

INQUIRY INTO CERTAIN AUSTRALIAN COMPANIES IN RELATION TO  
THE UN OIL-FOR-FOOD PROGRAMME

Before The Hon TRH Cole AO RFD QC

Held at Court 2, Level 5,  
55 Market Street, Sydney

On Wednesday, 15 February 2006, at 10am

1 THE COMMISSIONER: The inquiry to date has called Messrs  
2 Rogers, Lindberg, Geary, Long, Emons, Hogan, Officer and  
3 Stott. None of those witnesses has been released from  
4 their summons. I have previously said that they will be  
5 recalled, if required by counsel assisting or if it's  
6 necessary for them to be recalled after application is made  
7 to cross-examine them. Yesterday I reserved the right of  
8 BHP to cross-examine Mr Stott on the basis that BHP may  
9 have been working on the assumption that cross-examination  
10 would occur at a later date. It may well be that others  
11 have been working on that same assumption. It seems to me  
12 that the issues of interest to this Commission are now  
13 clear, so that in the future any application to  
14 cross-examine witnesses should be made at the conclusion of  
15 the examination of those witnesses by counsel assisting and  
16 by the counsel for the witness.

17  
18 Regarding the eight persons whom I first mentioned who  
19 have been called to date, I direct that any application to  
20 cross-examine those witnesses be made by a notice in  
21 writing addressed to the solicitor for the inquiry and to  
22 be received not later than 10am on Monday next,  
23 20 February. Any application should be accompanied by a  
24 schedule which sets out the name of the witness sought to  
25 be cross-examined, the evidence to be challenged of that  
26 witness and the contrary evidence of the witness on whose  
27 behalf the application is made. That will enable me to  
28 determine if there is truly an area of conflict and,  
29 accordingly, if cross-examine should be permitted. It will  
30 also enable the inquiry to take appropriate steps to have  
31 any necessary witnesses recalled. From hereon people  
32 should work on the basis that witnesses will be examined  
33 and cross-examined in the usual way.

34  
35 MR AGIUS: Mr Commissioner, there is an important matter  
36 that I wish to raise and put on the record. Last night the  
37 inquiry received further documents in response to a request  
38 for production directed to AWB Limited. Amongst those  
39 documents are three market briefs, which are dated, as best  
40 as we can determine, sometime post August 2001, sometime  
41 post 20 April 2002 and November 2002.

42  
43 Each of them contains a statement to the effect that  
44 inland transport fees are paid to Alia, who then paid the  
45 Ministry of Transport in Iraq. The fees are approved by  
46 the UN. Each of them contains a statement which is to the  
47 following effect, that there's a seasonal shortage of

1 trucks when the grain board remove transport from the port  
2 to move local production.  
3

4 There is no doubt, Mr Commissioner, that if these  
5 documents had been available to this Commission in November  
6 or December or January a great deal of time could have been  
7 saved. The documents make plain that from as early as 2001  
8 market briefs for Iraq reflected a knowledge, and a body of  
9 knowledge within AWB, that fees being paid to Alia were  
10 being passed by Alia to the Ministry of Transport in Iraq  
11 and that the AWB was aware of that from at least that time.  
12

13 The inquiry has lost the opportunity to examine the  
14 witnesses that have been called to date on that topic.  
15 Indeed, the examinations that have been conducted with  
16 witnesses called to date would definitely have been  
17 conducted in a different way had we known that material of  
18 this type was available within the records of the AWB. I  
19 have spoken to my learned friend about this. I do not in  
20 any way mean to criticise him or his legal team for this  
21 late production. The blame clearly lies with the AWB.  
22 It's a matter that I think is worthy of note and ought to  
23 be put on the record, because we have spent more than four  
24 weeks now examining witnesses, a great deal of money and a  
25 great deal of time and a great deal of effort, and a lot of  
26 that could have been saved had we had this material  
27 produced earlier.  
28

29 I should also indicate that we received last night  
30 copies of Mr Whitwell's diaries, also a folder containing  
31 relevant emails for a number of people, including  
32 Mr Stott - this is after we had concluded our examination  
33 of him yesterday - and Mr Lindberg. In relation to that  
34 material, we haven't yet had a chance to go through it. I  
35 do not know how material those emails are, but it does make  
36 the work of those assisting you very difficult. We're all  
37 operating under a time constraint. It is in the interests  
38 of the Australian community that we complete our work as  
39 soon as possible. These delayed productions impact not  
40 only on this inquiry, but have the capacity, as we read in  
41 the press, to impact more broadly on the Australian  
42 community and on AWB.  
43

44 I wonder if there could be an inquiry made as to  
45 whether AWB will ever be in a position to declare that it  
46 has in fact finally produced all that it has relating to  
47 this matter.

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THE COMMISSIONER: Mr Judd, what's the position?

MR JUDD: Commissioner, during the course of some submissions a week or so ago, I think I said to the Commission that our document production activity was ongoing. Perhaps I had underestimated the significance of the ongoing nature of it. There is no denying the significance of this particular document.

THE COMMISSIONER: It would have saved this inquiry a lot of time if the statements Mr Agius read are accurate, and I don't doubt that they are.

MR JUDD: Commissioner, I think it might be well understood by all concerned with the late production of this issue, and that includes those who instruct me, that it is in everybody's interests that this inquiry be conducted as expeditiously and as completely as possible in the shortest possible time. We have no interest in prolonging it or in prolonging the examination of any particular witness.

You may assume, sir, that the Commission's solicitor, or you, sir, depending on the course you wish to adopt, will be informed in some detail as to how it is that this document came to be produced only now. My understanding is - I might say that I saw it for the first time probably about the same time as counsel assisting - that it was requested by Mr Whitwell, who recalled its existence and sought to obtain a print-out of what he recalled existed. Now, he can better explain, no doubt, or his counsel, than I, but in the inquiries that we have made in the short time that we have been aware of its existence it seems that it may have been on a database other than that which was the subject of the searches that have been produced to the Commission on CDs. That, of course, doesn't overcome the problem that's been caused by its late production and it has also caused us to call for immediately - these will be produced to the Commission - the reports to the Wheat Export Authority, in respect of which these particular market briefs seem to relate. That, of course, may give rise to a separate set of issues, depending on what is contained in those reports.

As far as my friend's invitation to comment on the continuing course of document production, I wish I could

1 stand here and say to you, sir, that there is a point in  
2 time when we could confidently say that everything that is  
3 relevant to this inquiry has been produced. Even as we  
4 arrived this morning we became aware of additional material  
5 that is likely to arrive today that is pertinent to the  
6 inquiry made in particular of Mr Stott. We find that  
7 alarming, sir, and again an explanation will be given to  
8 the Commission or the Commission solicitor about that.

9  
10 We are concerned to do our best as legal  
11 representatives, and those instructing me, being the board,  
12 are deeply concerned about what has occurred in terms of  
13 the production of this material. The Commission can be  
14 confident that whatever can be done by us - that includes  
15 those instructing me - will be done to make sure that at  
16 some point we can say with reasonable confidence that what  
17 is and ought to be produced to this Commission has been  
18 produced.

19  
20 Perhaps I can say, and should say no more at this  
21 stage, but you can be confident, sir, that this matter is  
22 receiving our urgent attention.

23  
24 THE COMMISSIONER: I'm sure it is, Mr Judd. Thank you for  
25 that. I do say, however, that things such as market briefs  
26 would, by the very nature of their description, appear to  
27 be a document that anyone within AWB ought to have  
28 recognised as being possibly of material relevance to this  
29 inquiry. I would have thought that if somebody had sat  
30 down within AWB and said, "What documents are there which  
31 might relate to the subject matter of this inquiry", that  
32 would have been one that would have come to mind, along  
33 with a number of other categories of document. I am  
34 disturbed that that apparently did not occur. I have noted  
35 what you have said, Mr Judd. The matter will remain under  
36 continuous review.

37  
38 MR JUDD: Can I just conclude with this short comment,  
39 sir, that looking at the material and having the  
40 responsibility to appear to represent the interests of the  
41 AWB in this inquiry, that is a document that would have  
42 been near the apex of those that, in our submission, would  
43 have been in the interests of AWB to present to this  
44 inquiry at the first possible opportunity.

45  
46 THE COMMISSIONER: Yes, quite.

47

1 MR FORREST: Could I say something, Mr Commissioner, for  
2 the record, insofar as the employees whom I represent are  
3 concerned. Their evidence and cross-examination, or  
4 examination, has been in effect focused around their  
5 recollections of particular events. It's obvious that  
6 their recollections have either been refreshed or  
7 reconstructed from the various documents that they have had  
8 available to them.

9  
10 To the extent that they have had an incomplete access  
11 to the documents that may have reconstructed or refreshed  
12 their recollection, then, in my submission, it ought be  
13 borne steadily in mind that criticisms of their  
14 recollection of those reconstructions are criticisms that  
15 are based upon the witnesses only having an access to a  
16 limited number of documents and not the full set. In other  
17 words, what I'm saying really, I think, is the other side  
18 of the coin to what Mr Agius was saying. The witnesses  
19 themselves have been disadvantaged in recalling events by  
20 the lack of access to the complete set of documents.

21  
22 THE COMMISSIONER: Well, I understand your remarks and I  
23 will bear them in mind when I come to make my final  
24 decisions about how I regard the various witnesses.

25  
26 MR FORREST: Thank you, sir.

27  
28 THE COMMISSIONER: Mr Walters, do you have an application?

29  
30 MR WALTERS: Yes, if the Commission please, I seek the  
31 Commission's authorisation to appear with my learned friend  
32 Mr Lorkin for Mr Whitwell.

33  
34 THE COMMISSIONER: Yes, that authority is granted on the  
35 usual terms.

36  
37 MR AGIUS: Commissioner, I call Mr Whitwell.

38  
39 <CHRISTOPHER STUART WHITWELL, sworn: [10.24am]

40  
41 <EXAMINATION BY MR AGIUS:

42  
43 MR AGIUS: Q. Mr Whitwell, might we have your full name,  
44 please?

45 A. Christopher Stuart Whitwell.

46  
47 Q. You appear here in answer to a summons requiring your

1 appearance?

2 A. Yes, sir.

3

4 Q. Mr Whitwell, I wonder if we could bring up  
5 WST.0001.0066. I will provide a hard copy of the document  
6 for you. Is that a copy of your statement?

7 A. I believe so, although there's no signature on it,  
8 so - I think I signed one. Can I just check a couple of  
9 points?

10

11 Q. Yes, please do. I should tell you that a document has  
12 been provided to the inquiry in December of last year on  
13 the basis, it was said, that this was a statement of  
14 evidence that you were in a position to give.

15 A. Yes, this looks like the document, sir.

16

17 Q. Are the contents of that statement as at today's date  
18 true and correct to the best of your knowledge and belief?

19 A. Sir, I believe, since reviewing the documents, that  
20 there are a couple of small clarifications that I need to  
21 add or change in the document.

22

23 Q. By reference to the document, then, could you indicate  
24 what they are?

25 A. Just bear with me. Clause 21, I go down to "I was  
26 concerned that AWB Limited had had an immediate financial  
27 exposure as Alia Transport had been paid in advance for  
28 inland transport services it was to provide in relation to  
29 the wheat in the two vessels". I believe that to be just  
30 one vessel, the Pearl of Fujairah.

31

32 Q. Yes.

33 A. And the second one is in 23, "After the contracts were  
34 signed (which I believe occurred in late December 2002),  
35 they were passed over to" - I now know it's  
36 Nigel Edmonds-Wilson and Rex Iister.

37

38 Q. With the addition of those amendments, do you say that  
39 the contents of that statement are true and correct to the  
40 best of your knowledge and belief?

41 A. Yes, sir.

42

43 MR AGIUS: I tender that, Mr Commissioner.

44

45 THE COMMISSIONER: Exhibit 300.

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1 EXHIBIT #300 STATEMENT OF CHRISTOPHER STUART WHITWELL,  
2 BARCODED WST.0001.0066

3  
4 MR AGIUS: Q. Last night, Mr Whitwell, the inquiry  
5 received a volume of material which contains documents  
6 which appear to be market briefs dealing with Iraq for  
7 various periods of time dating from about August of 2001.  
8 I want to show you a volume of material. I wonder if you  
9 would look at it. From the bundle that was produced last  
10 night we've photocopied three documents, which, in the  
11 short time we've had, appear to be three discrete reports.  
12 I understand from what my learned friend Mr Judd said this  
13 morning that you may have some knowledge of those documents  
14 or of similar documents.

15 A. I have knowledge of the market brief.

16  
17 Q. Okay. Well, let's speak generally first of all. We  
18 understand from your statement that you commenced  
19 employment at AWB in 2002.

20 A. Correct.

21  
22 Q. And we understand from a great many documents that you  
23 were concerned in the work in the work of the AWB as it was  
24 related to the Iraq market. What can you tell us about the  
25 Iraq market brief? Was there a hard copy of a document  
26 called an "Iraq Market Brief" kept at AWB?

27 A. No, sir.

28  
29 Q. Was there an electronic copy of an Iraq market brief  
30 kept at AWB?

31 A. Yes, sir.

32  
33 Q. Was it a document - I'm speaking of it in the broader  
34 sense of the word "document" - that you had access to  
35 electronically?

36 A. Yes, sir.

37  
38 Q. How did you come to learn of its existence?

39 A. When I arrived at AWB in the middle of July 2002, one  
40 of the first things that I was asked to do by Michael Long  
41 was to get across all the markets or get a broad overview  
42 of all the markets, and one of them was Iraq and there was  
43 this database on our computer system which had this market  
44 brief in, but it sits on the computer. You can only really  
45 access it through the computer.

46  
47 Q. What did you need to do to access it?

1 A. Well, you had to have access in the first place, so I  
2 was given access. You then went into the intranet system  
3 of AWB and then you went into market profiles database and  
4 you clicked into market profiles database. That brought up  
5 all our markets. Iraq was one. You clicked into Iraq and  
6 there were a number of subheadings in Iraq - I think, from  
7 memory, about 18 sections. Then you could click into each  
8 section to look at the market - what we knew on the market  
9 at that time.

10

11 Q. From what we understand, only from looking at the  
12 documents that you have, it seems that the market profile  
13 in relation to Iraq was updated from time to time.

14 A. Correct, sir.

15

16 Q. Because there are documents which we've printed out,  
17 or which have been printed out, obviously from that  
18 electronic database, which appear to be different versions  
19 of the market profile, as best as we can determine, up to  
20 August of 2001, up to 20 April 2002, and one in November  
21 2002. Whose role was it or whose job was it to update the  
22 market brief from time to time?

23 A. When I arrived, I believe it had been updated before  
24 me by the previous account manager, who was Dom Hogan, and  
25 it would be - from when I actually took over responsibility  
26 for Iraq, it would be my responsibility to organise updates  
27 as I saw appropriate.

28

29 Q. You said that you had to gain authority, I take it  
30 authority to access this level of electronically stored  
31 material. Was it your belief that other people in the  
32 international sales and marketing division had authority to  
33 gain access to the market profile for Iraq?

34 A. Yes, sir, it's - yes.

35

36 Q. And was it a document then that existed in the  
37 electronic database of AWB as at the end of last year?

38 A. Yes, sir.

39

40 Q. Is it a document that you believe exists in the  
41 electronic database of AWB today?

42 A. Yes, sir.

43

44 Q. Do you still have responsibility for the Iraq market?

45 A. Currently, sir, yes.

46

47 Q. Have you maintained responsibility for that market

1 from the time that you first gained responsibility until  
2 today?

3 A. Yes, sir.

4

5 Q. So may we take it that you've had the responsibility  
6 of updating the market brief from time to time from then  
7 until now?

8 A. Yes, sir.

9

10 Q. May we take it that it was never your intention to  
11 keep secret the existence of the market brief from this  
12 inquiry?

13 A. Yes, sir.

14

15 Q. Indeed, is it the case that you drew its existence to  
16 the attention of others in AWB so that it could be produced  
17 to the inquiry?

