



Form 7
(Order 4 rule 6; Order 11)

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

NSD 2020/2007

IN THE MATTER OF JOHN WATSON & KAYE WATSON
in their own right and as representatives of the Group Members

Applicants

AWB LIMITED (ACN 081 890 459)

Respondent

SECOND FURTHER AMENDED STATEMENT OF CLAIM
(filed pursuant to leave granted by his Honour Justice Foster on 21 July 2009)

A The applicants and the Group Members

1. This proceeding is commenced by the applicants on their own behalf and on behalf of persons who:
 - (a) between 11 March 2002 and 13 January 2006 inclusive (**Relevant Period**) obtained an interest in the respondent's "B Class" securities (**AWB securities**) being an interest that was the result of a purchase of AWB securities on the financial market (**ASX**) operated by the corporation then known as Australian Stock Exchange Limited and now known as ASX Limited (trading as Australian Securities Exchange);
 - (b) at the close of business on 13 January 2006 held an interest in AWB securities obtained during the Relevant Period; and

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Statement of Claim.doc

(c) suffered loss and damage by reason of the Contraventions, as defined below

(Group Members).

2. The applicants purchased AWB securities in 2005 and sold them after 13 January 2006.

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The applicants' purchase details are detailed in Schedule A to this Second Further Amended Statement of Claim.

3. By reason of or resulting from the Contraventions, as defined in paragraph 57 below, the applicants:

(a) purchased AWB securities;

(b) retained their AWB securities from the date of purchase until the expiration of the Relevant Period; and

(c) did not purchase shares in the Commonwealth Bank of Australia for a comparable consideration as that paid for the AWB securities.

4. Deleted

B The respondent

5. The respondent (AWB):

(a) at all material times was and is:

(i) a company registered pursuant to either the *Corporations Law* (Vic) or the *Corporations Act 2001* (Cth) (CA) and is capable of being sued;

(ii) a trading corporation for the purposes of section 4 of the *Trade Practices Act 1974* (Cth) (TPA);

- (iii) a person within the meaning of section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
 - (iv) a person within the meaning of section 9 of the *Fair Trading Act 1999* (Vic) (**FTA**)
- (b) on 1 July 1999 became an unlisted public company;
- (c) on and from 21 August 2001 and during all of the Relevant Period was:
- (i) a listed disclosing entity within the meaning of section 111AL(1) of the CA; and
 - (ii) a participant in a financial market within the meaning of sections 9 and 767A of the CA and subject to and bound by the provisions of the Listing Rules (**ASX Listing Rules**) of the ASX as to its activities or conduct.

C AWB securities

6. From about 1 July 1999 and at all times during the Relevant Period AWB had a dual class share structure by reason of the issue of:
- (a) "A Class" shares to persons who met the definition of "growers" in the AWB Constitution; and
 - (b) "B Class" shares being the AWB securities.
7. On or about 21 August 2001 AWB securities were quoted on the ASX and have thereafter been quoted and traded on the ASX (excluding periods of trading halts).

D AWB, AWBI and its business

8. From 1 July 1999 and at all material times during the Relevant Period:
- (a) section 57 of the *Wheat Marketing Act 1989* (Cth) (**WM Act**):
 - (i) prohibited the export of wheat from Australia unless the Wheat Export Authority (**Authority**), established by the WM Act had given its written

consent to the export of the wheat and the export of the wheat was in accordance with the terms of that consent;

- (ii) provided that that prohibition did not apply to AWB (International) Limited (**AWBI**);
 - (iii) provided that the Authority must not give consent to the bulk-export of wheat without the prior approval in writing of AWBI.
- (b) AWBI was at all material times a wholly owned subsidiary of AWB.
 - (c) AWBI had common directors with AWB.
 - (d) the WM Act had the effect that a “single desk” arrangement existed (**single desk**) by which:
 - (i) growers and others sold any wheat intended for bulk export to AWBI, which would then, by itself or its agent, negotiate the sale of that wheat (**National Pool**) overseas;
 - (ii) AWBI would pay a purchase price calculated by reference to the net return for the pool in which the wheat was included;
 - (e) by reason of the matters in (a) and (d) AWBI had a monopoly on the bulk-export of Australian wheat (**AWB Monopoly**).
 - (f) AWB managed and marketed bulk wheat exports from Australia as agent for AWBI and entered into contracts for the supply of wheat (including with the Ministry of Trade, Iraqi Grain Board) as agent for AWBI;
 - (g) By virtue of the matters in (f) AWB derived revenue and other commercial benefits, such that loss of the AWB Monopoly would have materially impacted the returns and earnings of AWB.
9. By reason of section 57(7) of the WM Act, the management of the National Pool by AWBI was to be the subject of a review by the Authority before the end of 2004.

