ex 956, DFT.0008.0010_R.
- ¹⁴² Ex 956, DFT.0008.0010_R.
- ¹⁴³ Ex 956, AWB.0085.0128_R; Ex 956, AWB.0085.0146_R.
- ¹⁴⁴ Ex 956, AWB.0085.0146_R.
- ¹⁴⁵ Ex 956, AWB.0085.0121_R.
- ¹⁴⁶ Ex 956, AWB.0085.0129_R.
- ¹⁴⁷ Ex 956, AWB.0085.0130_R.
- ¹⁴⁸ Ex 956, AWB.0085.0131_R.
- ¹⁴⁹ Ex 956, AWB.0085.0140_R.
- ¹⁵⁰ Ex 956, AWB.0085.0144_R.
- ¹⁵¹ Ex 956, AWB.0085.0146_R.
- ¹⁵² Ex 956, AWB.0085.0150_R.
- ¹⁵³ Ex 956, AWB.0085.0152_R.
- ¹⁵⁴ Ex 956, AWB.0085.0155_R-0156_R.
- ¹⁵⁵ Ex 956, AWB.0085.0161_R.
- ¹⁵⁶ Ex 956, AWB.0085.0161_R at 0164_R.
- ¹⁵⁷ Ex 956, AWB.0085.0161_R at 0165_R.

158 Ex 956, AWB.0085.0167_R.
159 Ex 956, AWB.0085.0173_R.
160 Ex 956, AWB.0085.0177_R.
161 Ex 956, AWB.0085.0177_R.
162 Ex 956, AWB.0085.0181_R.
163 Ex 956, AWB.0085.0181_R.
164 Ex 956, AWB.0085.0186_R.
165 Ex 956, AWB.0085.0190_R.
166 Ex 956, AWB.0085.0190_R.
167 Ex 956, AWB.0085.0195_R.
168 Ex 956, AWB.0085.0202_R.
169 Ex 956, AWB.0085.0213_R.
170 Ex 956, AWB.0085.0214–0216.
171 Ex 956, AWB.0085.0226_R.
172 Ex 956, AWB.0085.0229_R at 0230_R.
173 Ex 956, AWB.0085.0229_R.
174 Ex 956, AWB.0086.0010_R.
175 Ex 956, AWB.0086.0033_R.
176 Ex 956, AWB.0294.0002_R.
177 Ex 956, AWB.0086.0040_R.
178 Ex 956, AWB.0294.0007; Ex 956, AWB.0002.0174_R.
179 Ex 956, UNO.0003.0194_R.
180 Ex 1338, AWB.9001.0203; Ex 1337, AWB.9001.0212; Ex 1340, AWB.9003.0092, respectively.
181 Ex 1377, AWB.0371.002 at 004.
182 Ex 1377, AWB.0371.002 at 004.
183 Ex 1377, AWB.0371.035 at 036; Ex 1377, AWB.0371.041 at 042.
184 Ex 1377, AWB.0417.0013 at 0014.
185 T 1301.3 – T 1302.33.
186 T 1540.28–30.
187 T 1540.47 – T 1541.2.
188 T 1541.45 – T 1542.4.
189 TRH Cole AO RFD QC, Reasons,
<<http://www.oilforfoodinquiry.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Statements>>, 2
February 2006.
190 T 724; T 1317.
191 Submissions of AWB, para. 12.
192 Submissions of AWB, para. 14.
193 Submissions of AWB, para. 17.
194 *AWB Limited v Honourable Terence Rhoderic Hudson Cole* (No. 5) [2006] FCA 1234, [229] (Young J).
195 Ex 1276, AWB.9002.0395 at 0407, para. 18.
196 AWB.9002.0018 at 0133.