18 A. No, sir. I - oh, yes, sir - well, I'm just trying to  
19 recall. I think I mentioned it as a document that they  
20 should look at when we were reviewing the documents, I  
21 don't recall, sometime last year, late last year, and I  
22 mentioned it to my counsel when I arrived back in the  
23 country in January, I said, "I want this document, and I  
24 want it from when I first arrived in the company."

25

26 Q. Now, when you say "when we were reviewing the  
27 documents late last year", who was reviewing the documents  
28 late last year?

29 A. Oh, when I was - in preparing my initial statement for  
30 the inquiry.

31

32 Q. Did you see copies of the market reports at that time?

33 A. No, sir.

34

35 Q. But you just drew attention to the existence of them  
36 at that time?

37 A. Yes, sir. If I could provide some clarification: the  
38 way that the system works is that you only see the latest  
39 updated version when you click into it, so you don't  
40 necessarily see the previous versions, because the idea is  
41 it's meant to give you the latest intelligence on Iraq, not  
42 what happened in 2001 or 2002. So, from what I understand,  
43 when I asked for the market brief as of July 2002, when I  
44 arrived, they said that it was going to have to take a lot  
45 of IT retrieval, and so on and so forth, to work out how to  
46 get it out of the system and get it out of the backup as it  
47 stood at that time, if you follow me.

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Q. Yes. All right. May I take it, then, that you've not had access to the documents, the historic market briefs, until today?

A. I received them yesterday lunchtime.

Q. Have you had a chance to go through them?

A. Very briefly.

Q. We've not yet had a chance to put them on to the system. Can I ask you to go to the market brief that you have in front of you, the folder that you have in front of you, and can you identify a document which has a cover sheet "Commercial in Confidence, AWB Limited", and then "AWB International Limited Market Brief Iraq". It should have "Last printed 13/2/2006" at the bottom.

A. Okay, "Last printed 13/2/2006", okay.

THE COMMISSIONER: Just so we're not confused, I'll mark that as an exhibit, I think, Mr Agius.

MR AGIUS: I think it might need to be a confidential exhibit, because it does contain a lot of material which is intelligence and I suspect will be commercial in confidence.

THE COMMISSIONER: All right. It's 26 pages in length, I think.

MR AGIUS: Yes.

THE COMMISSIONER: I'll mark that confidential exhibit 126C, except for any portions which are put on to the public record.

EXHIBIT #126C 26-PAGE DOCUMENT BEARING COVER SHEET HEADED "COMMERCIAL IN CONFIDENCE, AWB LIMITED", "AWB INTERNATIONAL LIMITED MARKET BRIEF IRAQ", MARKED "LAST PRINTED 13/2/2006"

MR AGIUS: Q. Mr Whitwell, can I ask you, please, to go to page 9 of that document. You see set out there, under the heading "Pricing", an example of the million tonne contract spread across two contracts, A1111 and A1112?

A. Yes, sir.

Q. And there is recorded there an inland transport and discharge cost in respect of the first contract of

1 55.17 Euros, and, in respect of the second, 55.40 Euros.

2 A. Yes, sir.

3

4 Q. Can I ask you to go to page 10. Do you see recorded  
5 there this paragraph:

6

7 Contracts are concluded with the IGB on a  
8 free in truck basis delivered to all  
9 governorates of Iraq. The inland transport  
10 fees (and all discharge fees) are included  
11 in the inland transport fee. Inland  
12 transport fees are paid via Alia Transport  
13 Company in Jordan, who then pay the  
14 Ministry of Transport in Iraq. These fees  
15 are approved by the UN.

16

17 Do you see that?

18 A. Yes, sir.

19

20 Q. Is that information that you learnt when you began to  
21 work at the AWB?

22 A. Yes, sir.

23

24 Q. That the fees were paid via Alia, who then passed the  
25 fees on to the Ministry of Transport?

26 A. I can't remember whether there was a distinction made  
27 between all of the fees or part of the fees, but I  
28 understood that certainly some of the fees were going to  
29 ISCWT, which was part of the Ministry of Transport.

30

31 Q. I'm trying to put a date on this document. I ask you  
32 to go to page 13. Under the heading "Operations" there is  
33 a reference to the value in US dollars of what the AWBI  
34 paid to vessel owners for delays incurred at Umm Qasr in  
35 1999/2000; do you see that?

36 A. Yes, sir.

37

38 Q. Then there's a reference to this:

39

40 In 2000/2001 AWBI took over the liability  
41 for demurrage costs at Umm Qasr.

42

43 So it would seem that this market brief is prepared after  
44 the date at which AWBI took over the liability for  
45 demurrage costs; do you agree with that?

46 A. That's how it looks to me, sir, yes.

47

1 Q. A bit further down the page there's a box indicating  
2 details of demurrage, which records those details as at  
3 20 August 2001.

4 A. Okay, yep.

5  
6 Q. Have you yourself any knowledge as to when it was that  
7 this document was prepared?

8 A. Sir, I haven't seen this document before now, or at  
9 least I can't recall seeing it before now, so I can only  
10 deduce from that that this was prepared before I arrived.

11  
12 THE COMMISSIONER: Q. The graphs in it seem to relate to  
13 a period up to normally July 01, but there is one on  
14 page 16 for August 01, so it would seem to have been  
15 prepared shortly after that time.

16 A. The only thing that I can help with is that I believe  
17 that A1111 and A1112 were contracts that were signed, I  
18 believe, or were signed in January 02.

19  
20 Q. The reason I mentioned the graphs is that they are  
21 prepared monthly, on pages 16 and 17, and 15. I might have  
22 expected that if August had been complete, perhaps sometime  
23 in September or October, August would have been included in  
24 the graph. Do you know how frequently these are updated,  
25 these sorts of graphs?

26 A. No.

27  
28 MR AGIUS: Mr Commissioner, we have a copy of the contract  
29 signed for AWB Limited - that is, contract A1111 - and it  
30 is dated 20 December 2001. That document is AWB.0062.0257.  
31 We will, in due course, be tendering all of the contract  
32 documents which have been arranged in chronological order,  
33 but I simply indicate that for present purposes. It would  
34 seem that this document was prepared, in our best  
35 estimation, at the end of 2001.

36  
37 Q. Can I bring you to a document that is dated November  
38 2002. Can you locate in the folder a document which  
39 commences with the page "Customer Information, November  
40 2002".

41  
42 THE COMMISSIONER: Paragraph number 1 is called "Market  
43 Strategy". It's about halfway through the volume, I'd say.

44  
45 MR AGIUS: Q. Have you found a document that has as its  
46 first page "Customer Information, November 2002", and then  
47 "Region Middle East, Market Iraq, Category 1.1, Strategy",

1 and then against name is the date November 2002, and then  
2 "Description", "Excerpt From WEA Market Brief"?  
3 A. Yes, sir.

4  
5 THE COMMISSIONER: I'll mark that document confidential  
6 exhibit 127.

7  
8 EXHIBIT #127C DOCUMENT BEARING FIRST PAGE HEADED "CUSTOMER  
9 INFORMATION, NOVEMBER 2002", "REGION MIDDLE EAST, MARKET  
10 IRAQ, CATEGORY 1.1, STRATEGY", "DESCRIPTION", "EXCERPT FROM  
11 WEA MARKET BRIEF"

12  
13 MR AGIUS: Our difficulty, Mr Commissioner, is knowing  
14 where this document starts and where it concludes, because  
15 the pages are not numbered.

16  
17 THE COMMISSIONER: The last page I have is something  
18 called "Middle East - Iraq - 11. Containers".

19  
20 MR AGIUS: The last page that we understood related to  
21 this document was "Middle East - Iraq - 18. News", which is  
22 a blank page, except for the heading and the reference to  
23 Mr Hogan as the account manager.

24  
25 Q. I wonder if you could just work through the document  
26 with me, Mr Whitwell. If we commence the document with a  
27 major division numbered 1, entitled "Market Strategy"; do  
28 you see that?

29 A. Yes, sir.

30  
31 Q. Then, two pages further on, another major division  
32 "Performance in 01/02"?

33 A. Yep.

34  
35 Q. Then, two pages further on, there's a heading "Middle  
36 East - Iraq - 1.1. Strategy Account Manager Chris Whitwell  
37 Description Strategy 02/03"?

38 A. Yes.

39  
40 Q. That's otherwise a blank page. The next "Middle  
41 East - Iraq - 2. Supply and Demand" --

42 A. Yes.

43  
44 Q. -- and there are --

45  
46 THE COMMISSIONER: It shows "Account Manager Dominic  
47 Hogan".

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MR AGIUS: Q. "Account Manager Dominic Hogan", and that's recorded on three pages, and there's a graph on the second page which refers to 2002/2003, and tables on the third page which refer to 2002/2003.

A. It's actually quite confusing, because I don't know which bits relate to which date.

Q. That's the problem we had, because we were given a paper version of this electronic series of documents, and I was wondering whether you would be able to assist us as to how we might put this together. Can I bring you to the section of the document marked "Middle East - Iraq - 5. Pricing"?

A. Yes.

Q. Again, there's a breakdown of the contracts A1111 and A1112; do you see that?

A. Yes.

Q. Beneath it again there is repeated "Contracts are concluded with the IGB on a free in truck basis delivered to all governorates Iraq. The inland transport fees (and all discharge fees) are included in the inland transport fee. Inland transport fees are paid via Alia Transport Company in Jordan, who then pay the Ministry of Transport in Iraq. These fees are approved by the UN." So that's repeated in this document.

A. Yes, sir.

Q. Then if you work through the document you'll come to a section entitled "Middle East - Iraq - 11.1 WEA Market Briefs". Do you see that there are icons there for "Iraq.doc May 02", "Iraq Brief - Response to WEA Query2 October 2002" and "Iraq 081102.doc"?

A. Yes, sir.

Q. May I take it that you would have had access to the documents dated October 2002 and 8 November 2002 whilst you were at the AWB at that time?

A. Sorry, sir, can you repeat the question?

Q. Would you have had access to the documents dated October and November 2002?

A. Not necessarily the document that was sent to the WEA. I can't deduce that from that. Those would have sat on their - to be honest with you, I haven't seen the contents

1 of those, and I can't guarantee to you that they are the  
2 ones that were sent to WEA.

3  
4 THE COMMISSIONER: Sorry, Mr Agius, where do I find that?

5  
6 MR AGIUS: That's a document which is headed "Middle  
7 East - Iraq - 11.1 WEA Market Briefs". It's a document  
8 that is otherwise blank but for three icons, being icons  
9 for Word documents.

10  
11 THE COMMISSIONER: My copy is "Middle East - Iraq - 11.  
12 Container".

13  
14 MR AGIUS: No, the next page.

15  
16 THE COMMISSIONER: I don't have a next page. Can I hand  
17 this down.

18  
19 MR AGIUS: We'll provide another copy. The difficulty  
20 we've had, Mr Commissioner, is that there are no dividers  
21 in the folder that we received which breaks these documents  
22 down into relevant portions, and we have attempted  
23 ourselves, as best we can, to put them into groups. All  
24 will become a little clearer when we receive the WEA market  
25 brief.

26  
27 Q. Can we go beyond that page, Mr Whitwell, and go to a  
28 page which has at the top the Umm Qasr demurrage table as  
29 at 24/4/02.

30 A. Yes, sir.

31  
32 Q. Do you see at the bottom of that page the following is  
33 recorded:

34  
35 Once central laboratories has approved the  
36 grain quality, authority is given to  
37 commence discharging the vessel. Vessels  
38 on berth 1, 2 and 4 are discharged directly  
39 into road trucks, and the rate is effected  
40 by the number of road transports available.  
41 This can be an issue during the local Iraqi  
42 harvest (May - August), when the IGB  
43 remove trucks from the port to use for  
44 moving local production to storage  
45 facilities.

46  
47 Do you see that, Mr Whitwell?

1 A. Yes, sir.

2

3 Q. That would appear to indicate that it was the IGB that  
4 was in control of the movement of trucks, would it not?

5 A. As it reads, sir, yes.

6

7 Q. Was it your understanding that it was the Iraqis who  
8 actually provided the trucking service?

9 A. My understanding was that Alia provided the - Alia  
10 were our trucking principal in 2002.

11

12 Q. When you say Alia were the trucking principal, I've  
13 taken you to that section of the market brief which records  
14 that money was paid to Alia and Alia passed it on to the  
15 Ministry of Transport, which you described as the ISCWT.  
16 That was an Iraqi organisation, was it not?

17 A. The ISCWT?

18

19 Q. Yes.

20 A. Yes, sir.

21

22 Q. And if money was being passed from Alia to the ISCWT,  
23 on what basis did you understand that Alia was providing  
24 the trucking service?

25 A. Because when I came into the company I was told that  
26 Alia were the people that were organising the trucking and  
27 they were the people to whom it seemed to me people were  
28 addressing issues which related to the trucking. So it  
29 didn't seem unusual that they would have to subcontract in  
30 Iraq. They were sitting in Jordan and it didn't seem  
31 unusual that they had to subcontract some of the services  
32 in Iraq.

33

34 Q. That was the belief you formed, was it, that Alia was  
35 subcontracting trucking services to Iraqis?

36 A. It seemed logical to me that they may use that, they  
37 may use other trucks. It's difficult for me now, knowing  
38 what I know, to remember back to 2002 and know what my  
39 state of mind was then, but I think that, as best as I can  
40 help you, I was coming in, I was reading this, and it  
41 didn't exercise my mind how the system worked, it was  
42 just - it was in the brief, it was transparent that we were  
43 using Alia as the trucking company, and I didn't really go  
44 into it any more than that. It was UN approved and the  
45 system was working and we were distributing the wheat to  
46 the silos. As a state of mind at the time, that's all I  
47 can really remember.

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Q. What was your state of mind about who had responsibility for moving the wheat after it was discharged to all governorates of Iraq?

A. Well, AWB were responsible in the contract for moving the wheat to the silos.

Q. That's what we understand from reading the contract. Were you aware that, in reality, leaving aside what the contract said, AWB had no responsibility for moving the wheat from Umm Qasr to all governorates?

A. No, I thought we had a responsibility, because if we didn't pay for the inland transportation, then we wouldn't fulfil our contractual obligation.

Q. I just want to break that down a little. There was a contract which provided for free in truck all governorates of Iraq.

A. Yes, sir.

Q. If one read that in isolation from anything else that one knew, that would imply, would it not, that AWB had a contractual responsibility to ensure that the wheat went to all governorates in Iraq?

A. Yes, sir.

Q. That was your understanding?

A. Yes, sir.

Q. Then there was the mechanism by which the wheat would get from Umm Qasr to all governorates in Iraq. What was your understanding as to who had the legal responsibility to move the wheat from Umm Qasr to all governorates of Iraq - not to pay for it, but to actually move it?

A. AWB had the contractual obligation to ensure that it was moved to all governorates of Iraq.

Q. What was your understanding as to how it was that AWB acquitted that responsibility or obligation?

A. My understanding was that we had contracted Alia to provide that service to us.

Q. That AWB had a contract with Alia for Alia to provide the trucking service?

A. Yeah, that AWB had an arrangement with Alia to provide the trucking service, yes.

1 Q. Did you know that AWB was making payments to Alia?

2 A. Yes, sir.

3

4 Q. On account of inland transport?

5 A. Yes, sir.

6

7 Q. And did you believe that those payments were being  
8 made as part of AWB's arrangement with Alia that Alia would  
9 undertake that portion of AWB's responsibility to deliver  
10 the wheat to all governorates of Iraq?

11 A. You might have to break that question down a bit, sir,  
12 sorry.

13

14 Q. Did you have a belief that the payments that AWB were  
15 making to Alia were being made because of AWB's agreement  
16 with Alia that Alia would deliver the wheat inside Iraq?

17 A. Yes, that they would be providing all the services to  
18 take the wheat from on board the vessel to all the  
19 governorates of Iraq; that was my understanding, yes, sir.