10. In 2001 the Federal Government announced that:
- (a) the single desk would be retained; and
 - (b) the single desk would not be scheduled for review under National Competition policy guidelines until 2010.

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AWB Investor Fact Book – ASX Public Announcement 2003 – 42 (at page 16), states: *“The Single Desk system is established under the Wheat Marketing Act 1989 in which AWBI is appointed as the sole marketer of Australian export bulk wheat. Both the Single Desk system arrangements and AWBI’s operation of the system are enshrined in the legislation and require an Act of Parliament to be amended. The Single Desk system marketing arrangements for wheat enjoy largely bipartisan support in the Commonwealth Parliament. The operation of the Single Desk system was recently reviewed in the NCP review process, which reported in December 2000. The Government responded to this review in early 2001 by retaining the existing arrangements under which AWBI is responsible for the Single Desk system. The Single Desk system legislation is not scheduled to be reviewed under NCP guidelines until 2010.”*

11. From about 1 July 1999:
- (a) and from time to time during the Relevant Period, AWB, as part of its business as agent for AWBI exported wheat from Australia to the Republic of Iraq (**Iraq**) by supplying wheat pursuant to certain contracts entered into with the Iraqi Grains Board (**IGB**);
 - (b) until on or about 28 May 2003, AWB could only export wheat from Australia to Iraq in accordance with regulations made under the provisions of the *Customs Act 1901* (Cth) including Regulation 13CA (**Regulation**) of the *Customs (Prohibited Exports) Regulations 1958* (Cth);
 - (c) AWB was prohibited by the Regulation, until the Regulation’s repeal on or about 28 May 2003, from exporting wheat from Australia to Iraq unless AWB first obtained permission (**Ministerial Permission**) from the Minister of State for Foreign Affairs and Trade (**Minister**) or his delegate.

12. From about 1 July 1999 and at all times during the Relevant Period AWB knew and it was the fact that:

- (a) the public international law obligations of Australia as a member state of the United Nations (UN) under the *Charter of the United Nations* 1945 (**Charter**) required Australia to accept and carry out the decisions and resolutions of the Security Council of the United Nations;

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Sections 3 and 5 Charter of the United Nations Act 1945 (Cth)

- (b) sanctions imposed on Iraq through UNSC Resolution 661 and subsequent resolutions (**UN Sanctions**) required Australia until on or about 22 May 2003 to, inter alia:
 - (i) prevent its nationals from selling goods to Iraq, excluding, in humanitarian circumstances, foodstuffs; and
 - (ii) prevent its nationals from making funds available to an Iraqi entity or entities;
- (c) The Regulation provided that Ministerial Permission would only be granted in accordance with the Regulation if the Minister or his delegate was satisfied that permitting the exportation of wheat pursuant to the relevant contract would not infringe the international obligations of Australia, including those referred to in subparagraph (b);
- (d) the UN, through, inter alia, resolutions of the UNSC, had established a UN Oil-for-Food Programme (**UN OFF Programme**), administered by a Committee of the UNSC (**UN 661 Committee**), which programme provided for:
 - (i) authorisation for member states to purchase petroleum and petroleum products originating in Iraq;

- (ii) the establishment and conduct of an escrow account (**UN escrow account**);
- (iii) payment for the purchase of Iraqi petroleum or petroleum products to be made directly into the UN escrow account;
- (iv) the use of the funds deposited in the UN escrow account to finance only the export to Iraq of, inter alia, foodstuffs, subject to certain conditions;