Glossary

661 Committee	A sanctions oversight committee created under Security Council Resolution 661 and made up of representatives of each of the 15 members of the Security Council.
address commission	A payment made by a vessel owner to a charterer provided for under the terms of the charterparty, usually expressed as a percentage of the amount of the freight payable that is earned upon loading and deducted by the charterer from the freight payable under the charter. The address commission does not require any particular services on the part of the charterer and amounts in effect to a slight reduction in the amount of freight payable.
after-sales-service fee	<p>When used by the Independent Inquiry Committee in its final report, refers to the term used to disguise the humanitarian kickback paid on Oil-for-Food Programme contracts as required by the Iraqi regime.</p> <p>In the context of the contracts for the sale of wheat by AWB Limited to Iraq under the Oil-for-Food Programme, refers to the 10 per cent of the CIF FOT price for wheat sold under contracts concluded under the Programme after November 2000 and paid by AWB Limited as part of the inland transportation fees payable in respect of those contracts. This additional fee was also added to the CIF FOT price in order to give the contract price for those contracts.</p>
Australian International Development Assistance Bureau	The bureau's main purpose was to manage the overseas aid programs undertaken by Australia; it was controlled by the Department of Foreign Affairs and Trade. In 1995 the bureau became AusAID.
Alkaloids of Australia Limited	One of the three Australian companies to be investigated by the Independent Inquiry Committee and this Inquiry in respect of sales made to Iraq during the Oil-for-Food Programme

AusAID	The Australian government agency responsible for managing the Australian Government's official overseas aid program since 1995.
Austrade	An Australian government agency that helps Australian companies win overseas business for their products and services by reducing the time, cost and risk involved in selecting, entering and developing international markets.
AWB National Pool	The wheat collected from Australian growers and pooled under the Single Desk operated by AWB (International) Limited pursuant to the provisions of the <i>Wheat Marketing Act 1989</i> .
Canadian complaint	In January 2000 the Canadian mission to the United Nations informed the Office of the Iraq Programme that the Canadian Wheat Board had been asked to deposit funds in a bank in Jordan to cover 'transport costs' in Iraq. In providing this information, the Canadian mission told the OIP that AWB had agreed to such an arrangement.
carrier	The owner or operator of a ship who enters into a contract of carriage with the shipper for the transportation of goods from one port (the port of loading) to another port (the port of discharge).
CIF	Under a sale on CIF terms, the delivery of the goods to the named port of destination and the cargo insurance against the risk of loss or damage during that transit are at the seller's expense. The buyer is responsible for the import customs clearance and other costs and risks.
CIF free out	Under a sale on CIF free out terms, the seller is responsible for arranging for and the expense of the cargo insurance and delivery to the named port of destination but is not responsible for arranging or the costs of the discharge of the cargo from the vessel.
charterparty	A contract for the use of a ship, or part of it, entered into by the shipowner or disponent owner and the person or entity proposing to use the ship.

CIP	Under a sale on CIP terms, the delivery of the goods and the cargo insurance to the named place of destination (discharge) is at the seller's expense. The buyer assumes responsibility for the import customs clearance, payment of customs duties and taxes, and other costs and risks.
CNF	Under a sale on CNF terms, the delivery of the goods to the named port of destination (discharge) is at the seller's expense. The buyer is responsible for cargo insurance (<i>compare</i> CIF) and other costs and risks.
contract of affreightment	A contract (usually on voyage charterparty terms) for the carriage of a specified quantity of cargo over a series of periodic voyages in a vessel or vessels to be nominated. (This type of contract is generally used where the quantity of the cargo to be carried is more than can be carried by one ship and/or is to be carried over a period of time.)
Cotecna Inspection SA	From December 1998 to 2003 this company inspected all humanitarian goods entering Iraq under the Oil-for-Food Programme, including all wheat cargoes shipped by AWB Limited to Iraq under the Programme and delivered at the port of Umm Qasr.
demurrage	The extra charge required to be paid generally by the charterer of a ship to the owner or disponent owner of the ship under a voyage charterparty or contract of affreightment for any delay (for which the ship owner is not responsible) in the loading or unloading of a ship beyond the agreed laytime.
despatch	The money payable by the owner or disponent owner of a ship to a charterer under a voyage charter or contract of affreightment where the ship completes loading or unloading before the agreed laytime has expired.
disponent owner	A person or company that has commercial control over the operation of a ship without owning it.
Distall Rhine Ruhr Pty Limited	The name by which Rhine Ruhr Pty Limited was incorrectly referred to in the Independent Inquiry Committee final report.