20

21 Q. To your mind, then, how did the statements in the  
22 market briefs that the inland transport fees are paid via  
23 Alia transport company in Jordan, who then pay the Ministry  
24 of Transport in Iraq - how did those statements fit with  
25 your understanding of AWB's contractual arrangements with  
26 Alia and the IGB?

27 A. It seemed a logical extension of just what I know  
28 about logistics that, you know, you have a contractual  
29 counter party and, you know, sometimes it's simpler to have  
30 one counter party rather than a number of different  
31 counter parties, because they will then consolidate the  
32 trucking. So it just seemed a commonsense thing that there  
33 would have to be Iraqis being paid, truck drivers being  
34 paid, stevedores being paid, port agents being paid in  
35 Iraq. It seemed a logical extension that there would have  
36 to be some kind of payment inside Iraq for all of these  
37 services.

38

39 Q. Did it --

40 A. And it comforted me - sorry, sir - that the company  
41 was saying that this is all UN approved. It just made  
42 sense to me.

43

44 Q. I understand. What we read in the market report is  
45 not that the payments by Alia to the Ministry of Transport  
46 were approved by the UN but the sentence actually says  
47 "These fees are approved by the UN"; that is, the inland

1 transport fees are approved by the UN. Did you draw a  
2 distinction in your own mind between the approval of inland  
3 transport fees and the approval of a mechanism whereby  
4 money was paid to the Iraqis on account of inland  
5 transport?

6 A. No, sir.

7  
8 Q. Were you aware in 2002/2003, up until the invasion,  
9 that UN sanctions prohibited the passing of money to the  
10 Iraqis?

11 A. No, sir.

12  
13 Q. Were you aware that it might be a breach of UN  
14 sanctions for the AWB to pay money to Alia in the knowledge  
15 that Alia was going to pay that money to an Iraqi  
16 instrumentality?

17 A. Sorry, sir?

18  
19 Q. Were you aware that it might be a breach of UN  
20 sanctions for the AWB to pay money to Alia in the knowledge  
21 that Alia was going to pay that money on to an Iraqi agency  
22 or an Iraqi instrumentality?

23 A. No, sir. As far as I was aware, I was coming in to  
24 AWB and I read this market profile. My management were  
25 telling me that the system was set up. It was all  
26 approved. And I was coming in and there'd already been a  
27 lot of wheat that had been shipped in this way, so I wasn't  
28 aware of any concerns that were passed to me anyway.

29  
30 Q. Can I take you back a little to some evidence you gave  
31 earlier. Who taught you to navigate your way round the  
32 electronic database of AWB so that you could access the  
33 market briefs?

34 A. It's not too difficult, sir. It's a drop-down system.  
35 Somebody just showed me where it was on the computer system  
36 and then told me that it's a double click with the mouse  
37 and then you're in and you double click, double click, down  
38 to the areas that you want to read. And it wasn't just  
39 Iraq that I was looking at. I was looking at a large  
40 number of markets.

41  
42 Q. Readily available to you?

43 A. Yes, sir. Joining our international sales and  
44 marketing, you'd have access to it.

45  
46 Q. Aside from international sales and marketing, are you  
47 aware as to who else had access to the Iraqi market briefs?

1 A. Not specifically, sir, but maybe the pool and maybe  
2 the WEA monitoring team, but I can't be specific on that.  
3 I don't know, to be honest with you.  
4  
5 Q. Who was the WEA monitoring team?  
6 A. The liaison team, rather than monitoring team.  
7  
8 Q. Who are they?  
9 A. Steve Sheridan, Annalisa Cattanach - I've forgotten.  
10  
11 Q. What was your understanding of their function?  
12 A. When the WEA asked for a market brief on a particular  
13 market, they would liaise to get the information, the  
14 appropriate information, or the necessary information to  
15 give to the WEA on those markets.  
16  
17 Q. So they were AWB employees, or AWBI employees?  
18 A. I don't know whether they're I or L, but they're AWB  
19 employees, yes.  
20  
21 Q. When the WEA made a request, they were the persons who  
22 were responsible for responding to that request?  
23 A. Correct, sir.  
24  
25 Q. To make that response, did they then liaise with  
26 international sales and marketing, or would they provide  
27 the response themselves by accessing the database  
28 themselves?  
29 A. No, they would liaise with us.  
30  
31 Q. Then would you - that is, international sales and  
32 marketing - produce a document to respond to a WEA request,  
33 or would you simply assist the response team or the liaison  
34 team to compile their own response to the request?  
35 A. I think assist would be a more accurate word.  
36  
37 Q. They would actually compile the material with your  
38 assistance?  
39 A. That's right, sir.  
40  
41 Q. You might show them where it was stored, and, to the  
42 extent to which they wanted to cut and paste that material,  
43 that was a matter for them?  
44 A. Yes, sir, and then we might be asked to give comments.  
45  
46 Q. Can I take you to another section of exhibit 127C.  
47 It's repeated in the other documents, but it's convenient,

1 since you have that open, to go to it. Would you go to the  
2 page that has the table for the contracts A1111 and A1112.  
3 I want you to turn to the next page. There's a full  
4 paragraph commencing, "The Grain Board of Iraq (IGB) has  
5 requested that all wheat payments to be made in a currency  
6 other than US\$, and has since requested the AWB to give a  
7 quotation in European currencies (eg) Sterling or Euro"; do  
8 you see that?

9 A. Yes, sir.

10  
11 Q. I wonder if you'd read through that paragraph to the  
12 end of the typing on that page, just to yourself, just so  
13 you're familiar with it, because I want to ask you one or  
14 two questions about it.

15  
16 MR AGIUS: Is there some way of projecting this?

17  
18 Q. Mr Whitwell, I want to ask you some questions about  
19 that portion that you've just read. There's an explanation  
20 set out there as to what actually happens at the AWB during  
21 the course of negotiations concerning currency.

22  
23 THE COMMISSIONER: Which page is this?

24  
25 MR AGIUS: I wonder if you could pass the folder down and  
26 we'll turn it up.

27  
28 Q. Perhaps I'll read it so that people can follow these  
29 questions:

30  
31 AWB initially agrees a sale in US dollar  
32 price. However, the choice of foreign  
33 currency and the exchange rate are subject  
34 to negotiation. Treasury is requested to  
35 provide an exchange rate in a European  
36 currency and this rate is then put forward  
37 to the Director General of IGB, who, after  
38 consultation with the Central Bank of Iraq  
39 will accept or reject the exchange rate.

40  
41 There is generally a time lapse between the  
42 time of quotation and the final agreement  
43 of the rate. Therefore Treasury places a  
44 "cushion" or small premium to the rate to  
45 protect the AWBI against adverse currency  
46 movements. The more time required to keep  
47 the quote open, the larger the size of the

1           premi um.

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10          This is the part I want to ask you about:

11

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16

In the last two transactions Treasury has been able to manage and improve on the rate offered, and has refunded U\$\$110,000 and U\$\$417,000 to the Grain Board of Iraq.

17

18

19

20

21

Can you tell us anything about that, Mr Whitwell, about refunds to the Grain Board of Iraq in sums of that size?

22

23

24

25

A. Sir, this is in relation to transactions before I arrived, so - I mean, I don't know about those two figures.

26

27

28

29

Q. Do you know about similar transactions after you arrived where Treasury was able to improve on the rate that had been offered and there was a pool of money available which was refunded to the IGB?

30

31

32

33

34

35

36

37

A. The first contract I did for the AWB was the one in December, so - I mean, I could tell you - I'll try and assist, but, you know, I - I mean, all I could say was --

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39

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Q. The question we will direct at Treasury, but I'm just wondering what your understanding of the situation was from --

A. I'll run you through what happened in December, because that's the only thing I can recall, if that helps, but I can't comment on those two, because they weren't - I wasn't party to them.

Q. What can you tell us about December, then?

A. What would happen is that we would agree a price, in this instance I think it was US\$220. Then we would agree a final price with the inland transportation. That would then be a US dollar number. We would then agree, or we would give them - I would go to Treasury within AWB and they'd give me a range between a buy and a sell range on Euro to US dollar, and we would then communicate that to the IGB. The IGB would then speak to the Central Bank of Iraq, and they'd say, "No, it's too high", or "it's too

1 low", or "we think the rate is higher or lower", and that  
2 can take two, three days, or whatever. I can't recall what  
3 it took in terms of the contract that I was involved in,  
4 but you'd agree a final sort of exchange rate number - say,  
5 for example, 0.9950 between US dollar and Euro, and they  
6 would say, "Okay, go away and fix the contract at that  
7 rate". So I would then take that to my Treasury team and  
8 they'd have to try to execute that at that rate, which,  
9 when you're dealing with 500 or a million tonnes of wheat  
10 there's quite a lot of Treasury effort that needs to be  
11 done.

12  
13 From recollection, I think what happened here is if  
14 Treasury did better than that, then we would say to them,  
15 "Look, we fix 99.50, but we actually did better than that",  
16 whichever way around it was, "So we'll actually give you  
17 the better rate" so the contract is actually discounted at  
18 that point in time, if you understand what I mean.

19  
20 Q. Yes. Does that mean that there would be a physical  
21 refund --

22 A. No.

23  
24 Q. -- as a consequence of the better rate?

25 A. No, what it would mean was that the price was slightly  
26 reduced.

27  
28 THE COMMISSIONER: Q. If it was \$250, it might be  
29 \$249.80?

30 A. Absolutely, yes.

31  
32 MR AGIUS: Q. I think the transcript says "quite a lot  
33 of Treasury effort". Did you mean "Treasury effort", or  
34 did you mean "Treasury FX", as in foreign exchange?

35 A. Probably both, sir.

36  
37 THE COMMISSIONER: "Effort" I think is more correct.

38  
39 MR AGIUS: Q. The last document that you should have in  
40 that folder is a document which again we've had difficulty  
41 dating. I will tender it as a confidential exhibit.

42  
43 THE COMMISSIONER: I'll mark it confidential exhibit 128C.  
44 It starts "Middle East - Iraq - 1"; is that right?

45  
46 MR AGIUS: Yes, and it should conclude with "Middle East -  
47 Iraq - 18. News" and a blank page.

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THE COMMISSIONER: Yes.

EXHIBIT #128C DOCUMENT BEARING COVER PAGE HEADED "MIDDLE EAST - IRAQ - 1" AND CONCLUDING WITH PAGE HEADED "MIDDLE EAST - IRAQ - 18. NEWS" AND A BLANK PAGE

MR AGIUS: The portions of the earlier documents that I've read out are repeated in this document.

Q. Mr Whitwell, can I take you through some other documents that we have. For this purpose, you might put that folder aside. I won't be taking you back to that until we know a little more about the contents. Could we bring up, please, confidential exhibit 62C, which is AWB.0176.0053. This is a document entitled "Executive Brief Iraq - AWB Delegation August 2002".

A. Yes, sir.

Q. Did you see this document in August 2002?

A. Yes, sir.

Q. Can we go to 0055, the third page. Under the heading "Iraq At a Glance", the last dot point records:

AWB also pays a fee, covered under sales contract, to the Ministry of Transport covering inland transport fees and discharge costs.

May we take it that you would have read that?

A. Yes, sir.

Q. Did it occur to you then that AWB was in fact paying money and was aware that it was paying money to the Ministry of Transport?

A. I think that whole document in part comes from the market profiles that we've already covered, so I would imagine that, you know, we didn't type it out, we just cut and paste it from that. So my understanding was from the market profile, so it wouldn't have surprised me when I saw that.

Q. Thank you. I'm going to work through all of the material that you might be able to assist us with in a chronological order, Mr Whitwell, so we may move from topic to topic, but I'm going to try to keep everything in

1 chronology. If you get into any difficulty in that regard,  
2 would you let me know? If there's any other document that  
3 you're aware of that bears upon a matter that I'm asking  
4 about, please feel free to indicate. Could we bring up,  
5 please, AWB.0129.0101. This is an email from you to  
6 Mr Long of 26 August 2002. Are you able to read that on  
7 the screen?

8 A. Yes, sir.

9

10 Q. You were aware, obviously, that there was a quality  
11 claim - claims by the Iraqis that there was contamination  
12 of the wheat - and you were aware that there was a  
13 delegation of AWB personnel going to Iraq to deal with that  
14 problem?

15 A. Yes, sir.

16

17 Q. And you had prepared this response as a draft for  
18 Mr Long and you were seeking his input?

19 A. Yes, sir.

20

21 Q. You say in the last sentence of the major paragraph:

22

23 To that end we would ask for your proposal  
24 with regard to a settlement process that  
25 would abide by relevant United Nations  
26 guidelines with respect to the Oil for Food  
27 Program.

28

29 Had you had discussions within AWB as to how it might be  
30 that any quality claim might be settled?

31 A. Sorry, sir, sorry, I was concentrating on the screen.  
32 Sorry.

33

34 Q. Let me put it another way. When you read that  
35 sentence, it seems apparent that you or others in AWB were  
36 concerned that the Iraqis might have a settlement process  
37 in mind which was outside the United Nations guidelines.  
38 Had you had any discussion within AWB as to how any  
39 settlement process might be constructed as at the time that  
40 you prepared this draft?

41 A. To the best of my recollection, no, sir, I think this  
42 draft is our first attempt to get the Iraqis to tell us  
43 what they had in mind.

44

45 Q. Was it in contemplation of the likelihood that the AWB  
46 would have to pay some money to the Iraqis?

47 A. I'm sorry, again I don't understand that, sorry.

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Q. When you prepared this, did you have in mind that the AWB might have to pay money to the Iraqis?

A. Yes, sir. An agreement had been - the Iraqis understood an agreement to have been reached to settle the iron contamination claim.

Q. And it would be an agreement which involved the payment of money to the Iraqis?

A. No, not necessarily.

Q. Had you known as at this date that there was an agreement to pay US\$6 a metric tonne in settlement of the iron filings claim?

A. I understood the figure of \$6 at that point, but the number of vessels it involved was still being worked through, as it were, because the Iraqis were still complaining that a number of vessels were contaminated with these alleged iron filings, I think even after the delegation came back from Iraq.

Q. But you understood that there would be a payment at least of \$6 a metric tonne in respect of the quality claim, but you didn't know how many metric tonnes would be involved, because you didn't know how many shipments would be involved; is that right?

A. Again, yes, the final quantum hadn't been agreed to, and neither had the method of settling it.

Q. Had there been any suggestions up to this time?

A. No. Michael came back from Iraq and said, you know, we've had to agree to the figure, the \$6 a tonne, and we need to work through how this can be settled.

Q. You say at the end:

Haven't mentioned anything from our side (eg Tigris etc) yet since it is in our interests to prolong this process as long as possible.

A. Yes, sir.

Q. What did you have in mind when you wrote "it is in our interests to prolong this process as long as possible"?

A. Well, there was a body of thought within the AWB that this was a, for want of a better word, bogus contamination

1 claim that was inspired more by the politics of the time  
2 rather than anything else. And that we were effectively -  
3 we had no real option with vessels that stopped discharging  
4 in Umm Qasr, costs arising which were coming back to us, we  
5 had no real - we had no option but to go to Baghdad and  
6 agree the cheapest possible settlement that we could.

7  
8 Now, that doesn't mean that we suddenly believed that  
9 the contamination claim was real, and so what I'm  
10 suggesting there is that we still have a battle to try and  
11 delay payment, maybe the war will come and we'll be able to  
12 renegotiate. We're already thinking about, you know, how  
13 we can try and renegotiate it, because in our minds it's  
14 not a fair claim.

15  
16 Q. Were you aware, then, that there was a Tigris debt?

17 A. I believe that Michael had said to me that one of the  
18 options might be paying the amount of the iron  
19 contamination to Tigris as a part repayment of their debt  
20 at that stage. But that's, you know - that's what he said.  
21 He suggested that to me.

22  
23 Q. Then at 0102, which is the next page, Mr Long  
24 responded to you that you should put in the Tigris option.

