

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

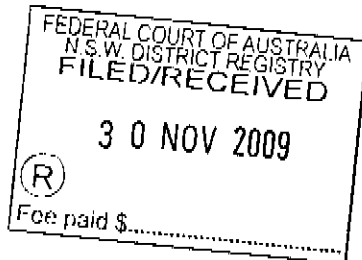
No NSD2020 of 2007

**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



AMENDED DEFENCE

(filed pursuant to the Orders of his Honour Justice Foster made on
~~10 March~~ 30 November 2009)

By way of Amended Defence to the Third Further Amended Statement of Claim filed on
~~11 March~~ 10 November 2009 (and using terms as defined in the Third Further Amended
Statement of Claim except where otherwise indicated) the Respondent (**AWB**) says as
follows.

Non justiciability and Jurisdiction

- 1A (a) AWB says that the following matters that are alleged in the Third Further
Amended Statement of Claim are not justiciable in this Honourable Court:
- (i) the international obligations of Australia in relation to the exportation
of wheat from Australia to the Republic of Iraq;
 - (ii) the conduct of the Republic of Iraq outside Australia in relation to
the exportation of wheat from Australia to the Republic of Iraq;
 - (iii) the conduct of the United Nations and the United Nations Security
Council (**UNSC**) 661 Committee outside Australia in relation to the
exportation of wheat from Australia to the Republic of Iraq;
 - (iv) the conduct outside Australia of each sovereign State that was from
time to time a member of the UNSC 661 Committee in relation to
the exportation of wheat from Australia to the Republic of Iraq;

Filed on behalf of: the Respondent

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Particulars

The relevant matters are alleged in paragraphs 11, 12, 15, 16, 18, 19, 22, 23, 26-39, 46-48, 51, 52, 54 and 57 of the Third Further Amended Statement of Claim.

- (b) By reason of the matters set out in sub-paragraph (a), this Honourable Court does not have jurisdiction in the purported controversy as pleaded, alternatively is required, or ought, to decline to exercise any jurisdiction it has in respect of that controversy.

The Applicants and Group Members

1. AWB denies the matters alleged in paragraph 1(c) and does not admit the remaining matters alleged in paragraph 1.
2. AWB ~~does not admit~~ the matters alleged in paragraph 2.
3. AWB:
 - (a) denies the Contraventions alleged; and
 - (b) denies that any of the matters alleged in paragraphs 3(a), (b) and (c) occurred by reason of the alleged Contraventions; and
 - (c) otherwise does not admit the matters alleged in paragraph 3.
4. Deleted.

The Respondent

5. AWB admits the matters alleged in paragraph 5.

AWB Securities

6. AWB admits the matters alleged in paragraph 6.
7. AWB admits the matters alleged in paragraph 7.

AWB, AWBI and their business

8. AWB:
 - (a) admits the matters alleged in paragraph 8(a) save that it says section 57 of the WM Act did not refer to AWB (International) Limited (**AWBI**) but to "nominated company B" which was, at all material times during the Relevant Period, AWBI;
 - (b) admits the matters alleged in paragraph 8(b);

- (c) says that AWBI and AWB had some but not all directors in common during the Relevant Period and otherwise does not admit the matters alleged in paragraph 8(c);
 - (d) subject to reference being made at the trial of the proceeding to the full terms and effect of the WM Act:
 - (i) says that pursuant to the WM Act, growers sold wheat from time to time to pools operated by AWBI;
 - (ii) says that the price AWBI paid to the growers was determined by the net return for the relevant pools after AWBI sold the wheat (overseas or domestically); and
 - (iii) otherwise does not admit the matters alleged in paragraph 8(d);
 - (e) does not admit the matters alleged in paragraph 8(e);
 - (f) admits the matters alleged in paragraph 8(f); and
 - (g) says that AWB derived revenue by virtue of the matters alleged in paragraph 8(f) but does not otherwise admit the matters alleged in paragraph 8(g).
9. AWB:
- (a) says that section 57(7) of the WM Act required the Authority, before the end of 2004:
 - (i) to conduct a review of:
 - (A) the operation of section 57(1A) in relation to nominated company B; and
 - (B) the conduct of nominated company B in relation to consultations for the purposes of section 57(3A) and the granting or withholding of approvals for the purposes of section 57(3B); and
 - (ii) to give the Minister a report on the review; and
 - (b) otherwise does not admit the matters alleged in paragraph 9.
10. AWB does not admit the matters alleged in paragraph 10.