Duboisia	Native Australian plant grown, among other places around Kingaory in Queensland, used to produce the pharmaceutical product hyocine (hyocine-N-butylbromide), which is used to treat stomach spasm.
Executive Leadership Group	Comprised the Managing Director of AWB Limited together with the senior executives who reported directly to the Managing Director.
escrow account	Account maintained by the United Nations with BNP from which purchases under the Oil-for-Food Programme were made. Also referred to as the UN Iraq account.
EXIT	Information technology system used by the Australian Customs Service.
final report	The final report of the Independent Inquiry Committee, entitled <i>Manipulation of the Oil-for-Food Programme by the Iraqi Regime</i> and issued on 27 October 2005. Also referred to as the Volcker report.
FIO	Where goods are shipped FIO, the freight charged does not include loading or discharge costs.
FOB	Where goods are sold FOB, delivery of the goods on board the vessel at the named port of origin (loading) is for the seller's expense. The buyer is responsible for arranging and paying for the carriage of the goods (freight), cargo insurance and other costs and risks after loading.
Independent Inquiry Committee into the United Nations Oil-for-Food Programme	Also referred to as the Volcker Inquiry. Established by the United Nations under Security Council Resolution 1538 to inquire into and report on the manipulation of the Oil-for-Food Programme.
inland transportation fee	When used by the Independent Inquiry Committee in its final report, refers to the scheme related to the humanitarian goods contracts in which the Iraqi regime required from those companies selling goods to it payment of transportation fees in order to deliver goods internally within Iraq. Also referred to as a 'trucking fee'.

Iraq-UN MOU	Memorandum of Understanding between the Secretariat of the United Nations and the Government of Iraq on the implementation of Security Council Resolution 986.
Iron Filings Claim	A claim made by the Iraqi Grain Board against AWB Limited, alleging that a number of AWB shipments of wheat were found on discharge at Umm Qasr to be contaminated with traces of 'iron powder'. The claim was subsequently settled, with AWB Limited agreeing to pay to the Iraqi Grain Board US\$6 per tonne compensation in respect of the contamination.
kickback	When used by the Independent Inquiry Committee in its final report, denotes an illicit payment to Iraq by a company contractor made in connection with Iraq's selection of a company to receive a contract to provide humanitarian goods under the Oil-for-Food Programme.
laytime	The period that the owner or disponent owner of a ship under a voyage charter or contract of affreightment on voyage charter terms has agreed with the charterer as the time during which the owner or disponent owner will make and keep the ship available for loading and discharge without any payment additional to freight.
MOU	In particular, used to described the Memorandum of Understanding on the implementation of Resolution 986 that the Secretariat of the United Nations and the Government of Iraq concluded on 20 May 1996.
non-paper	A paper circulated within a committee or section of the United Nations that does not have formal status and will not be circulated to the United Nations membership more broadly.
Office of the Iraq Programme	Established by the United Nations on 15 October 1997 to administer the Oil-for-Food Programme.
phostoxin tablets	Aluminium phosphide tablets that are used to produce phosphine gas, a fumigant used in the treatment of stored grain.