25 A. Yes.

26  
27 Q. Then could we bring up AWB.0140.0011. That is your  
28 email to Mr Yousif raising the matter of the iron filings  
29 settlement, \$6 a metric tonne, with the nominated number of  
30 tonnes and total US dollar price, and a suggestion that it  
31 be offset against the Tigris petroleum debt?

32 A. What this email is saying is, in the first instance,  
33 give us a mechanism or tell us your proposal that would  
34 abide by the relative relevant sanctions, relevant United  
35 Nations guidelines, and then, you know, absolutely, we're  
36 saying an option might be to pay - for us to pay Tigris  
37 back part of their debt.

38  
39 MR AGIUS: I tender those three documents, AWB.0129.0101,  
40 0102, and the last document, AWB.0140.0011.

41  
42 EXHIBIT #301 THREE DOCUMENTS, BARCODED AWB.0129.0101-0102  
43 AND AWB.0140.0011

44  
45 MR AGIUS: Is that a convenient time to take a short  
46 break?

1 THE COMMISSIONER: Yes.

2

3 SHORT ADJOURNMENT

4

5 MR AGIUS: Q. Mr Whitwell, we'll go to the next document  
6 that I want to ask you about, AWB.0142.0292. It's an email  
7 from yourself to Nigel Edmonds-Wilson and Dominic Hogan of  
8 18 October 2002.

9 A. Yes, sir.

10

11 Q. You asked Mr Edmonds-Wilson to do some things as part  
12 of the planning process for your upcoming trip to Iraq?

13 A. Yes.

14

15 Q. About halfway through the email you refer to the Iraq  
16 brief file. You ask Mr Edmonds-Wilson, "Can you update the  
17 Iraq brief file particularly so that we can cover off", and  
18 you list a number of things. What was the Iraq brief file?

19 A. Iraq brief file would be typically a small, black  
20 A4 folder, ring binder, that we would - or I would ask  
21 Nigel to - put the relevant pieces of paperwork to the  
22 issues that we were discussing in Iraq in there and put  
23 dividers in, and he'd take that out of the IS&M file. So  
24 rather than taking in the big IS&M files, we'd just compact  
25 it into a very small file that the marketing manager or the  
26 account manager could take with him and they'd have  
27 reference to it.

28

29 MR AGIUS: I tender AWB.0142.0292.

30

31 EXHIBIT #302 EMAIL FROM MR WHITWELL TO MR EDMONDS-WILSON  
32 AND MR HOGAN, DATED 18/10/2002, BARCODED AWB.0142.0292

33

34 MR AGIUS: Q. The larger IS&M file that you referred to,  
35 that was a file that was kept in the IS&M area?

36 A. Yes, sir.

37

38 Q. What sort of material did it contain in hard copy?

39 A. You know, it would have typically contracts in it --

40

41 Q. Trip reports?

42 A. Yeah, it could have trip reports in it. It's really -  
43 the way that it works is, you know, you or Nigel - Nigel  
44 Edmonds-Wilson - or anybody who had information that they  
45 came across that they'd read in relation to Iraq would hand  
46 it to Nigel, who would then file it in the appropriate  
47 section of the IS&M file, but there was no hard and fast

1 procedure about what went in and what stayed out. It was  
2 just if it was relevant to the market in somebody's mind,  
3 then they would ask Nigel to file it.

4  
5 Q. You went on that trip to Iraq with Mr Hogan, and when  
6 you came back you sent him an email of the draft of the  
7 trip report. Could we bring up, please, AWB.0142.0219.  
8 This appears to be your draft of the trip report asking  
9 Mr Hogan for comments. May I ask you first about the  
10 handwriting at the top. "Send" and then "to Exec"?

11 A. Yes, it's my handwriting, sir.

12  
13 Q. Was this a note to yourself to ensure that the trip  
14 report was sent to those persons?

15 A. Yes, sir. This was the first trip report, or maybe  
16 the second, that - I went to Iran in September, but this is  
17 the first time that I've prepared a trip report for Iraq.  
18 So I'm running through the process with people.

19  
20 Q. To the best of your knowledge and belief, was the  
21 material that you included in this factual?

22 A. Yes, sir.

23  
24 Q. Can I come to the heading "Suggested following  
25 proposal":

- 26  
27 1. Offsetting vessel claims (iron filings)  
28 against Tigris (BHP) debt - approx  
29 USD2 million.  
30 2. Balance of debt to be recovered against  
31 new business (load up contract) - approx  
32 USD7.5 million (if using compound).

33  
34 Where did that suggestion come from, that the balance of  
35 the Tigris debt could be recovered against new business by  
36 loading up the contract?

37 A. From memory, I think on this trip into Iraq we met  
38 Norman Davidson Kelly in Amman on the way in, and he might  
39 have suggested that that's a possibility that - I think he  
40 did suggest that was a possibility of how that debt could  
41 have been recovered.

42  
43 Q. Did he say where that idea came from?

44 A. Not that I can recall.

45  
46 Q. Mr Davidson Kelly wasn't a member of AWB staff.  
47 Before you put that proposal to the Iraqis, as is reflected

1 in this draft trip report, did you obtain authority from  
2 anybody at AWB?

3 A. Yes, sir.

4  
5 Q. Who was that?

6 A. Well, Dominic Hogan was my manager at the time, or  
7 senior to me, but I was aware that Dominic might have been  
8 instructed by Michael that this was okay to discuss.

9  
10 Q. By Michael Long?

11 A. Yes.

12  
13 Q. How were you aware of that?

14 A. Because we're all sitting on a reasonably open desk in  
15 the IS&M area and I was going on the trip and, you know,  
16 Michael might have said, "This is one of the issues that  
17 you can discuss on this trip."

18  
19 Q. So then you were not surprised to hear the suggestion  
20 from Norman Davidson Kelly once you got to Amman?

21 A. I can't recall where the first suggestion was made,  
22 but, no, it didn't strike me as - I had no concerns about  
23 it, no, sir.

24  
25 Q. Because, what, it had already been suggested by  
26 Mr Long?

27 A. I can't recall who first suggested it, sir.

28  
29 Q. But you had heard Mr Long suggest it?

30 A. No, I'd heard Mr Long say that, as far as he was  
31 concerned, he had no objections and wanted us to discuss  
32 helping to recoup the Tigris debt.

33  
34 Q. By loading up future business?

35 A. Well, that's - yes, by - again, I'd better take this  
36 slowly, but that was certainly one of the mechanisms that  
37 might have been used, yes, sir.

38  
39 Q. I'll stay on this email, because we already have as an  
40 exhibit the final trip report. If we go to 0222, which  
41 seems to be in much the same form as your own first draft,  
42 but because this is the first draft, I want to ask you  
43 about it. Do you see the heading "Sabah Jumah - 29th  
44 October", you there record discussions with Sabah. In the  
45 second line it says:

46  
47 AWB briefed him as to the Iraqi position

1 vis a vis the Tigris debt and again  
2 clarified that our role was as facilitator  
3 only and that Tigris had to agree amount  
4 with Iraqis prior to our next meeting...

5  
6 Next paragraph:

7  
8 We discussed possible difficulties in  
9 raising the price that significantly to  
10 incorporate the entire debt into one 500 K  
11 contract. Suggested some alternate  
12 pressure could be brought to bear on the  
13 Iraqi Govt to increase the tonnage of next  
14 contract to make things easier to pass  
15 through UN. He said he would look into it.

16  
17 May I take it that that accurately records the substance of  
18 your discussions with Sabah Jumah?

19 A. Yes.

20  
21 Q. So there was a recognition, it seems, by you and  
22 Mr Hogan that if the contract was loaded up too much, it  
23 might attract the attention of the UN as not being an  
24 acceptable contract?

25 A. No, sir. No. I mean, my view on that was that it was  
26 a bit of salesmanship - I can't recall whether it was by  
27 Dom or myself, but I suspect it was Dominic - that was  
28 trying to say to these guys, "Well, look, we're in a  
29 situation where the minister has turned around and he's  
30 kept the contract at 500, we want a million, and the price  
31 will be better for the Iraqis if they split it over a  
32 million", and it also leverages, or attempts to sort of  
33 leverage what influence Sabah Jumah had in that process  
34 into the process. I had no further concerns about it.

35  
36 Q. I can understand the element of salesmanship and  
37 trying to gain assistance to bump the contract up from  
38 500,000 tonnes to a million tonnes, but the aspect that I  
39 was focusing on was the next part of the paragraph:

40  
41 ...to increase the tonnage of next contract  
42 to make things easier to pass through UN.

43  
44 What was the significance of saying to Sabah anything about  
45 making things easier to pass through the UN, if it wasn't  
46 that, in substance, you'd have to load up a 500,000 tonne  
47 contract too much and it would be too obvious, and if you

1 loaded up a million tonne contract, then it wouldn't be as  
2 obvious because you'd only be loading up half the amount if  
3 you spread it over a million tonnes --  
4 A. Right.  
5  
6 Q. -- do you see that?  
7 A. Yeah, no, I understand. Yeah, I follow the point. So  
8 the question, sorry?  
9  
10 Q. Well, the question was this paragraph seems to reflect  
11 that you and Mr Hogan had a knowledge that if you loaded up  
12 the 500,000 tonne contract too much it would not pass  
13 through the UN.  
14 A. Well, again, as I say, I'm on a look-and-learn trip,  
15 but I do understand at that point, that the price of a  
16 contract when it's finalised will go through a UN approval  
17 process involving a UN expert checking on the price to see  
18 that it's fair and reasonable, yes.  
19  
20 Q. If you spread \$7m or \$8m over 500,000 tonnes it will  
21 be more obvious than if you spread it over a million  
22 tonnes?  
23 A. Well, it will make the price higher, yes, sir.  
24  
25 Q. And be more likely to draw attention of the UN  
26 inspector?  
27 A. No, sir. It's just - it's an all in one price.  
28  
29 Q. But if a contract for 500,000 tonnes is inflated by  
30 \$7m or \$8m, the price is going to be per tonne higher than  
31 if the contract for a million tonnes is inflated by \$7m or  
32 \$8m?  
33 A. Correct, sir.  
34  
35 Q. And if it's higher with a 500,000 tonne contract, it's  
36 more likely to catch the attention of the United Nations?  
37 A. Yes, sir.  
38  
39 Q. And that's why you typed the words "to make things  
40 easier to pass through the UN", because that's what had  
41 been said to Sabah?  
42 A. Yes, sir. Sorry, I didn't understand the point of the  
43 question, but yes, sir.  
44  
45 Q. If we go to 0220, would you come down under the  
46 heading "Minister Mehdi Saleh", do you see that, there's a  
47 heading "Tigris Issue"?

1 A. Yes, sir.  
2  
3 Q. Is that up on your screen?  
4 A. It is now, yes, sir.  
5  
6 Q.  
7 Simple Interest amount to be recovered by  
8 Tigris through loading up the next Phase 13  
9 wheat business. This has received Cabinet  
10 approval  
11  
12 That's Iraqi approval?  
13 A. Yes, sir.  
14  
15 Q. The next paragraph is the one I want to ask you about:  
16  
17 Vessel rejection claims as per original  
18 agreement to be paid through inland  
19 transport payment system against next  
20 contract...  
21  
22 That was the substance of the agreement that was reached  
23 with the Iraqis on this trip?  
24 A. I don't think an agreement had been reached even at  
25 that stage, sir.  
26  
27 Q. Well, I'm just wondering how we should read it in any  
28 other way:  
29  
30 Vessel rejection claims as per original  
31 agreement to be paid through inland  
32 transport payment system against next  
33 contract...  
34  
35 That would seem to imply, if not state directly, that the  
36 Iraqis were saying, "You can pay the iron filings claim to  
37 us by using the same mechanism that you use to pay the  
38 inland transport fee" --  
39 A. Yes, sir.  
40  
41 Q. -- is that the way we should read that?  
42 A. Yes, this is Minister Mehdi Saleh - this is him  
43 telling us that that is his understanding of how he wants  
44 it to happen, yes, sir.  
45  
46 Q. That carries with it, doesn't it, the obvious  
47 implication that money being paid on account of the inland

1 transport fee was finding its way to the Iraqis, if he was  
2 recommending the same mechanism for the payment of the iron  
3 filings claim?

4 A. I mean, he was suggesting that, yes - I mean, he was  
5 suggesting paying Alia. This raised concerns for us,  
6 because we didn't think this was - we drew a  
7 differentiation between the inland transport fees which we  
8 thought were UN approved and this 2 million or whatever  
9 iron filings fee, which was for a quality claim. So it  
10 wasn't for a service that was provided. So, you know, in  
11 our minds it was something that couldn't be paid through  
12 the inland transportation system, because the inland  
13 transportation fees were approved, whereas this wasn't  
14 approved to pay quality claims back through in that way.  
15 So we drew - I mean, I had a clear distinction in my mind  
16 between the two things.

17  
18 MR AGIUS: I tender that email.

19  
20 EXHIBIT #303 EMAIL CONTAINING MR WHITWELL'S  
21 DRAFT IRAQ TRIP REPORT, ASKING MR HOGAN FOR COMMENTS,  
22 BARCODED AWB. 0142. 0219-0222

23  
24 MR AGIUS: Q. We have your trip report as exhibit 26,  
25 which is in similar terms to your email that we've just  
26 covered. I want to move past that to exhibit 25,  
27 WST.0002.0079. This is exhibit 25. This is your email to  
28 the executive and to others attaching the trip report,  
29 Mr Whitwell?

30 A. Yes, sir.

31  
32 Q. And including a very brief summary?

33 A. Yes, sir.

34  
35 Q. You sent it to Mr Lindberg, Mr Ingleby and Mr Stott,  
36 Mr Geary and others. Why did you choose that list of  
37 recipients?

38 A. Because I - if you remember the previous one you  
39 showed me with my handwriting on the top, I'd been advised  
40 that it was appropriate - maybe by Dom; I don't recall  
41 exactly - that this would be the appropriate list of people  
42 to send an Iraq trip report to.

43  
44 Q. Can you recall whether you ever discussed the trip  
45 report thereafter with any of the persons to whom you'd  
46 sent it - leave aside Michael Long and Mr Hogan.

47 A. Look, I would imagine only really Michael. I can't

1 recall anybody else, no. Michael and Dom.

2

3 Q. Can we come to the trip report for November 2002,  
4 confidential exhibit 94C, WST.0004.0028. There's a heading  
5 "Meeting with the IGB - Miss Moona and Acting DG Mr Talal";  
6 do you see that, Mr Whitwell?

7 A. Yes, sir.

8

9 Q. To the best of your knowledge and belief, this report  
10 accurately summarises what took place --

11 A. Yes.

12

13 Q. -- in relation to the issues that it touches upon?

14 A. Yes, sir.

15

16 Q. If we go to the bottom of that page, under the heading  
17 "Rebate":

18

19 This was then raised by IGB. ML --

20

21 Michael Long; is that right?

22 A. Yes, sir.

23

24 Q.

25 -- asked whether for corporate governance  
26 reasons the issue of repayment of this  
27 debt, which AWB acknowledged, could be  
28 passed through Tigris or through further  
29 equipment to be provided rather than  
30 through Alia.

31

32 What did Mr Long say - I take it you were the author of  
33 this document?

34 A. Yes, sir.

35

36 Q. You've written "for corporate governance reasons"?

37 A. Yes, sir.

38

39 Q. I take it they were not the precise words that Mr Long  
40 used when speaking with the IGB?

41 A. I doubt it, sir.

42

43 Q. What did he say?

44 A. To the best of my recollection, I think Michael - we  
45 all had concerns about how to repay the iron filings in a  
46 way that was UN approved, and Michael would have - I can't  
47 recall specifically how he raised it, but what I'm

1 effectively reporting there is that Michael did raise it  
2 and say, "Look, the way that you have proposed - ie,  
3 through Alia - is not something we can live with,  
4 therefore, can we please consider other options by taking a  
5 slice off the Tigris debt and repaying that - paying the  
6 iron filings partly back to Tigris - or through buying  
7 equipment for them and then getting UN approval to send  
8 that equipment over." So that's what he's saying. I can't  
9 remember the exact words of what he said, but that would  
10 have been the feel of what he said.