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UN Sanctions including UNSC Resolution 661 and 986

and

- (v) the UN 661 Committee to review proposed transactions to ascertain whether the proposed transaction was consistent with the requirements of the UN OFF Programme and did not result in a payment to an Iraqi entity or entities contrary to UN Sanctions.
- (e) Ministerial Permission and approval of, or consent to, a proposed transaction by the UN 661 Committee could be sought by AWB by application to the Department of Foreign Affairs and Trade (**DFAT**) in accordance with procedures implemented by DFAT and the UN 661 Committee from time to time (**Procedures**);
 - (f) the Procedures relevantly provided for:
 - (i) the lodgment of documentation by AWB which included the contract or contracts between AWB and the IGB pursuant to which wheat was to be exported from Australia to Iraq (**Export Contracts**) together with a completed UN *"Notification or Request to Ship Goods to Iraq form* (**Notification form**);

- (ii) the review of the Export Contracts and Notification form by DFAT to ascertain whether the proposed transaction did not or did not appear to infringe the international obligations of Australia;
- (iii) in the event the Export Contracts and Notification form revealed that the proposed transaction did not or did not appear to infringe the international obligations of Australia, the transmission of the Export Contracts and Notification form by DFAT to the Australian mission to the UN for supply to the UN 661 Committee;
- (iv) review by the UN 661 Committee to ascertain whether the UN 661 Committee would approve (or not object) to the proposed transaction as being consistent with the requirements of the UN OFF Programme and not contrary to UN Sanctions;
- (v) if the proposed transaction was approved (or not objected to) by the UN 661 Committee:
 - (A) the communication of this information by DFAT or the Australian mission to the UN to AWB;
 - (B) Ministerial Permission being granted to export following notification by AWB to DFAT that a shipment was to leave Australia.

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The Procedures were contained in a pamphlet entitled "Exporting to Iraq" published initially in December 1996 by DFAT which was updated, at least once, in January 2001 and was placed on the DFAT website and were supplemented by the administrative procedures followed within DFAT and the UN 661 Committee.

E The Contracts

13. AWB lodged with DFAT part of the contract or contracts between AWB and the IGB pursuant to which wheat was to be exported from Australia to Iraq (**Contract Documentation**), during the period 1 July 1999 to 14 August 2000, which included Contract Documentation in relation to the following contracts (**Initial Contracts**):
- (a) contracts A4653, A4654 and A4655 dated 14 July 1999 and lodged with DFAT on 3 August 1999;
 - (b) contract A4822 dated 14 October 1999 and lodged with DFAT on 29 October 1999;
 - (c) contracts A4970, A4971 and A4972 dated 20 January 2000 and lodged with DFAT on 2 February 2000;
 - (d) contracts A0265, A0266 and A0267 dated 16 July 2000 (and 7 August 2000) and lodged with DFAT on 14 August 2000.
14. AWB lodged with DFAT Contract Documentation during the period 2 November 2000 to 23 December 2002, which included the following contracts (**Handling Fee Contracts**):
- (a) contract A0430 dated 2 November 2000 and lodged with DFAT on 2 November 2000;
 - (b) contracts A0552 and A0553 dated 2 February 2001 and lodged with DFAT on 27 February 2001;
 - (c) contracts A0784 and A0785 dated 13 June 2001 and lodged with DFAT on 27 June 2001;
 - (d) contracts A1111 and A1112 dated 20 December 2001 and lodged with DFAT on 22 January 2002;
 - (e) contract A1441 dated 23 June 2002 and lodged with DFAT on 24 July 2002;

- (f) contracts A1670 and A1680 dated 11 December 2002 and lodged with DFAT on 23 December 2002.

15. Each of the Initial Contracts and the Handling Fee Contracts (**Contracts**) was:

- (a) subject to a collateral or parallel agreement or agreements; or
- (b) contained either express or implied terms;

the effect of which purported to require AWB to pay for the discharge and transportation of wheat within Iraq (**Transportation Fee**) and thereby to make funds available to an Iraqi entity or entities.

16. Each of the Handling Fee Contracts was:

- (a) subject to a collateral or parallel agreement or agreements; or
- (b) contained either express or implied terms;

the effect of which was the imposition of a 10% surcharge, after-sales-fee or handling fee (**Handling Fee**) payable by AWB and thereby to make funds available to an Iraqi entity or entities.