10A. AWB:

- (a) admits that on 4 April 2001 the Commonwealth Minister for Agriculture, Fisheries and Forestry, the Hon Warren Truss MP, issued a media release in which he announced that "Australia's single desk arrangements for exporting wheat, held by AWB (International) Ltd (AWBI), will remain";
- (b) reserves the right to rely at trial on the media release in its entirety; and
- (c) otherwise does not admit the matters alleged in paragraph 10A.

11. AWB:

- (a) admits the matters alleged in paragraph 11(a);
- (b) admits that Regulation 13CA of the *Customs (Prohibited Exports) Regulations 1958* (Cth) (the **Regulation**) was repealed on or about 28 May 2003; and
- (c) otherwise does not admit the matters alleged in paragraph 11.

11A. AWB:

- (a) repeats and relies upon paragraph 1A hereof;
- (b) as to paragraph 11A(d), repeats and relies upon the matters admitted in paragraph 11(b) hereof; and
- (c) otherwise does not admit the matters alleged in paragraph 11A.

12. AWB:

- (a) repeats and relies upon paragraph 1A hereof;
- (b) repeats and relies upon the matters admitted in paragraph 11(b) hereof; and
- (c) otherwise denies the matters alleged in paragraph 12.

The Contracts

13. AWB:

- (a) says that it lodged with DFAT Contract Documentation in relation to each of the Initial Contracts on or about the dates alleged; and
- (b) otherwise does not admit the matters alleged in paragraph 13.

14. AWB:

- (a) says that it lodged with DFAT Contract Documentation in relation to each of the Handling Fee Contracts on or about the dates alleged; and

(b) otherwise does not admit the matters alleged in paragraph 14.

15. AWB:

(a) says that:

- (i) the Contracts were generally entered into in response to tenders issued by the Republic of Iraq through the IGB for the supply of wheat to the Republic of Iraq under the UN OFF Programme;
- (ii) the IGB specified that the price was to include delivery costs from the port to silos in each of the Governates of the Republic of Iraq;
- (iii) the IGB also specified the transport company to be used to deliver wheat from the port to the silos;
- (iv) AWB, as agent for AWBI, entered into the Contracts with the IGB to supply wheat under the UN OFF Programme;
- (v) each of the Contracts included express terms to the effect that wheat was supplied CIF Free Into Truck to all silos within all Governates of the Republic of Iraq and, as a consequence, the price specified in each of the Contracts included a component for inland transport;
- (vi) inland transport of wheat the subject of the Contracts was undertaken in order to meet the contract requirements that wheat be delivered from the port to inland silos;
- (vii) each of the Contracts was approved by the UN 661 Committee and/or the UN under the UN OFF Programme in accordance with UNSC Resolutions 986 and 1284;

(b) repeats and relies upon paragraph 1A hereof; and

(c) otherwise does not admit the matters alleged in paragraph 15.

16. AWB:

(a) repeats and relies upon the matters set out in paragraphs 1A and 15 hereof;

(b) says that in the second half of 2000 the Republic of Iraq imposed an additional surcharge or impost on all suppliers conducting transactions under the UN OFF Programme with such fee to be calculated on the contract value (the *surcharge*);

(c) says that, consequently, the surcharge was required to be included, and was in fact included, as part of the price specified in each of the Contracts; and

(d) otherwise does not admit the matters alleged in paragraph 16.

17. AWB:

(a) says that the price specified in each of the Contracts referred to in paragraph 17 included a component for inland transport and/or the surcharge; and

(b) otherwise does not admit the matters alleged in paragraph 17.

18. AWB:

(a) repeats and relies upon the matters set out in paragraphs 1A and 17(a) hereof; and

(b) otherwise denies the matters alleged in paragraph 18.

19. AWB:

(a) says that any alleged debt (the existence of which is not admitted by AWB), the payment of which was to be facilitated by contracts A1670 and A1680, was between the Republic of Iraq and BHP Petroleum Pty Ltd;

(b) repeats and relies upon paragraph 1A hereof;

(c) repeats and relies upon paragraph 15(a)(vi) hereof; and

(d) otherwise does not admit the matters alleged in paragraph 19.