11  
12 Q. Then if we go to AWB.5020.0203, an email from  
13 Mr Hockey to yourself. This is Mr Hockey writing to you,  
14 Mr Hogan and Mr Long passing on information that he had  
15 received from DFAT on this very topic of settling the iron  
16 filings issue; is that right?

17 A. Yes, sir.

18  
19 MR AGIUS: I tender that, Mr Commissioner.

20  
21 EXHIBIT #304 EMAIL FROM MR HOCKEY TO MR HOGAN AND MR LONG,  
22 DATED 27/11/2002, BARCODED AWB.5020.0203

23  
24 MR AGIUS: The inquiry may recall that we already have  
25 exhibit 43, being emails within DFAT, on this very issue.  
26 This is evidence of the passing of that information to AWB.

27  
28 Q. Can we bring up part of confidential exhibit 99,  
29 AWB.0147.0119. This is a note to the Iraqis where you put  
30 to them two options. The email in that respect speaks for  
31 itself.

32 A. Yes, sir.

33  
34 Q. But it records inland transport of \$51.15 per metric  
35 tonne - US\$51.15. How did you calculate that figure?

36 A. That figure came from a work sheet which was - which  
37 Dom took me through, and effectively there was an inland  
38 transport figure, I can't exactly remember what it was, but  
39 it was maybe \$26 or \$28, and then the final inland  
40 transport fee also included a 10 per cent figure that was  
41 calculated on the total free in truck price of the wheat.

42  
43 Q. Can I bring you to an email from Mr Hockey to a number  
44 of persons, including yourself, AWB.5019.0260. It is an  
45 email from Mr Hockey to PC McBride at AWB and a number of  
46 other persons, dated 11 December 2002.

47 A. I don't recall seeing this document, sir.

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3  
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47

Q. When the email comes up, Mr Whitwell, I'll ask you about it. There's a barcoding problem. A very small number of documents have had to be rebarcoded because of some technical glitch. (Document AWB.5020.0262 shown). I wonder if you'd read that, because I want to ask you some questions as to what was behind this email, as best you can recall.

A. Sir, I've read it.

Q. I should tell you that 11 December, which is the date of this email, is a significant date in some respects. It was the date when AWB Limited signed two contracts, 1670 and 1680, each for 500,000 tonnes of wheat, and it was the date when you faxed Yousif Abdul Rahman confirming the sale of that wheat, setting out the price, including the inland transport fee?

A. Yes, sir.

Q. So I just give you that information to put this email in a temporal context.

A. Yes, sir.

Q. So it would seem that, on that date, the price of the sale of this wheat, including inland transport, had been agreed with the Iraqis.

A. Yes, sir.

Q. And it may have been that the detail of those contracts, or some of the detail - at least the fact of the sale - had been made public?

A. I wouldn't necessarily draw that conclusion, sir. I think that Pete McBride, Matt Foran, Matt Thomas and Darryl Hockey were all in the corporate media area at that moment in time. We obviously kept them informed of sales, but AWB's policy is it's a commercial in confidence matter between us and the buyers, so whilst we tell our public relations that there is a sale, so that if they get a question they're not totally offguard, it's not AWB's policy to then tell the world that we've made a sale.

Q. What we know, though, don't we, is that those contracts, at that time, had an agreed price which included a component for the Tigris debt?

A. Yes, sir.

Q. What is the background, then, of the email that we see

1 on the screen from Mr Hockey to the persons you've  
2 nominated and yourself on 11 December?

3 A. To the best of my recollection, I think what Darryl is  
4 saying is that he's received calls from Canberra saying,  
5 "Have you done the sale? Have you not?" He's saying,  
6 "Look, we shouldn't go out and tell the world about this,  
7 because" - and he's saying "and I've asked the government  
8 to treat it as the same, as a commercial in confidence  
9 matter", because if we raise the issue, I think there was a  
10 rumour at that time that the French had sold some wheat to  
11 the Iraqis - I can't recall now whether, you know, it was  
12 true or not. On one of our information wires we may well  
13 have heard that the French had sold some wheat. So Darryl,  
14 from a media perspective, is saying that may cause the  
15 issue, which was the Australian Government's view on the  
16 war, on Saddam Hussein, and so on and so forth, to flare up  
17 again, and we didn't want that at a time when we were just  
18 concluding the contract.

19  
20 The other PR danger - well, I think that probably  
21 speaks for itself. I think he clearly doesn't - Darryl is  
22 not a commercial guy, so he wouldn't know, you know, what  
23 the price reflected. The rest of it reads on, "The  
24 preferable thing", he's just saying "let's keep it as per  
25 our normal policy, which is just not to comment".

26  
27 Q. Would Mr Hockey have been privy to the fact that these  
28 contracts contained inflated prices for wheat to cover the  
29 Tigris debt component?

30 A. I can't recall.

31  
32 Q. Is it something that, in the normal course, you would  
33 have passed on to people in the AWB media unit?

34 A. No, you wouldn't typically pass on the costing details  
35 of a contract, no.

36  
37 Q. Would you have passed on the contract price?

38 A. I'd be happy telling him the contract price, yes.

39  
40 Q. But did you?

41 A. I can't recall doing that.

42  
43 Q. What about the tonnage?

44 A. Yes. I'd certainly tell him the tonnage, yes.

45  
46 Q. Just think back about the Tigris debt and it as a  
47 component of these two contracts. Was that something that

1 you would have wanted published outside the AWB?  
2 A. No.  
3  
4 Q. Had there been discussions within the AWB that it's a  
5 matter that shouldn't be published outside the AWB?  
6 A. Well, it relates to IGB, Tigris and AWB, and they're  
7 commercial dealings which would normally be a commercial in  
8 confidence matter that you wouldn't discuss outside of  
9 that.  
10  
11 Q. Beyond that, doesn't it also relate to the loading up  
12 of two contracts that the AWB had to submit to the UN for  
13 approval?  
14 A. Sorry, sir, I don't understand the question.  
15  
16 Q. Well, these two contracts --  
17 A. Yes, sir.  
18  
19 Q. -- had a component added to the price of wheat to  
20 cover the Tigris debt.  
21 A. Yes, sir.  
22  
23 Q. So hidden in the contract prices was something like  
24 US\$8m to cover the Tigris debt?  
25 A. I wouldn't use the word "hidden", sir. I think, in  
26 terms of the internal communications that we're putting  
27 out, there's nothing hidden about the Tigris debt.  
28  
29 Q. Well, it's not disclosed on the face of the contract,  
30 is it?  
31 A. No, sir, but that's not untypical for a contract. We  
32 don't break down a typical cost insurance and freight  
33 contract, we don't break it down into what's the freight  
34 component, what's the insurance component, what's the cost  
35 component.  
36  
37 Q. But all of those components relate to the wheat which  
38 is actually the subject of the contract - that is, the  
39 wheat that's going to be delivered under the contract.  
40 A. Yes, sir.  
41  
42 Q. The Tigris debt related to wheat that had been  
43 delivered in 1996 --  
44 A. Yes, sir.  
45  
46 Q. -- and it didn't have any relationship at all with the  
47 wheat that the contract related to?

1 A. Yes, sir, but if I can --

2

3 Q. Why --

4 A. Why? Look, in commodity trading it wasn't unusual to  
5 use a contract to offset debts, or whatever. For example,  
6 when I was in sugar, there might be three, four, five  
7 parties to a contract, five different companies on one sale  
8 of, say, Thai sugar, for instance, and the initial buyer  
9 might be in a chain of five or six parties to - the initial  
10 seller would be in a chain of five or six parties to the  
11 end buyer, and there would be an offset situation between  
12 one to the next to the next to the next, and you might turn  
13 around and say, "Well, let's simplify it, I'll go from A  
14 to - from the buyer to the end seller and we'll offset the  
15 amounts". In a similar way it wasn't at all unusual to  
16 use - to run statements of accounts with customers whereby,  
17 you know, in the course of doing business there'd be debits  
18 and credits to your business - for example, demurrage or  
19 late payment might incur an interest fee, or whatever. And  
20 you might take the next contract that you're doing with the  
21 customer to make the necessary amendments to put the  
22 statement of account back into line.

23

24 So in my mind it wasn't anything abnormal, and  
25 similarly there wasn't any concern that the management had  
26 given me about this process. They had told me that, you  
27 know - or they'd told Dom and I in October to go in and  
28 discuss it. They hadn't shared any concerns with me about  
29 the mechanism that was being proposed.

30

31 Q. I'm not suggesting, Mr Whitwell, that you were the  
32 author of this scheme or that you had responsibility for  
33 the form in which the deal was done --

34 A. Yes.

35

36 Q. -- but there are at least two dissimilarities between  
37 this situation and the ones you've identified. The first  
38 is that here the Tigris debt had nothing at all to do with  
39 the wheat which was otherwise the subject of the contract.  
40 So, to take your sugar example, all of those arrangements  
41 related to that one parcel of sugar the subject of the  
42 contract. Here the Tigris debt related to something  
43 entirely separate.

44

45 The second and perhaps the most significant  
46 dissimilarity is that here the contract had to be approved  
47 by the United Nations, and in order to obtain that approval

1 lawfully and within the sanctions, the contract had to  
2 actually reflect what the deal was. May I take it that,  
3 once you had the imprimatur of upper management at AWB, you  
4 didn't concern yourself with it?

5 A. Yes, sir.

6  
7 Q. You agree with that?

8 A. Once I'd been instructed by them, I didn't concern  
9 myself with - because it was more than I would know, yes,  
10 sir.

11  
12 MR AGIUS: I tender that email, Mr Commissioner.

13  
14 EXHIBIT #305 EMAIL FROM MR HOCKEY TO MR MCBRIDE AND OTHERS,  
15 DATED 11/12/2006, BARCODED AWB. 5020.0262

16  
17 MR AGIUS: Q. Can I bring you now to a memo from you to  
18 Mr Geary on 10 January 2003, AWB.0129.0217. I also want to  
19 pass you a copy of exhibit 28, which is a memo from you to  
20 senior management, AWB.0129.0199.

21 A. Yes, sir.

22  
23 Q. There is similarity between these two memos. There's  
24 one on the screen, which is dated January 2003, and there  
25 is exhibit 28, which I've passed you, dated December 2002?

26 A. I have both of them saying - now I've got it, yes,  
27 sir.

28  
29 Q. Can we deal with the one in your hand, exhibit 28, of  
30 11 December 2002. Clearly you prepared that.

31 A. Yes, sir.

32  
33 Q. Did you forward it to senior management?

34 A. No, sir. From recollection I've just forwarded it to  
35 Michael.

36  
37 Q. Why did you prepare that document?

38 A. It was - obviously the payment of the iron filings,  
39 how we were going to pay the iron filings, was a serious  
40 issue and, you know, similarly, the Tigris Petroleum was an  
41 issue that Michael felt it was important to raise those  
42 issues with senior management, and he asked me to start  
43 preparing the memo in that respect. So, to help you, this  
44 11 December and 10 January I believe are drafts of the  
45 memo. I don't believe they went any further than Michael.

46  
47 Q. So you prepared, then, the memo of 11 December,

1 exhibit 28?  
2 A. That's right.  
3  
4 Q. Was that your first draft addressing the matters that  
5 Mr Long had asked you to address in the memo?  
6 A. Yes, to the best of my recollection, yes, sir.  
7  
8 Q. And then you passed that to Mr Long?  
9 A. That's right.  
10  
11 Q. Can we go to the document which is on the screen --  
12 A. Yes.  
13  
14 Q. -- this is the 10 January document.  
15 A. Yes.  
16  
17 Q. Is this your next draft?  
18 A. There may have been a couple in between, but, I mean,  
19 yes, this is the next one that we have a physical copy of  
20 anyway, but it's still a draft.  
21  
22 Q. It's only passing between you and Mr Long?  
23 A. At this stage, yes, sir. Dom Hogan might have seen it  
24 at one point in time. I simply can't recall. But I know  
25 that Michael would have seen it, yes.  
26  
27 Q. Whose handwriting is on that page, 0217? Can you  
28 recognise it?  
29 A. No.  
30  
31 THE COMMISSIONER: Q. Did you draft this one of  
32 10 January after discussion with Mr Long about the document  
33 of 11 December?  
34 A. Yes. I'd come from a background of companies where  
35 memos didn't happen, because we were all quite small, and  
36 whatever, and this is probably one of the first memos that  
37 I'm having to draft for AWB, so Michael's coaching me  
38 through that process.  
39  
40 MR AGIUS: Q. To the extent to which this is different  
41 to the December memo, are the differences attributable to  
42 what Mr Long told you to put in or the corrections that he  
43 made?  
44 A. It's a combination of - I mean, Michael would have  
45 said to me, "Look" - A1, my grammar is never strong, so  
46 he'd be changing that. He may also be saying, "Look, what  
47 I want at this stage is a memorandum which, you know, gives

1 a recommendation to senior management and action points to  
2 senior management, because a wishy-washy memorandum that  
3 just talks about issues is not helpful to senior  
4 management."

5  
6 I think at January 10 he was saying, "You're not on  
7 the button here with the way you're presenting it. I want  
8 you to go away and counsel all the relevant stakeholders,  
9 get all the relevant opinions, come back and write it up in  
10 a form where you lay out that you've done all of the work  
11 that senior management need to make the appropriate  
12 decisions in relation to the recommendation you're making  
13 and the action items that you're making". So he's saying  
14 that, as of 10 January, that doesn't do any of that, or it  
15 starts to but it's not a finished form.

16  
17 Q. Can I ask you, if we go to the second page, 0218,  
18 you'll see that there are action points. The first is:

19  
20 Recommendation from IS & M is to repay debt  
21 as per method requested by Minister of  
22 Trade ie directly through Alia...

23  
24 A. Mmm.

25  
26 Q. Who made that suggestion?

27 A. I don't recall, but at that stage this is - we're on  
28 10 January and we've still got to counsel a lot of other  
29 opinion post this, that's where IS&M are saying, you know,  
30 they would like to proceed at this stage.

31  
32 Q. Who was it from within IS&M that came up with that  
33 idea, or did you all sit down together and --

34 A. I think at that stage, you know, we'd been trying to  
35 find other ways of paying the fee and we'd got pretty much  
36 nowhere with the Iraqis and we're facing a situation where  
37 they've said no to all of our other options. We've still  
38 got boats on the water, we've still got a new contract  
39 coming up, so we're saying, "Well, look, if they won't  
40 agree to all the other options that we've put up, then we  
41 have to agree to their proposal". But Michael's seen that  
42 and said to me, "I want you to go and get the opinions of a  
43 wider group, including legal", and so on and so forth, "to  
44 see whether this is an appropriate method." So I don't  
45 think it's adopted at that point in time.

46  
47 Q. I'm not suggesting it was --

1 A. So I think it's an IS&M collective - I mean, it would  
2 be my - I would take responsibility for it at that point in  
3 time, but it would have been a collective recommendation.  
4 But I'm writing the email, so I stand behind that at that  
5 point in time.  
6  
7 Q. Who did you consult with prior to writing that first  
8 line and a half?  
9 A. What, on 10 January?  
10  
11 Q. Up to 10 January?  
12 A. I would have consulted with Dom --  
13  
14 Q. Mr Long?  
15 A. Yes.  
16  
17 Q. Anybody else?  
18 A. No.  
19  
20 Q. Let's look at the next sentence:  
21  
22 IS & M will attempt to organise repayment  
23 as part of a service agreement between Alia  
24 Transport and AWB but in the event that  
25 this does not prove possible payment should  
26 [be] made as per the ministers request.  
27  
28 Whose idea was it to attempt to organise repayment as part  
29 of a service agreement between Alia and AWB?  
30 A. It would have been put up as an option, and I don't  
31 recall who it would have been. It would have been either  
32 Dom or me. We were charged with trying to find, you know,  
33 ways to pay this debt which was in accordance with the UN.  
34 But that particular option would have been disregarded,  
35 because it was not an appropriate way to do it.  
36  
37 Q. And the next dot point:  
38  
39 Approval from GGM Trading...  
40  
41 What's GGM trading?  
42 A. Group general manager, trading, which was Peter Geary.  
43  
44 Q. That's why there was space for his signature?  
45 A. Indeed.  
46  
47 MR AGIUS: I'll tender the January version of the

1 document, AWB.0129.0217.