port fees	Fees charged or sought to be charged by the Iraqi State Company for Water Transport on vessels at the port of unloading (Umm Qasr).
Project Rose	The code name used by the AWB group for its internal investigation into AWB's wheat exports to Iraq and its involvement in the UN Oil-for-Food Programme.
Project Water	The code name given by AWB Limited to the recovery of the Tigris debt via contracts A1670 and A1680.
Project Lilac	The code name used by the AWB group from November 2005 for the group's response to this Inquiry.
Proton	The code name given by AWB Limited to Mr Long during the period he was seconded to the Coalition Provisional Authority in 2003.
recap, recap telex	Communication, usually in the form of a telex or email, that recapitulates (sets out) the terms of a charterparty or fixture under negotiation.
Resolution 661	UN resolution passed following the invasion of Kuwait by Iraq in 1990. It prohibited most forms of trade and financial transactions with Iraq.
Resolution 687	UN resolution passed in 1991 expressly providing that Resolution 661 shall not apply to foodstuffs notified to the 661 Committee established by Resolution 661.
Resolution 986	UN resolution passed in 1995 establishing the Oil-for-Food Programme.
Resolution 1284	UN resolution passed in 1999 varying the procedures of the 661 Committee for approval of contracts for the provision of humanitarian supplies.
Resolution 1538	UN resolution passed in 2004 establishing the Independent Inquiry Committee.
Rhine Ruhr Pty Limited	One of the three Australian companies to be investigated by the Independent Inquiry Committee and this Inquiry in respect of sales made to Iraq during the Oil-for-Food Programme.

shipper	A person who ships their cargo with a carrier.
Single Desk	The system under the <i>Wheat Marketing Act 1989</i> pursuant to which AWB (International) Limited was exclusively responsible for marketing all bulk exports of Australian wheat.
the Tigris debt	Refers to the recovery from Iraq of the cost of 20,833 tonnes of wheat that had been shipped by the Australian Wheat Board to Iraq in January 1996 on the <i>Ikan Sepat</i> . The cost of the wheat shipped was financed at the time by BHP Petroleum Pty Ltd, which in 2000 purported to assign to Tigris the alleged liability of the Iraqi Grain Board to repay that cost.
trucking fee	Another name used for the inland transportation fee.
Umm Qasr	The only sea port in Iraq and the port at which AWB shipments of wheat to Iraq were discharged during the Oil-for-Food Programme.
US embargo	The prohibition on the transfer of funds to the Government of Iraq, its instrumentalities and controlled entities imposed by the United States Government as part of the trade sanctions on Iraq following Iraq's invasion of Kuwait in August 1990.
vacuator	Self-contained heavy-duty portable pneumatic conveyor used to discharge grain from the hold of a ship.
Volcker report	The final report of the Independent Inquiry Committee, entitled <i>Manipulation of the Oil-for-Food Programme by the Iraqi Regime</i> and issued on 27 October 2005.
Zuhair	Mr Zuhair Daoud, Director General of the Grain Board of Iraq until late 1999.

Shortened forms

ACS	Australian Customs Service
adcom	address commission
AH	Australian Hard (wheat)
AIDAB	Australian International Development Assistance Bureau
Alia	Alia for Transportation and General Trade
Alkaloids	Alkaloids of Australia Limited
APH	Australian Prime Hard (wheat)
API	Arabian Peninsula and Iran and Iraq Section of the Middle East and Africa Branch of the Department of Foreign Affairs and Trade
APW	Australian Premium White (wheat)
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
ASSF	after-sales-service fee
ASW	Australian Standard White (wheat)
AusAID	Australian Agency for International Development
AWB	AWB Limited
AWBA	AWB (Australia) Limited
AWBI	AWB (International) Limited
AWBL	AWB Limited
AWBS	AWB Services Limited
BHPB	BHP Billiton Limited
BHPP	BHP Petroleum Pty Limited