The Effect of the Contracts and Payment

20. AWB admits the matters alleged in paragraph 20.

21. AWB:

(a) says that, in respect of each Contract, following the shipment of wheat under the Contract, AWB was paid out of the UN escrow account for the wheat so shipped in accordance with the terms of the Contract; and

(b) otherwise does not admit the matters alleged in paragraph 21.

22. AWB:

(a) repeats and relies upon paragraph 1A hereof; and

(b) otherwise denies the matters alleged in paragraph 22.

23. AWB:

- (a) says that during the Relevant Period it disclosed publicly that the contract price stated in the Contracts included amounts for, *inter alia*, the onground distribution of wheat to all Governates of the Republic of Iraq:

Particulars

AWB announcements:

- (i) Media Release entitled "AWB hits out at baseless US allegations" dated 6 June 2003;
- (ii) ASX Release entitled "Statement by AWB Limited – UN Oil for Food Programme" dated 27 October 2005;
- (ii) ASX Release entitled "Further Statement by AWB Limited – UN Oil For Food Program" dated 28 October 2005.

Statements by AWB reported in the following:

- (iv) "AWB denies Saddam bribe claims", *The Age*, 6 June 2003;
- (v) "US attacks AWB as a stooge of Saddam", *The Sydney Morning Herald*, 6 June 2003;
- (vi) "Probe On Our Sales of Wheat to Iraq", *The Age*, 29 April 2004;
- (vii) "Saddam Deals Face Inquiry", *The Sydney Morning Herald*, 29 April 2004;
- (viii) "Wheat Deal Was Overpriced, Says US", *The Sydney Morning Herald*, 30 April 2004;
- (ix) "No Iraq Rort: AWB", *The Australian*, 30 April 2004;
- (x) "Documents 'tug-of-war' Muddies Iraq Corruption Probe", *The Age*, 25 May 2004;
- (xi) "Now A Paper War To Track Saddam's Profits", *The Sydney Morning Herald*, 25 May 2004;
- (xii) "Australia gave valuable help to UN inquiry", *The Sydney Morning Herald*, 13 January 2005;
- (xiii) "AWB defends Iraq deals", *The West Australia*, 28 October 2005;
- (xiv) "Heat on our wheat Iraq oil report out today", *Herald-Sun*, 28 October 2005;

(xv) "Iraq affair exposes AWB flaws". *The West Australian*,
2 November 2005;

(xvi) "Kickbacks poured in as navy led Iraq blockade". *The Sydney
Morning Herald*, 7 December 2005.

(b) says that during the Relevant Period it did not otherwise disclose publicly
the alleged Contract Inflation Information;

~~(b)(c)~~ denies that it was under any obligation to do so;

~~(c)(d)~~ repeats and relies upon paragraphs 13 to 22 hereof; and

~~(d)(e)~~ otherwise denies the matters alleged in paragraph 23.

24. AWB does not admit the matters alleged in paragraph 24.

25. AWB:

(a) repeats and relies upon paragraph 19 hereof; and

(b) otherwise does not admit the matters alleged in paragraph 25.

AWB's Alleged Conduct in Procuring Ministerial Permission and UN Approval

26. AWB:

(a) repeats and relies upon paragraph 1A hereof; and

(b) otherwise denies the matters alleged in paragraph 26.

27. AWB:

(a) repeats and relies upon paragraph 1A hereof; and

(b) otherwise denies the matters alleged in paragraph 27.

AWB's Alleged Contract Concealment, the Counterfactual and Non-Disclosure

28. AWB:

(a) repeats and relies upon paragraph 1A hereof; and

(b) otherwise denies the matters alleged in paragraph 28.

29. AWB:

(a) says that during the Relevant Period it did not disclose publicly the alleged
Concealment Information;

(b) denies that it was under any obligation to do so;

(c) repeats and relies upon paragraphs 26 to 28 hereof; and

(d) otherwise denies the matters alleged in paragraph 29.

Payment Information and Regulatory Risk

30. AWB admits the matters alleged in paragraph 30.

31. AWB admits the matters alleged in paragraph 31.

32. AWB:

(a) denies that the component for inland transport in the price specified in each of the Contracts was 'purportedly' for inland transport; and

(b) otherwise admits the matters alleged in paragraph 32.

33. AWB admits the matters alleged in paragraph 33.

34. AWB:

(a) repeats and relies upon paragraph 32(a) hereof; and

(b) otherwise admits the matters alleged in paragraph 34.