2

3 EXHIBIT #306 DRAFT MEMO FROM MR WHITWELL TO MR GEARY ON  
4 10/1/2003, BARCODED AWB.0129.0217

5

6 MR AGIUS: Q. Another version of the 10 January document  
7 is exhibit 29. Can we bring up AWB.0129.0219. You'll see  
8 that the repayment under the guise of a service agreement  
9 between Alia and AWB has been moved up and become one of  
10 the issue dot points, and there's now only one action  
11 point, which was the signoff from GM trading; do you see  
12 that?

13 A. Yes, sir.

14

15 Q. Then, if we could go to exhibit 30, AWB.0129.0220,  
16 this is your email to Mr Long of 14 January --

17 A. Yes.

18

19 Q. -- in which you say you've redrafted the memo to  
20 include his suggestions and now to have one action point.  
21 A little further down you say:

22

23 I agree that we have to keep a lid on this  
24 but feel strongly that we cannot afford to  
25 go down the line of repayment and when a  
26 problem possibly occurs be told by the ELG  
27 'we were not aware of the possible  
28 implications of this method of repayment'.

29

30 When you wrote "I agree that we have to keep a lid on  
31 this", what were you referring to?

32 A. Sir, I can't recall specifically, but I think - from  
33 reading the context and from knowing what I know about the  
34 time of that, we were all now as confident as we could be  
35 that war was going to intervene and mean that the issue got  
36 parked for a while, if you understand what I mean, because  
37 it was against 1680 that was likely to be executed after  
38 the war that this would become an issue.

39

40 So in discussions with Michael - Michael's one of  
41 these managers that if it's an issue that needs to be  
42 raised above him, he'll raise it above him, but if he  
43 thinks that it's not going to get to that point that a  
44 decision needs to be made, he says, "Look, let's just not  
45 raise it as an issue". I think that's probably what - in  
46 terms of the context of the time, to the best that I can,  
47 that's what - I agreed to keep a lid on this: don't make

1 it a bigger issue than it is if it's not going to come to  
2 pass.

3

4 Q. Then towards the end of that paragraph, the last  
5 sentence:

6

7 We have also provided a couple of solutions  
8 re timing of the Service Agreement which  
9 may work to lessen the exposure level.

10

11 What's the exposure level, particularly in relation to the  
12 service agreement?

13

14 A. It's not in relation to the service agreement, I don't  
15 think, sir. Can I just read it for a second?

15

16 Q. Can I draw your attention as well to five lines up,  
17 where you for the first time refer to "highlight the  
18 exposure that this may bring the company".

19

20 A. Right, okay. May I have time to just read it all  
21 again?

21

22 THE COMMISSIONER: Q. Yes, take your time.

23

24 A. Okay. Yeah, I think the exposure level that it's  
25 referring to there is the concerns that we had that the  
26 method that the minister was proposing was breaching  
27 sanctions and therefore we - if we agreed to do it his way,  
28 we would be - we'd have an exposure that we'd breached  
29 sanctions in that way.

29

30 Q. Is not the exposure the first dot point under the  
31 issues of the document as amended, exhibit 29.

32

33 MR AGIUS: Q. That's exhibit 29, which was your draft as  
34 at the date of this email, "Issues" reads as follows:

35

36 Possible implications for AWB on a  
37 corporate governance basis ie - direct  
38 payment to a company with links to the  
39 Iraqi regime may be construed to be in  
40 contravention of the UN Sanctions.

41

42 A. Yes, sir.

43

44 THE COMMISSIONER: And the next dot point.

45

46 MR AGIUS: Q. Which was "According to DFAT" --

47

A. I haven't got it on my screen.

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MR AGIUS: I'll pass you a hard copy of exhibit 29.

THE COMMISSIONER: It's on the screen now.

MR AGIUS: Q. The second dot point:

According to DFAT any repayment of a quality rebate should be either re-paid through UN ESCROW account or as a contract price reduction but there is no clear UN protocol for debt repayment that we can find. It is a grey area we would ideally not like to test openly.

A. Right.

Q. So that's the kind of exposure you're talking about in this email?

A. Yes, sir. I mean, this email, or this memo, which is still in a draft form, is - IS&M are charged with having to try and repay the iron filings debt in a legal way, and we are concerned, for the reasons that I've outlined previously, that - okay, the inland transport payments to Alia, they're UN approved, no problem, but this is a payment that is not for a service that the UN has approved and, you know, we're aware that there is a UN process, which is not clear - that clear - about how any repayment of quality claims should be dealt with. So clearly, if we go along with the minister's suggestion, then that's not something that's tenable to us and it will bring an exposure level to the organisation if we agree to it.

Q. But that's what you were agreeing to.

A. No, we weren't.

Q. Isn't that what you say in the action point on exhibit 29?

A. No, sir. We're making a recommendation. We're not agreeing to anything. Because at that point in time I think the IS&M group had actually come to the view, in the email that I'm discussing with Michael, that the war, which we were following very closely, you know, the run-up to the war in January and February, and we were having conversations with DFAT and others saying, you know, "How likely is it?" I think it was up at 90, 95 per cent probability at that point in time. So we were saying,

1 "Well, look, the best option that we have at the moment to  
2 not repay this is to use timing as a tactic," and so we  
3 said, "Okay, we think the war is going to come in early in  
4 the new year, 2003" - a lot of reasons for that, it's too  
5 hot for troops and everybody was saying it was too hot for  
6 troops in the Gulf post March, April, in biological suits,  
7 and so on and so forth. So for us we were at the point  
8 where we were saying, "Look, we think it's unlikely we're  
9 going to have to pay this in the way that the minister  
10 says, because it's against 1670, 1680, which is not going  
11 to be shipped until April, May at the earliest, and there's  
12 going to be a war in between and we'll be able to  
13 renegotiate it after the war."  
14

15 What I'm doing here with Michael is saying, "Well,  
16 look, that may be what we think, but there's a 5 per cent  
17 chance that war doesn't happen, that these things don't  
18 happen and we have to be proactive in how we are to pay  
19 this if war doesn't happen." So I'm putting a contingency  
20 memo together saying, "In the event that war doesn't  
21 happen, in the event that 1670, 1680 start being shipped,  
22 what are we recommending AWB do to settle this iron filings  
23 claim?", if that makes sense.  
24

25 Q. And the recommendation was, was it not, that the debt  
26 be repaid as per the method requested by the minister?

27 A. Well, the final draft of the memo was 7 February.  
28

29 Q. I will come to that in a moment, but the  
30 recommendation as at 10 January was that the debt be repaid  
31 as per the method requested by the minister.

32 A. Correct, but that didn't get past Michael. He said  
33 "That's not enough", I've not given enough information to  
34 agree to that, so he sent me off to get some more  
35 information.  
36

37 Q. Whilst you have exhibit 29 there, do you see the first  
38 dot point under "Issues"?

39 A. Which one are we looking at?  
40

41 THE COMMISSIONER: Q. The one on the screen.

42 A. Okay. Yes, sir.  
43

44 MR AGIUS: Q. Where did you get the information that's  
45 recorded in this part of that sentence:  
46

47 ...direct payment to a company with links

1 to the Iraqi regime...

2

3 Where did you get the information that Alia had links to  
4 the Iraqi regime?

5 A. Oh, Alia were organising our inland transportation.  
6 They'd been suggested to us by - from what I can recall,  
7 they'd been suggested to us by IGB. So they clearly knew  
8 each other. Is that the question you're asking?

9

10 Q. How does that make it a link?

11 A. Well, that's what I'm asserting there, sir. It links  
12 in that sense, not in any - well, I mean, I can't recall  
13 exactly what I'm saying, but I'm just saying there are  
14 links between Alia and Iraq.

15

16 Q. Did you know at that time that in fact the Iraqi  
17 regime was a shareholder in the Alia company?

18 A. No, sir.

19

20 Q. Did you come to learn that?

21 A. Yes, sir.

22

23 Q. When did you come to learn that?

24 A. I can't recall exactly, but it would have been later  
25 on in 2003, or early 2004.

26

27 Q. So it was recognised, was it, amongst the IS&M team at  
28 least that there were links between Alia and the Iraqi  
29 regime?

30 A. Yes, sir. I mean, there were - they had - again, I go  
31 back. In my mind, they were organising our inland  
32 transportation in Iraq to satisfy IGB as our customer. So,  
33 given that they were the final link in the chain for our  
34 contract - ie, to all silos, all governorates - and they  
35 had to ensure that all the trucks got to all silos, all  
36 governorates, logically they would have to have a measure  
37 of linkage to the IGB to tell them what trucks were  
38 arriving, what was happening. So they clearly had to talk.  
39 It was a logical extension of the way the contract was set  
40 up.

41

42 Q. Those links were what you thought to be legitimate  
43 links, though, weren't they?

44 A. Yes, sir.

45

46 Q. Then how could direct payments to a company with  
47 legitimate links to the Iraqi regime be construed to be in

1 convention of the UN sanctions?

2 A. Because the direct payment in question, this payment,  
3 sir, was for the repayment of a quality claim. It was not  
4 in my mind for the payment of an inland transportation  
5 service which I believed to be approved by the UN. So  
6 that's the distinction that I drew between the two.

7

8 MR AGIUS: Is that a convenient time, Mr Commissioner?

9

10 THE COMMISSIONER: Yes, I'll adjourn until 2 o'clock.

11

12 LUNCHEON ADJOURNMENT

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1 UPON RESUMPTION:

2

3 THE COMMISSIONER: You are on your former oath,  
4 Mr Whitwell.

5

6 MR AGIUS: Q. The next document, Mr Whitwell, is the  
7 memo of 7 February 2003, exhibit 32, AWB.0188.0047. This  
8 is the version of the memo which is signed on the last  
9 page by Mr Long.

10 A. Yes, sir.

11

12 Q. May we take it it was the final version of the  
13 memorandum?

14 A. Yes, sir.

15

16 Q. You had consulted outside the IS&M group in order to  
17 have this memo in this form?

18 A. Yes, sir.

19

20 Q. You consulted with the legal group?

21 A. Yes, sir.

22

23 Q. Anybody else?

24 A. From memory, public affairs, the pool, obviously  
25 within IS&M themselves. I can't remember anybody else that  
26 we consulted.

27

28 Q. Can we go to page 0049. The first part of the first  
29 dot point, "IS&M is to repay debt as per method outlined in  
30 AWB's legal opinion (and requested by the Minister of Trade)  
31 directly to Alia Transport in Jordan in instalments", would  
32 appear to coincide with the thrust of your earlier action  
33 dot point - that the money would be repaid via Alia as the  
34 minister had requested.

35 A. Yeah, but with the qualification that it was as per  
36 the method outlined in AWB's legal opinion.

37

38 Q. Yes, it may have been outlined in that opinion -  
39 I don't want to go in into that, I'm not permitted to do  
40 that --

41 A. No.

42

43 Q. -- but so far as your earlier account point suggested  
44 that it would be a direct payment to Alia, that same plan  
45 is carried forward in this memorandum, isn't it?

46 A. Yes, sir.

47

1 Q. The next dot point speaks of "Managing Director only  
2 to convey our intentions to the Australian Government at  
3 the appropriate time prior to Shipment", et cetera - we can  
4 all read that for ourselves?

5 A. Mmm-hmm.

6  
7 Q. Who was responsible for that dot point?

8 A. Sir, I honestly don't recall, but what I can tell you  
9 is that, in the final stages of this preparation, Michael  
10 and I were working on it together. The process was as we  
11 were finalising it on 7 February, I clearly recall that  
12 I would make changes, I would then print it out, take it  
13 over to Michael, he would get his red biro and look through  
14 it, make changes, send it back to me, and I would go back  
15 and do the changes. I think that happened two or three  
16 times before he finally read through it and was happy with  
17 it and happy for him to sign. So, to be honest with you,  
18 I don't know whether, you know, that was a Michael  
19 amendment or a me. I just can't help you with that.

20  
21 Q. Well, did you think up that scheme, that the managing  
22 director only would convey AWB's intention to the  
23 Australian Government at an appropriate time, "the timing  
24 of such a disclosure was important, we would recommend that  
25 nothing be done until at least Letters of Credit are in  
26 place for these contracts", and then there is quite an  
27 involved process set out in the second dot point.

28 A. Sir, again, I am happy that I was happy with that  
29 process that's being described there, that we are  
30 recommending that, prior to any payments being made, or any  
31 shipment against 1670, 1680 being made, that the managing  
32 director, given the sensitive nature of this, convey our  
33 intentions to the government. So, yes, no, I am happy to  
34 say, you know, that that was something that I was happy to  
35 go forward to Michael with.

36  
37 Q. Could we bring up, then, AWB.0129.0240. Mr Whitwell,  
38 at the top of the page, there is an email from you to  
39 Mr Davidson Kelly regarding Tigris which you have blind  
40 -copied to Michael Long?

41 A. Right.

42  
43 Q. This is the end of a long chain of emails which  
44 commences with Mr Davidson Kelly asking how things were  
45 going. There is very little consequence in the earlier  
46 emails, other than this email from you:

47

1 Still need final sign off from Managing  
2 Director on various issues surrounding this  
3 deal before I can organise something with  
4 you. Am pushing it...

5  
6 What we know had happened by 17 March is that you had  
7 already agreed contracts with the IGB which included a  
8 component for settlement of the Tigris debt?

9 A. Yes, sir.

10  
11 Q. Those contracts were locked in with the IGB?

12 A. That's right, sir.

13  
14 Q. The sign-off you are speaking of here, which you  
15 wanted from the managing director on various issues,  
16 concerned how that money, once recouped by AWB, would be  
17 paid to Tigris; is that right?

18 A. No. I think the various issues is probably in  
19 relation to the memo of 7 February - that we're still - you  
20 know, we're still trying to get agreement, as are IS&M, on  
21 how we are going to handle certain things. But I am  
22 conscious as well of the date, because 17 March is, if not  
23 at the date, it is pretty close to the date that the  
24 Americans went into Baghdad. So that put a lot of things  
25 on hold.

26  
27 Q. I believe they went in on 20 March.

28 A. Right. So it is reasonably close.

29  
30 Q. But what you have said here is, "Still need final sign  
31 off from Managing Director on various issues surrounding  
32 this deal." You didn't need a final sign-off, did you,  
33 from the managing director on how the money would be  
34 recouped from the Iraqis, because you had already agreed  
35 that in the contracts?

36 A. That's right, sir.

37  
38 Q. And if you needed a final sign-off from the managing  
39 director, what was left? You had agreed how you were going  
40 to get the money from the Iraqis?

41 A. Yes.

42  
43 Q. The last dot point in your memo of 7 February says:

44  
45 IS&M to finalise as soon as possible a  
46 written agreement with Tigris with regard  
47 to the settlement of their debt.

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A. Yes, sir.

Q. It seems that all that was outstanding was the finalisation of an agreement between the AWB and Tigris; is that right?

A. Well, sir, I think what this is saying is that we haven't got the managing director's approval on the memo that we put up to him, and so that included Tigris and the iron filings. So I am trying to remember, but I am just saying to Norman, well, look, from recollection, I remember post 7 February I proceeded on the basis of which I understood, which was that it was okay to start working on an agreement with Tigris. So I think some time in early March I started preparing an agreement for Tigris, which I then sent to legal for their opinion.