17. The amount of the Transportation Fee, and in respect of the Handling Fee Contracts, the Handling Fee (collectively, **Inland Transportation Fee**) with respect to each contract was calculated as follows:

- (a) contracts A4653, A4654 and A4655 required an Inland Transportation Fee calculated at a rate of USD12 per metric tonne (**pmt**);
- (b) contract A4822 required an Inland Transportation Fee calculated at a rate of USD12 pmt (and in respect of one shipment under contract A4822, USD15 pmt);
- (c) contracts A4970, A4971 and A4972 required an Inland Transportation Fee calculated at a rate of USD15 pmt;
- (d) contracts A0265, A0266 and A0267 required an Inland Transportation Fee calculated at a rate of USD14 pmt;

- (e) contract A0430 required an Inland Transportation Fee calculated at a rate of DM101.46 pmt;
 - (f) contract A0552 required an Inland Transportation Fee calculated at a rate of DM96.45 pmt and contract A0553 required an Inland Transportation Fee calculated at a rate of DM96.88 pmt;
 - (g) contract A0784 required an Inland Transportation Fee calculated at a rate of EUR55.17 pmt and contract A0785 required an Inland Transportation Fee calculated at a rate of EUR55.40 pmt;
 - (h) contract A1111 required an Inland Transportation Fee calculated at a rate of EUR55.17 pmt and contract A1112 required an Inland Transportation Fee calculated at a rate of EUR55.40 pmt;
 - (i) contract A1441 required an Inland Transportation Fee calculated at a rate of EUR48.53 pmt;
 - (j) contracts A1670 and A1680 required an Inland Transportation Fee calculated at a rate of EUR51.33 pmt.
18. The contract price stated in each of the Contracts for the wheat supplied pursuant to each contract was inflated, with the agreement of IGB, so that it included both the agreed price for the supply of wheat together with an amount representing the Inland Transportation Fee to be paid by AWB in respect of the contract (**Contract Inflation**).
19. In relation to contracts A1670 and A1680 lodged with DFAT on 23 December 2002, the contract price was inflated by the Contract Inflation and:
- (a) an amount of USD8.375 pmt, with the agreement of IGB, to facilitate the repayment of an alleged debt (**Alleged Tigris Debt**) supposedly owed by IGB or the Republic of Iraq to BHP Petroleum Pty Ltd or Tigris Petroleum Corporation Limited (**Tigris**);

- (b) an amount of USD2.017 pmt payable pursuant to a collateral or parallel arrangement relating to the payment of "compensation" to IGB for alleged contamination of eight earlier wheat shipments

(collectively the **Further Contract Inflation**).

F The Effect of the Contracts and Payment

- 20. Following receipt of the Contract Documentation and Notification forms in relation to the Contracts by DFAT:
 - (a) DFAT transmitted the Contract Documentation and Notification forms to the Australian mission to the UN for supply to the UN 661 Committee;
 - (b) the Contracts were approved for payment from the UN escrow account by the UN 661 Committee pursuant to the requirements of the UN OFF Programme; and
 - (c) Ministerial Permission was given to AWB by delegates of the Minister to export the wheat the subject of the Contracts to Iraq.
- 21. Following shipment of wheat in accordance with the Contracts, AWB was paid a sum out of the UN escrow account representing the consideration for the supply of wheat as stated on the face of the Contract Documentation which sum included an amount representing the Inland Transportation Fee.

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Following UN approval of each of the Contracts, the Central Bank of Iraq requested the bank holding the UN escrow account, BNP Paribas SA, (BNP) to issue AWB with an irrevocable letter of credit in favour of AWB; AWB drew down on the letter of credit on a shipment-by-shipment basis, upon discharge of wheat from the vessel at Umm Qasr; upon discharge of each shipment of wheat, AWB presented documents as required by the letters of credit to BNP, which then paid AWB for the shipment of wheat and an amount representing the Inland Transportation Fee out of funds held in the UN escrow account.

22. At all material times AWB knew or believed that:
- (a) the Inland Transportation Fees were not intended by AWB or IGB solely to be consideration for transportation or handling services provided to AWB with regard to the wheat supplied pursuant to the Contracts (other than contracts A1670 and A1680);
 - (b) the Inland Transportation Fees were intended by AWB or IGB to be a means of obtaining funds from the UN escrow account which funds in whole or in part (or their equivalent) would thereafter be paid to an Iraqi entity or entities;
 - (c) amounts paid by AWB as representing the Inland Transportation Fees had in fact resulted in funds being made available to an Iraqi entity or entities.