35. AWB:

(a) repeats and relies upon paragraph 32(a) hereof; and

(b) otherwise does not admit the matters alleged in paragraph 35.

35A. AWB:

(a) repeats and relies upon paragraph 1A hereof;

(b) otherwise denies the matters alleged in paragraph 35A.

36. AWB:

(a) repeats and relies upon paragraph 1A hereof;

(a)(b) repeats and relies upon paragraph 12 hereof; and

(b)(c) otherwise denies the matters alleged in paragraph 36.

37. AWB:

(a) says that during the Relevant Period it disclosed publicly that:

(i) the contract price stated in the Contracts included amounts for, *inter alia*, the onground distribution of wheat to all Governates of the Republic of Iraq;

Particulars

AWB repeats and relies upon the particulars to paragraph 23(a) hereof.

- (ii) the IBC specified the transport company to be used to distribute the wheat to all Governates of the Republic of Iraq:

Particulars

Statements by AWB reported in the following:

(A) "Probe On Our Sales of Wheat to Iraq", *The Age*, 29 April 2004;

(B) "Wheat Deal Was Overpriced, Says US", *The Sydney Morning Herald*, 30 April 2004;

(C) "AWB defends Iraq deals", *The West Australia*, 28 October 2005.

(b) says that during the Relevant Period it did not otherwise disclose publicly the alleged Iraqi Entity Payment Information;

(b)(c) denies that it was under any obligation to do so;

(c)(d) repeats and relies upon paragraphs 30 to 36 hereof; and

(d)(e) otherwise denies the matters alleged in paragraph 37.

38. AWB:

(a) repeats and relies upon paragraphs 22 to 27 and 30 to 36 hereof; and

(b) otherwise denies the matters alleged in paragraph 38.

AWB's Alleged Failure to Keep the ASX Informed of Material Information

39. AWB denies the matters alleged in paragraph 39.

40. AWB denies the matters alleged in paragraph 40.

41. AWB denies the matters alleged in paragraph 41.

42. AWB:

(a) repeats and relies upon paragraphs 23(a) and 37(a) hereof;

(a)(b) says that during the Relevant Period it did not otherwise inform the ASX of the Relevant Information;

(b)(c) denies that it was under any obligation to do so;

(c)(d) repeats and relies upon paragraphs 23(b) to 23(e), 29, and 37(b) to 41 hereof; and

(e)(e) otherwise denies the matters alleged in paragraph 42.

43. AWB denies the matters alleged in paragraph 43.

AWB's Alleged Misleading and Deceptive Conduct

Express representations

44. AWB:

- (a) says that, on 24 January 2003, 22 January 2004 and 20 January 2005, it represented that the boards of AWB and AWBI were committed to clearly promoting and demonstrating that their business affairs were, at all times, being conducted legally, ethically and in accordance with the highest standards of integrity and propriety;
- (b) says that, on 6 June 2003, it represented that all its contracts for the export of wheat from Australia to Iraq had been approved and executed through the UN OFF Programme and had been totally transparent and above board;
- (c) says that, on 20 January 2005, it represented that it had implemented Continuous Disclosure Guidelines to ensure that it met its continuous disclosure obligations under the ASX Listing Rules and the CA;
- (d) says that, on 28 October 2005, it represented that throughout the UN OFF Programme it operated in the belief that Alia was a genuine transport company providing an effective trucking service;
- (e) says that, on 28 October 2005, it represented that throughout the UN OFF Programme it did not know what Alia did with the money AWB paid to it by way of transportation fees; and
- (f) otherwise denies the matters alleged in paragraph 44.

45. AWB:

- (a) repeats and relies upon paragraph 44 hereof;
- (b) If (which is denied) it made the Express Representations, does not admit the matters alleged in paragraph 45; and
- (c) otherwise denies the matters alleged in that paragraph.

46. AWB denies the matters alleged in paragraph 46.

47. AWB denies the matters alleged in paragraph 47.

48. AWB denies the matters alleged in paragraph 48.

Implied representations

49. AWB does not admit the matters alleged in paragraph 49.

50. AWB denies the matters alleged in paragraph 50.

51. AWB denies the matters alleged in paragraph 51.

52. AWB denies the matters alleged in paragraph 52.

53. AWB:

(a) repeats and relies upon paragraphs 49 to 52 hereof;

(b) if (which is denied) it made the Implied Representations, does not admit the matters alleged in paragraph 53; and

(c) otherwise denies the matters alleged in paragraph 53.