Post that Norman - I seem to recall Norman saying, "Well, I am coming in to Melbourne and I want to get the thing signed." And I'm saying, "Well, okay, we will go through the process and try and get something to you for you to have a look at."

Q. Had you been to Mr Lindberg prior to your writing this email to Mr Davidson Kelly?

A. No. We were still - as far as I was concerned, the memo had gone up from me to Michael, Michael had passed it up to Peter, and we were still waiting for a decision back from Andrew.

Q. But the contracts were locked in with the IGB?

A. Yes, sir.

MR AGIUS: Those three pages, I am told, are exhibit 281.

Q. Could we come, then, to AWB.5017.0230. This is a copy of an email from you to David Johnstone entitled "Board Brief":

David as discussed some material for you.

I want, in that context, to show you part of confidential exhibit 99C - AWB.5017.0240. This is entitled "Iraq Situation Report" of the same date as your email, 18 March 2003. Did you prepare this?

A. Sorry, yes, sir.

1 Q. Did you forward it to David Johnstone to be included  
2 in a board briefing paper?  
3 A. If this is the attachment that was behind it, yes,  
4 sir.  
5  
6 Q. Well, is that --  
7 A. Yes, sir.  
8  
9 Q. -- why you prepared the situation report?  
10 A. Yes, sir.  
11  
12 Q. If we go to page 0241, you will see that it records  
13 that in relation to contract 1680, contract date  
14 11 December 2002, for 500,000 tonnes the UN approval had  
15 been received?  
16 A. Yes, sir.  
17  
18 Q. And that the LC had been received, but it required  
19 some amendments?  
20 A. That's right, sir. The first stage of the - well,  
21 yes, the first stage of UN approval had been received. It  
22 meant that the funds were in the escrow account to cover  
23 that 500,000. As a result, BNP sent us over a letter of  
24 credit to ANZ, which wasn't workable, so it required 12  
25 amendments. So we didn't actually have what I call an  
26 operable payment instrument in place at that point of time.  
27  
28 Q. But you did have the UN approval for the contract?  
29 A. Correct - the first - correct.  
30  
31 Q. For 1680?  
32 A. Correct.  
33  
34 Q. Can I bring you to a document which is part of  
35 confidential exhibit 68C.  
36  
37 THE COMMISSIONER: Do you wish to tender the document?  
38  
39 MR AGIUS: I understand that is already an exhibit.  
40  
41 THE COMMISSIONER: AWB. 5017.0230?  
42  
43 MR AGIUS: No, my apologies. The email is not.  
44  
45 THE COMMISSIONER: That will become exhibit 307.  
46  
47

1 EXHIBIT #307 EMAIL FROM CHRISTOPHER WHITWELL TO  
2 DAVID JOHNSTONE ENTITLED "BOARD BRIEF",  
3 BARCODED AWB. 5017. 0230  
4

5 MR AGIUS: As I understand it, the Iraq situation report  
6 is part of confidential exhibit 99C.  
7

8 THE COMMISSIONER: Yes.  
9

10 MR AGIUS: Q. The next document is part of confidential  
11 exhibit 68C - AWB. 0202. 0125. This is a draft of an  
12 agreement between AWB Limited and Tigris Petroleum  
13 Corporation Limited, which appears to have been drafted  
14 in April 2003. If we go to the next page, there are a  
15 number of deletions and other amendments to the document  
16 which have been noted in typescript on the document. You  
17 mentioned in an answer to an earlier question that you sent  
18 a draft of the agreement to legal?

19 A. Yes, sir.  
20

21 Q. Is this the draft that you sent to legal?

22 A. Sorry, sir, can I just have a look at it? Could  
23 I just review it?  
24

25 Q. Yes.

26 A. I don't believe so, sir.  
27

28 Q. What was the nature of the draft that you sent to  
29 legal?

30 A. To the best of my recollection, I don't think this is  
31 the draft that I sent. I think this is - from memory,  
32 I think this is something that Tigris provided to me,  
33 I think.  
34

35 Q. What was the nature of the draft that you sent to  
36 legal?

37 A. From memory, I think I asked legal or somebody to  
38 provide me with an agreement that could be used to sort of  
39 set up an agreement for debt recovery or an offset  
40 agreement, or something like that, and they sent it to me  
41 and I made some comments, or I made some sort of changes,  
42 which set the agreement in context between us and Tigris,  
43 and then I sent it back up to Jess Lyons saying, you know,  
44 "Can you work this into a proper agreement". But then  
45 I think that - that was just before the war, and I think it  
46 was just one of those things that got caught up in and got  
47 put on hold until after the war, because, you know, just

1 prior to the war and during the war there were lots of  
2 other issues of much more importance than this to deal  
3 with.

4  
5 Q. I am asking about this because on the cover sheet, if  
6 we go back one page, 0125, at the very top, you will see  
7 there is a reference to April 2003?

8 A. Yes.

9  
10 Q. If we go over the page, you will see there is a  
11 reference to April 2004.

12 A. Yes.

13  
14 Q. Did you see a draft of this agreement in April 2003?

15 A. No, I think it was closer to May, but - yes, look,  
16 I saw - the process as I remember it was I sent an  
17 agreement up to legal, which was my first attempt at it.  
18 It didn't go, as far as I recall, to Norman Davidson Kelly  
19 prior to the war. Post war I was dealing with a lot of  
20 issues and Norman phoned me up and said, "Where are we with  
21 the agreement?" And I said, "Oh, look, I haven't got time  
22 to deal with this at the moment." He said, "Well, do you  
23 mind if I send you an agreement?" I think we talked about  
24 who would send who the agreement, and I said, "Look,  
25 I really don't have time, Norman. You are a lawyer, why  
26 don't you have a go at the agreement?" And he sent  
27 something over to me in an email, which I looked at, and  
28 I don't remember when - the precise date of that email, but  
29 it was either April or early May. I looked at it, I made  
30 some comments on it. It looked too complicated and it  
31 wasn't really - as I remember it, it was too complicated.  
32 I sent it up to Jess Lyons for some comments, but it wasn't  
33 really my focus, because I was dealing with a lot of other  
34 issues at that point in time around operational issues to  
35 do with the contract and getting the exposure levels down.  
36 So, quite frankly, Norman asking me, "What's the status of  
37 the agreement" was just - it just wasn't high on my  
38 priority list.

39  
40 THE COMMISSIONER: Q. Did you in fact draft an agreement  
41 that you sent to legal?

42 A. I got a - in March I got an agreement. I had asked  
43 legal or - I can't remember who I had asked, but I had  
44 said, "Look, this is the situation that we have with  
45 Tigris, can you send me a format, a proforma that  
46 approximates what we're trying to achieve here?"  
47

1 Q. And they sent you something?

2 A. And they sent me something. I then tacked, you know,  
3 a few sort of details like - I mean, I can't remember what  
4 I tacked. I mean, I haven't reviewed the document, but it  
5 was like a million tonnes, US\$8.375m, 500,000 to be paid to  
6 AWB, or something. I mean, I just simply can't remember.  
7 I sent it up to Jess Lyons, who was our corporate counsel,  
8 and just said, "Look, can you have a look at this and form  
9 it into a proper agreement, because I'm not a lawyer", and  
10 then I left it at that. And Norman came on to me later, in  
11 - I don't know whether it was April or May, but he had a  
12 few conversations with me, and I was really very, very  
13 focused on the contracts and other parts of the - you know,  
14 other things to do with these contracts, rather than  
15 Norman's issues. So I just said, "You draft something up".  
16 I probably had even forgotten that I had sent something up  
17 to Jess, actually, at that point. You know, this is -  
18 I think this is what came back from Norman and, as I said,  
19 then I made some comments on it and, to the best of my  
20 recollection, I then sent it up to legal and said, "These  
21 are my initial comments; do you have any further comments?"  
22 I know that's a long answer, but it is the best of my  
23 recollection.

24

25 MR AGIUS: Q. The first document that you sent to  
26 Jessica Lyons --

27 A. Yes.

28

29 Q. -- and that you got back from her, did that speak of  
30 the arrangement between AWB and Tigris in terms of AWB  
31 recouping a debt for Tigris?

32 A. Look, I don't think I - I don't know that I got it  
33 back from her, but it did talk about debt, yes.

34

35 Q. That's what you sent off to legal?

36 A. That's right.

37

38 Q. And you asked for their assistance?

39 A. That's right. And that was in March.

40

41 Q. And it didn't speak of AWB paying Tigris a fee by way  
42 of commission or compensation for any work that Tigris had  
43 done for AWB?

44 A. No, sir.

45

46 Q. It reflected the transaction as you understood it -  
47 which was AWB getting money from the Iraqis and paying it

1 to Tigris to acquit the debt that was owed to Tigris?  
2 A. That's right, the March one did, yes.

3  
4 MR AGIUS: I will tender the version of the agreement that  
5 I was asking the witness about.

6  
7 THE COMMISSIONER: It is confidential exhibit 68C, isn't  
8 it?

9  
10 MR AGIUS: Yes. That's part of exhibit 68C. I won't ask  
11 for it to be marked separately.

12  
13 MR JUDD: Commissioner, we are trying to weave a path  
14 through issues of privilege which gives the witness a  
15 proper opportunity to say what he has to say and maintains  
16 our obligation and instructions. We have turned our mind  
17 to the question whether the particular document that he  
18 produced is a privileged document. We will give it some  
19 further consideration, but if we decide that it doesn't  
20 pass the test, that might lead to some consequences, but it  
21 is a matter that is under consideration.

22  
23 THE COMMISSIONER: Thank you.

24  
25 MR AGIUS: Q. You spoke of having received an agreement  
26 from Mr Davidson Kelly.

27 A. I believe so, sir, yes.

28  
29 Q. Could we go to AWB.0129.0291. This is an email from  
30 Davidson Kelly to you of 7 May, attaching an agreement for  
31 your consideration.

32 A. Right.

33  
34 Q. Your initial response is, "Will study and revert".  
35 A. Right.

36  
37 MR AGIUS: I tender that page, AWB.0129.0291.

38  
39 EXHIBIT #308 EMAIL FROM MR DAVIDSON KELLY TO MR WHITWELL  
40 DATED 7/5/2003, BARCODED AWB.0129.0291

41  
42 MR AGIUS: Q. If I could stay with this for a moment,  
43 could we bring up exhibit 74, AWB.0129.0300. This is the  
44 document that Mr Davidson Kelly attached to his email. If  
45 we go to the next page, 0301, this is a draft of May 2003.  
46 If we go to AWB.0129.0283, this is your email to  
47 Michael Long forwarding Mr Davidson Kelly's email to you.

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THE COMMISSIONER: It is to Mr Long, isn't it?

MR AGIUS: Q. Sorry, you were forwarding to Michael Long --

A. The same agreement.

Q. -- and to Mr Stott Mr Davidson Kelly's email to you?

A. That's right, sir.

MR AGIUS: AWB.0129.0283 is exhibit 283.

Q. The next document is exhibit 34 - AWB.0129.0298. This is your email of 28 May to Jessica Lyons and Jim Cooper, copied to the others that we can see, attaching your comments in relation to the draft that Mr Davidson Kelly had sent you.

A. Yes, sir.

Q. What is plain is that, if we look at the substance of the draft that Mr Davidson Kelly sent you, the arrangement as between AWB and Tigris is therein depicted as a service agreement, that Tigris is being paid by AWB for some services rendered, which was quite different to what you had asked the legal department to prepare for you, and quite different from what you understood to be the arrangement between AWB and Tigris. Do you agree with that?

A. Look, by that stage, in May, I have to be - you know, again, I am trying to recall to the best of my memory, but, look, I thought by that stage that there were elements of, you know, a service agreement in it. For example - in my mind I am just going through this at this moment in time. Clearly, I know that the original deal was put on because of the debt recovery, but I also, in my mind, know that we were facing a situation where we were at 500,000 tonnes with the minister, and we went up to a million tonnes, and I'm sure - I don't know for sure, but, you know, one assumes that the Tigris guys were influential in getting us up to a million tonnes.

THE COMMISSIONER: Q. Why do you assume that?

A. Just because I think - I suppose it is difficult to actually assume, sir, but I just - you know, we were at 500 and we did end up selling a million tonnes and we did ask them for help, so --

1 Q. But the Tigris deal had been done on the basis of a  
2 million tonnes and the prices had been fixed accordingly?  
3 A. No, but this is back in October, when the minister  
4 told us we were facing 500,000 tonnes, so he was only going  
5 to give us 500,000 tonnes in October, and by November, when  
6 we actually went in, you know, he said, "Look, we are  
7 prepared to give you a million tonnes". So there has been  
8 some lobbying between then and the million tonnes  
9 in November, if you understand what I mean.

10  
11 Q. No, I don't.

12 A. Right. The minister had said to us in a meeting in  
13 October --

14  
15 Q. I understand the history of it.

16 A. Yes.

17  
18 Q. What I don't understand is your reference to there  
19 having been lobbying. There is no material at all  
20 presently before the inquiry which suggests lobbying,  
21 either by Tigris or anybody else?

22 A. Right. Well, what I would say to you is that when we  
23 discussed it with Sabah Jumah, we said, "Maybe you can help  
24 influence it to take it up from 500 to a million", and he  
25 said he would look into it. I think those were the words.  
26 So I was told by - or at least I recall, you know, Norman  
27 saying, "Look, we were helpful in changing the minister's  
28 mind to take it up from 500 to a million."

29  
30 But, look, clearly in my mind, in May, I still thought  
31 this was debt recovery, but I am just saying that, you  
32 know, Norman putting this agreement over to me in this  
33 form, whilst I had serious reservations about the style of  
34 it, as I say, I'm open minded and I was just saying, at  
35 that point in time, I could see elements of how they had  
36 maybe helped us provide a service. But, quite frankly,  
37 again, as I say, at that time, this was so far down my list  
38 of priorities that I just left it there as an issue and  
39 I drafted this up saying, "Look, this is not what  
40 I expected the agreement to look like. It is too  
41 complicated. It is not what I want and", you know, "please  
42 can you have a look at it."

43  
44 MR AGIUS: Q. When you were talking to Sabah - and we  
45 covered this before lunch --

46 A. Yes.

47

1 Q. -- the concept of the extra 500,000 tonnes came about  
2 in this way - we have it in the exhibit which I took you  
3 through, exhibit 303.

4 A. Sure.

5

6 Q. I am reading from AWB.0142.0222:

7

8

9

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

18

19 Now, you had described in this, "Sabah Jumah, Director  
20 General of the Iraqi Oil Board? Has connections with the  
21 Ministry of Oil, and is a consultant with Tigris  
22 Petroleum". Now, the context in which the trip report  
23 refers to this is that extra tonnage or increase in tonnage  
24 of the next contract to make things easier to pass through  
25 the UN. There is nothing there about an agreement between  
26 the AWB and Tigris that Tigris would receive any kind of  
27 Commission if there was extra tonnage in the next contract  
28 from the IGB.

29 A. I agree with that, sir. Sorry. Maybe you  
30 misunderstand me. I am just saying in May, when Norman is  
31 saying to me, "Well, we did actually help influence the  
32 minister" - or whatever - "to take it up to a million".  
33 Therefore, you know, he was saying, "Look, if you hadn't  
34 had our help you would have still been stuck at 500,000  
35 tonnes but, with our help, you got up to a million tonnes".  
36 I am just - all I am saying to you is that I was listening  
37 to what he had to say. I wasn't accepting it or rejecting  
38 it, I was listening to what he had to say, and there were  
39 elements of it that, you know, might have been true. But  
40 clearly in May I am still of the opinion that this is a  
41 debt recovery - you know, this is a debt recovery  
42 agreement. So that's the thing. I am just saying that  
43 there is that added thing going through my mind of what  
44 Norman is saying to me.

45

46 Q. Why don't you say this in your email to your legal  
47 department of 28 May --

A. Well --

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Q. -- exhibit 34?