BNP	BNP Paribus SA – formerly Banque Nationale de Paris SA
BNY	Bank of New York
BOL	bill of lading
CBI	Central Bank of Iraq
CFO	Chief Financial Officer
CIF	cost insurance freight
CIF FIT	cost insurance freight, free in truck
CIF FOT	cost insurance freight, free on truck
CIP	carriage and insurance paid
CNF	cost and freight – also known as C&F and CFR
COA	contract of affreightment
CPA	Coalition Provisional Authority
CPMD	Contracts Processing and Monitoring Division of the Office of the Iraq Programme
CRRC	Corporate Risk Review Committee of AWB Limited
CRU	Corporate Risk Unit of AWB Limited
CWB	Canadian Wheat Board
DA	disbursement account
dem	demurrage
des	despatch
DFAT	Department of Foreign Affairs and Trade
DM	Deutschmark
ECN	export clearance number
EFIC	Export Finance and Insurance Corporation
ELG	Executive Leadership Group of AWB Limited

eta	estimated time of arrival
eta UMQ	estimated time of arrival at the port of Umm Qasr
FIO	free in and out
FIT	free in truck
FOB	free on board
FOT	free on truck
frt	freight
FSSL	First Siam Shipping Lines Pte (Singapore)
GAFTA	Grain and Feed Trade Association
GBI	Grain Board of Iraq – also referred to as Iraqi Grain Board
GCRC	Group Corporate Risk Committee of AWB Limited
GGA	Grain Growers Association Limited
GRL	goods review list
HMM	Hyundai Merchant Marine Limited
IAEA	International Atomic Energy Agency
IGB	Iraqi Grain Board – also referred to as Grain Board of Iraq
IGC	Iraqi Grain Corporation – erroneous reference to the Iraqi Grain Board
IIC	Independent Inquiry Committee into the United Nations Oil-for-Food Programme – also referred to as the Volcker Inquiry
IJLTC	Iraqi Jordanian Land Transport Company
ILD	International Organisations and Legal Division/International Legal Division of the Department of Foreign Affairs and Trade
IOB	International Organisations Branch of the Department of Foreign Affairs and Trade
IOL	International Organisations and Litigation Section of the Department of Foreign Affairs and Trade

ISCLT	Iraqi State Company for Land Transport
ISCWTT	Iraqi State Company for Water Transport
ISM	International Sales and Marketing Division of AWB Limited
ITF	Iraq Task Force – a task force established within the Department of Foreign Affairs and Trade
JIS	joint information session
L/C	letter of credit
LOI	letter of indemnity
MAB	Middle East and Africa Branch of the Department of Foreign Affairs and Trade
MIF	Multinational Interception Force
mol	more or less
molbopt	more or less at buyer’s option
molsopt	more or less at shipper’s option
MOT	Ministry of Transport
MOU	memorandum of understanding
OFFI	Oil-for-Food Inquiry
OFFP	Oil-for-Food Programme
OGC	Office of General Counsel in the Coalition Provisional Authority
OIP	Office of the Iraq Programme
OLA	Office of Legal Affairs
ORHA	Office of Reconstruction and Humanitarian Assistance
Pac Rim	Pacific Rim Shipping Pty Limited
pct	per cent
PMC	Department of the Prime Minister and Cabinet
PMO	Prime Minister’s Office

pmt	per metric tonne
PONL	P&O Nedlloyd
PSI	(US Senate) Permanent Subcommittee on Investigations
RR	Rhine Ruhr Pty Limited
SEWT	(Iraqi) State Enterprise for Water Transport
SOMO	State Oil Marketing Organisation
tbn	tonnage to be nominated
Tigris Australia	The Tigris Petroleum Corporation Pty Limited
Tigris, Tigris Petroleum	The Tigris Petroleum Corporation Limited
tpd	tonnes per day
UN	United Nations
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNNY	Australian permanent mission to the United Nations in New York
UNSC	United Nations Security Council
USD	US dollar
UWA	US Wheat Associates
WBC	Western Bulk Carriers
WEA	Wheat Export Authority
WFO	World Food Organization
WFP	World Food Programme
WTO	World Trade Organization