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The Contracts resulted in payments of amounts from funds obtained by AWB from the UN escrow account to the benefit of an Iraqi entity or entities by payment of amounts representing the Inland Transportation Fees (as pleaded in paragraph 17) to, among others, a Jordanian joint venture entity, Alia For Transportation and General Trade (Alia), an entity which was a "front company" which served as a conduit for funds to be paid to an Iraqi entity or entities; the payments made to Alia by AWB were made either directly, or via ship owning entities, such as Tse Yu Hong Metal Limited, Hyundai Merchant Marine and Atlantic and Orient Shipping; further particulars will be provided following discovery.

23. At all times during the Relevant Period AWB did not disclose publicly the matters pleaded in each of paragraphs 18, 19 and 22 (collectively, the **Contract Inflation Information**).
24. AWB paid amounts representing the Inland Transportation Fee in respect of wheat supplied pursuant to the Contracts.

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- a. contract A4653 (USD3,148,542.66), A4654 (USD3,143,272.97) and A4655 (USD2,483,532.82);
- b. contract A4822 (USD2,657,922.65);

- c. *contracts A4970 (USD4,722,570.00), A4971 (USD4,718,653.95) and A4972 (USD4,513,269.60);*
- d. *contracts A0265 (USD2,940,000.00), A0266 (USD5,730,827.90) and A0267 (USD5,895,000.00);*
- e. *contract A0430 (DM31,596,567.05);*
- f. *contracts A0552 (DM40,183,552.00 and EUR4,931,089.82) and A0553 (DM36,436,408.79 and EUR6,495,340.93);*
- g. *contracts A0784 (EUR28,714,871.11) and A0785 (EUR29,010,790.04);*
- h. *contracts A1111 (EUR29,444,567.08) and A1112 (EUR28,238,139.53);*
- i. *contract A1441 (EUR18,229,441.09).*

25. In relation to contracts A1670 and A1680, AWB:

- (a) paid Inland Transportation Fees for the provision of the transportation of wheat in Iraq in October 2003 at a time when payment for such transport was in fact an obligation of AWB pursuant to the terms of contracts A1670 and A1680;
- (b) obtained the sum of USD8,375,000 from the UN escrow account as a part of AWB's entitlement to payment under contracts A1670 and A1680 and, using such funds, paid to Tigris a sum to discharge the Alleged Tigris Debt.

G AWB's Conduct in Procuring Ministerial Permission and UN Approval.

26. In providing the Contract Documentation for the purposes of the Procedures (pleaded in paragraph 12(e)) AWB:

- (a) with respect to the Contracts, concealed from DFAT and/or the UN 661 Committee and/or the UN:
 - (i) the existence of the Contract Inflation;
 - (ii) the Contract Inflation Information;
- (b) with respect of contracts A1670 and A1680, in addition to concealing the Contract Inflation, concealed from DFAT and/or the UN 661 Committee and/or the UN:

- (i) the existence of the Further Contract Inflation;
- (ii) the Contract Inflation Information

(collectively, the **Contract Concealment**).

27. Further the Contract Concealment was:

- (a) intended to induce the Minister or his delegate to grant Ministerial Permission which could not lawfully and/or would not otherwise have been given;
- (b) intended to induce the UN 661 Committee and/or the UN to approve (or not object to) the proposed transaction reflected in the contract or contracts as being a transaction which was consistent with the requirements of the UN OFF Programme and not contrary to UN Sanctions.

H Contract Concealment, the counterfactual and non-disclosure

28. At all material times AWB knew or believed that:

- (a) had the Contract Inflation, the Further Contract Inflation, or the Contract Inflation Information been disclosed to DFAT (to the extent it applied to the relevant contract or contracts) then Ministerial Permission:
 - (i) could not lawfully have been given for the export of wheat pursuant to the relevant contract or contracts; and/or
 - (ii) would not have been given for the export of wheat pursuant to the relevant contract or contracts.

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Ministerial Permission in such circumstances would have been contrary to the Regulation and could not lawfully have been given.

- (b) had the Contract Inflation, the Further Contract Inflation, or the Contract Inflation Information been disclosed to the UN 661 Committee and/or the UN (to the extent it applied to the relevant contract or contracts) then UN approval