54. AWB denies the matters alleged in paragraph 54.

Allegation that contraventions caused loss

55. AWB:

(a) repeats and relies upon paragraph 2 hereof; and

55.(b) otherwise does not admit the matters alleged in paragraph 55.

56. AWB:

(a) repeats and relies upon paragraph 2 hereof;

(a)(b) does not admit that the Applicants-Group Members acquired AWB securities or interests in AWB securities;

(b)(c) says that AWB securities were available for trade from 21 August 2001 to the end of the Relevant Period (except during trading halts) and were traded on the ASX, which was a financial market regulated by the ASX Listing Rules and section 674(2) of the CA; and

(c)(d) otherwise does not admit the matters alleged in paragraph 56.

57. AWB denies the matters alleged in paragraph 57.

58. AWB does not admit the matters alleged in paragraph 58.

59. AWB denies the matters alleged in paragraph 59.

Waiver

60. Further or alternatively, by reason of Article 3.5 of the Constitution of AWB, each of the Applicants and the Group Members has waived in favour of AWB all and any rights, powers and remedies which, but for Article 3.5, any of them may at any time have whether by statute, at law or in equity, against AWB, by reason solely of a director of AWB acting or endeavouring in good faith to act in accordance with Article 3.1 of the Constitution of AWB. Therefore each of the Applicants and the Group Members is precluded from making any of the claims alleged in the Amended Statement of Claim, or seeking any of the relief that is sought in the Amended Application.

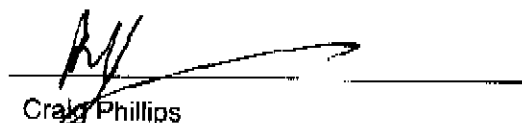
Commencement of Proceeding

61. Further or alternatively, this proceeding was not validly commenced under Part IVA of the *Federal Court of Australia Act 1976 (Cth) (Act)* and, accordingly:
- (a) any judgment in the proceeding will not take effect as a judgment in a representative proceeding commenced under Part IVA of the Act;
 - (b) any judgment in the proceeding will not have any effect on the rights or liabilities as between any persons other than the applicants and AWB; and
 - (c) so far as the proceeding purports to make any claim on behalf of the Group Members, the proceeding ought to be dismissed.

Limitations Defence

62. Further or alternatively:
- (a) by operation of section 1041(2) of the CA, section 12GF(2) of the ASIC Act, section 82(2) of the TPA and/or section 159(3) of the FTA, the claims of each Group Member who did not enter into a litigation funding agreement with IMF (Australia) Limited in relation to this proceeding prior to 10 October 2007, in respect of an interest in AWB securities acquired on or before 31 October 2002, further or alternatively 11 March 2003, are statute-barred; and
 - (b) by operation of section 1317K of the CA, the claims of each Group Member who did not enter into a litigation funding agreement with IMF (Australia) Limited in relation to this proceeding prior to 10 October 2007, in respect of an interest in AWB securities acquired on or before 31 October 2002, further or alternatively 11 March 2003, are statute-barred.

Dated: ~~16 March~~ 30 November 2009



Craig Phillips

Allens Arthur Robison

Solicitors for the Respondent

The pleading was prepared by Craig Phillips and Duncan Travis of Allens Arthur Robison and settled by Matthew Darke of Counsel and Charles Scerri of Queen's one of Her Majesty's Counsel.

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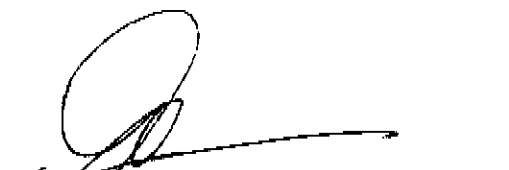
Respondent

**CERTIFICATE OF LEGAL REPRESENTATIVE
(Order 11 rule 1B)**

I, CRAIG PHILLIPS, legal practitioner, certify to the Court that, in relation to the pleading dated 30 November 2009 filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (c) each allegation in the pleading; and
- (d) each denial in the pleading; and
- (e) each non-admission in the pleading.

Dated 30 November 2009



CRAIG PHILLIPS
Legal practitioner for the Respondent