A. Well, again, "Too complicated" - I am probably saying this is not what I expected to be the document. But, to be really - to give you a context, this is me just firing off an email to legal saying, "Look, I've got a lot of things to do", I've received this agreement in, this is my - I have briefly looked through it, these are some comments that I would make. I am not agreeing to the agreement in its final form. I am just passing it over to somebody else, because in my mind at that point in time we've only started shipping 200,000 tonnes of 1680. We've got an exposure of 800,000-odd tonnes of 1670 and 1680 that we don't know we're going to get paid on and, in my mind, I'm thinking really my first focus is on getting those contracts executed rather than, you know, the Tigris agreement or how we're going to pay Tigris or whatever. That's well down my list of priorities. So I'm just parking this agreement with somebody else.

Q. But in parking it you don't say anything about the fact that this agreement doesn't reflect the true situation. You comment on the contract almost clause by clause, without actually drawing legal's attention to the fact that there never was any commission or compensation arrangement between AWB and Tigris. Why didn't you just say to legal, "I don't know what Norman is up to, but this doesn't reflect what happened"?

A. Sorry, I tried to give some context around it. I am looking at an agreement. I am seeing this agreement and I don't think that it is at a final stage of really looking into it. I am - I have got a lot of other things that are a higher priority. You know, it is just - I would treat it differently, I suppose, if somebody was saying, "This is the final draft. Are you happy with it?" As far as I am concerned this is still at a very early stage of its existence, and it is still in very much a draft form.

Q. Were you not interested in actually disguising the nature of the payments that were going to be made by AWB to Tigris?

A. Absolutely not, sir. As I said, I believe I prepared a beginning agreement in March, which I sent to legal, that is different from this one. So, no, I had no --

THE COMMISSIONER: Q. Which said it was about recovery of a debt?

1 A. Yes. Exactly. I had no interest at all in trying to  
2 describe it as something else.

3

4 MR AGIUS: Q. But now you seem to be going along with  
5 the idea that it could be described as a service agreement  
6 and the payment of compensation?

7 A. No, I think I'm - what I'm saying to you is that there  
8 were elements of what Norman was saying to me which was  
9 consistent with them providing a service to AWB in relation  
10 to moving the contract from 500 to a million. Now,  
11 clearly, the whole basis of the agreement was a repayment  
12 of debt, okay? But Norman is suggesting to me through his  
13 agreement that there is also a service element to this, and  
14 at this stage this is down my list. I think about it for a  
15 little while whilst I am talking on the phone to him, but  
16 I don't really go any further than that.

17

18 Q. This is three weeks later, Mr Whitwell?

19 A. Yes, sir.

20

21 Q. This is 21 days after you received the agreement. You  
22 have sent it off to Mr Long. You are now sending it off to  
23 Jessica Lyons and Jim Cooper with your comments, and  
24 nowhere in your comments do we see anything that says,  
25 "Look, this just isn't right. This isn't the agreement  
26 that we had with Mr Davidson Kelly." Is that because you  
27 were content, as at 28 May, to go along with the basic  
28 thrust of the agreement that it was a payment of  
29 compensation?

30 A. No, sir.

31

32 Q. Well --

33 A. It just means - it means that I had probably received  
34 this at the beginning of May. I can't recall for  
35 definitive purposes, but I suspect - I think I went on a  
36 trip in the middle of May. I got back at the end of May.  
37 I am doing my job, which is the Iraq marketing manager,  
38 I am dealing with all of the operational issues to do with  
39 trying to get the contracts back on board. I think I have  
40 taken over by that stage acting general manager - so  
41 Michael's position - so I am dealing with all the  
42 administrative matters with that. This comes up. It is a  
43 very low order priority for me, trying to push forward this  
44 agreement at the moment, because there are so many other  
45 things that need to happen before this gets actualised, and  
46 I don't give it the full concern at that point. I just  
47 have a brief look at it. I make some comments, because I

1 know that it is going to legal. Legal are going to look at  
2 it, they are going to come back, they are going to provide  
3 another draft, and if we get anywhere near signing this  
4 with Tigris, then I have an opportunity then to really look  
5 at it. But - do you understand what I am saying - I am  
6 saying that at that moment --

7  
8 Q. Let's follow it through and see what happens.

9 A. Right.

10  
11 Q. If we could go to AWB.0216.0031, this is email from  
12 Jessica Lyons to you passing you a marked-up version of the  
13 Tigris agreement and providing notes as to what she has  
14 done with the agreement. She has taken advice about the  
15 tax clause. She has deleted certain clauses, including the  
16 provision of information to Tigris, and she has added a  
17 clause. We have that series of amendments as AWB.0216.0032  
18 through to 0038. They are the next pages behind your  
19 email. If we go to page 0033 and page 0034, you will see  
20 amendments which have been marked up by Ms Lyons. So you  
21 received her comments and the amended agreement - do you  
22 see that?

23 A. This is the one of June 2nd.

24  
25 Q. Yes. She sent this to you on 2 June at 2.11pm.

26 A. Yes. It is just on that previous paper it still said,  
27 "to be signed this day in May". So I just wondered why it  
28 was there, that's all?

29  
30 Q. She hadn't picked up that amendment.

31 A. Oh, okay.

32  
33 Q. But it is the document that you get when you go to  
34 your email and you go to the document that is immediately  
35 behind it, and one comes to this agreement?

36 A. Okay, sir. Yes, sir.

37  
38 Q. With these apparent amendments and suggested changes?

39 A. Yep.

40  
41 MR AGIUS: Mr Commissioner, I tender AWB.0216.0031 through  
42 to 0038, which is the email and the amended agreement.

43  
44 EXHIBIT #309 EMAIL FROM MS LYONS TO MR WHITWELL CONTAINING  
45 DRAFT WITH AMENDMENTS, BARCODED AWB.0216.0031-0038

46  
47 MR AGIUS: Q. The next matter is AWB.0216.0049. This

1 is Coralie Trotter's email to you of 4 June, taking up the  
2 point that you raised in the paragraph numbered 5 in your  
3 email of 28 May 2003, where you asked, "Will we have tax  
4 implications?" And you see that Coralie Trotter has  
5 provided you advice in relation to that?

6 A. I haven't reviewed this document, so I will just have  
7 to check that. Right, sir.

8  
9 Q. Sorry?

10 A. Yes, I have read that.

11

12 MR AGIUS: I tender that.

13

14 EXHIBIT #310 EMAIL FROM CORALIE TROTTER TO MR WHITWELL,  
15 DATED 4/6/2003, BARCODED AWB.0126.0049-0050

16

17 MR JUDD: Commissioner, it looks like some material that  
18 might otherwise have been regarded as privileged slipped  
19 through the net. There is not much we can do about it at  
20 this stage. It seems that the Commission have it. This  
21 material might be material for which a claim of privilege  
22 might go, but it has been provided to the Commission and  
23 I rose to say that it didn't seem to us there was much we  
24 could do about it at this point. We will try to manage the  
25 situation from here, but it is obviously entered into the  
26 system by some means other than that which sought to check  
27 for privilege.

28

29 THE COMMISSIONER: It is entered into the system because  
30 AWB gave it to the Commission.

31

32 MR JUDD: I suspect that is right, sir.

33

34 MR AGIUS: I think you will find that privilege was waived  
35 when we come to the next few emails, if there was any  
36 privilege.

37

38 Q. The next email that we come to is yours to Mr Davidson  
39 Kelly, AWB.0216.0058, in which, on 6 June, you say:

40

41 I haven't had a chance to look at lawyers  
42 comments but will pass onto you at this  
43 stage for your comments and then I will  
44 look at it in light of that - ie may have  
45 further deletions/changes but this should  
46 at least keep process ticking over.

47

1 Do you see that?

2 A. Yes, sir.

3

4 MR AGIUS: I tender that, Mr Commissioner.

5

6 EXHIBIT #311 EMAIL FROM CHRIS WHITWELL TO MR DAVIDSON  
7 KELLY, DATED 6/6/2003, BARCODED AWB.0216.0058

8

9 MR AGIUS: Q. Then Mr Davidson Kelly's comment to you,  
10 barcoded AWB.0216.0066, Mr Davidson Kelly's reply to you on  
11 7 June saying that he had no problems with the lawyer's  
12 comments, "So let's please sign off on it."

13

14 MR AGIUS: I tender that email.

15

16 EXHIBIT #312 EMAIL FROM MR DAVIDSON KELLY TO MR WHITWELL,  
17 DATED 7/6/2003, BARCODED AWB.0216.0066

18

19 MR AGIUS: Q. Have you read that, Mr Whitwell?

20 A. Could I just look at it?

21

22 Q. Yes, take your time.

23 A. Right, sir. I have read it now.

24

25 Q. The next is an email from you to Mr Davidson Kelly of  
26 10 June. Could we bring up AWB.0216.0070. You thank  
27 Mr Davidson Kelly and say:

28

29 I will look through this and may need to  
30 meet you here in Melbourne to discuss - I  
31 will contact you later in the week...

32

33 MR AGIUS: I will tender that email.

34

35 EXHIBIT #313 EMAIL FROM MR DAVIDSON KELLY TO MR WHITWELL,  
36 TOGETHER WITH REPLY, DATED 10/6/2003,  
37 BARCODED AWB.0216.0070

38

39 MR AGIUS: Q. On 11 June, if we bring up AWB.0216.0072,  
40 this is a two-page train of emails. You will see that the  
41 last of them is an email from you to Mr Davidson Kelly on  
42 11 June, "Can we chat today - few developments from our  
43 side which I probably need to chat with you in person  
44 about?"

45 A. Yes, sir.

46

47 MR AGIUS: I tender those two pages.

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EXHIBIT #314 TWO-PAGE TRAIN OF EMAILS, DATED 11/6/2003,  
BARCODED AWB. 0216. 0072-0073

MR AGIUS: Q. So you met up with Mr Davidson Kelly, did you?

A. Yes, sir.

Q. What did you talk about?

A. We met in London in - I think it would have been a few days after that, probably the following week, in London. From memory, Michael had joined me from Baghdad in London, and Michael and I got together first and we had a chat about our meeting with Norman. And I said to Michael at that stage two things. I said, "Look, I'm a bit concerned about the Tigris agreement" from the tenor of that previous email, for instance, but also I think Norman had mentioned something back in May about influential people. So I said "Look", you know, "Michael, I'm a bit concerned about this. My amber lights are on a little bit." And I can't remember whether it was Michael or I who said it, but we had a discussion, or we had another - we had a further discussion just about this whole switching things from debt to a service agreement, and we just said, "Look", you know, "this is not something that we are probably equipped to handle."

And I think the third thing that we discussed is that, "Look, we've only got 200,000 tonnes of this business booked", you know, "there is 800,000 tonnes to go, and, quite frankly, the farmer is taking a lot of exposure." So really, again, Tigris is well down the list of our - the list of things that we had to deal with. So we both agreed then that we would talk to Norman, which we subsequently did, and we said to him, "Look, Norman, this is the situation: we're not running away from the agreement, but we are not in a position to further this agreement at this stage, until such time as we get the whole of the million tonne contract in".

Look, I can't remember the absolute specifics but Norman in the end, or Norman at that meeting, said, "Look, I understand that, but what's going to happen? How can I be sure that you're not going to get to the end of the contract and renegotiate?" And I just said - well, I think it was Michael that was leading the discussion. He said, "Look, we're the AWB. We'll - first of all, we've got to

1 get the rest of the contract up and running, but what we  
2 will do is I will ask Chris to go back and, when he gets  
3 back to Melbourne, make sure that we ring-fence a sum of  
4 money coming off the first vessels that we've executed and  
5 we will just keep it there earning interest and provision  
6 for it." And that's what I did. So we just parked the  
7 issue as a result of that meeting with Norman in June.

8

9 THE COMMISSIONER: Q. Is that in London?

10 A. In London, yes; at the Intercontinental in London.

11

12 MR AGIUS: Q. What you parked was the issue of signing  
13 off on the agreement?

14 A. Yes, well, we parked the issue of the agreement, yes,  
15 and I think we also parked the - yes, we just parked the  
16 whole issue.

17

18 Q. But you didn't park the recoupment of the money from  
19 the Iraqis - that still came?

20 A. Yes, first - at that stage we had signed the first  
21 200,000 tonnes, or the first 200,000 tonnes had been signed  
22 with the UN. But I think in everybody's mind at that point  
23 in time that money was all heading back to the farmers,  
24 because there was 800,000 tonnes of contract that was still  
25 exposed, as it were, because we didn't have letters of  
26 credit or UN approvals for it, and it would - certainly in  
27 mine and Michael's mind it would be very unfair to the  
28 farmers to pay off Tigris and not pay off the farmers. But  
29 as it came to pass, we actually did execute the whole  
30 contract. So that's not a - you know, that's not an issue  
31 that we had to deal with.

32

33 Q. Well, was it not an issue you had to deal with? Did  
34 you not agree to ring-fence the Tigris money?

35 A. Yes. Well, we ring-fenced - yes, we ring-fenced  
36 whatever it was, \$7.85 per tonne that came in.

37

38 Q. What do you mean by "ring-fence"?

39 A. What I mean by "ring-fence" is as the money came in  
40 from the UN, from the contracts - so once we got paid and  
41 the money came in - the money would come into our account  
42 and \$7.85 - I mean, I am not an accountant, so I don't know  
43 how it was done, but a provision of \$7.85 a tonne was put  
44 into a separate Tigris account.

45

46 Q. So it didn't go to the farmers?

47 A. Sorry?

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Q. It didn't go to the farmers?

A. Not - no, not immediately, no.

Q. Well, it never went to the farmers. The whole idea was that this Tigris debt money wasn't the farmers' money and wouldn't be going to the farmers; isn't that right?

A. If we executed the whole million tonnes, but in June I didn't know that.

Q. Whether you knew it in June or not, you and Mr Long agreed that you would ring-fence the Tigris debt, which meant, in practice, that an amount per tonne which related to the Tigris debt would be held back in the accounts of AWB?

A. That's right, pending a further discussion - if we managed to get the full million tonne contract up, then that would be a further discussion. But our rationale for doing it, Mr Agius, was, look, we were uncomfortable about a couple of other things to do with this agreement at that stage, and we were saying to Norman, "Look, we're going to park this agreement. That's the situation, but between Michael and I, we have concerns and so we're just going to park the agreement."

Q. What concerns did you have?

A. As I said to you, sir, I had concerns over the comments that Norman had mentioned to me in May.

Q. We will come to those separately. What other concerns did you have?

A. Look, I wasn't in a position to - I didn't feel comfortable about the fact that this was a debt repayment and that this element of the service agreement and commissions had taken up such a huge part of it.

THE COMMISSIONER: Q. It hadn't taken up a huge part of it; it had taken up the whole lot?

A. Mmm.

Q. The element of commission, as you call it, had become the whole agreement, and the element of debt, which was in truth the whole agreement, disappeared.

A. That's right, sir. So it was a situation where we were saying, "Well, Mike is busy in Baghdad, I'm busy here, we have a meeting with Norman", we just slammed the brakes - well, we put the brakes on and said we were not

1 going to discuss it until we got the whole million tonnes  
2 in.

3

4 MR AGIUS: Q. What did Mr Davidson Kelly say about that?

5 A. Look, I think he understood - it was a pretty strong  
6 argument for us to say, "Well, hold on, if the farmer  
7 doesn't get - if we don't get the rest of this contract up,  
8 the farmer is going to lose a lot more money than \$7m. We  
9 can't, when we have our first duty to the farmer, be paying  
10 you back when the whole contract is" - I will start again -  
11 "We can't, when there is still exposure to the farmer if we  
12 do not get the rest of the contract up, give you your money  
13 first."

14

15 Q. I just want to see if we're not actually confusing two  
16 elements here. The mechanism for getting the money out of  
17 the Iraqis was, in effect, to gather for Tigris a small  
18 amount of money from each shipment of the wheat?

19

A. Correct.

20

21 Q. So a small amount from each of the payments from the  
22 escrow account was notionally attributable only to the  
23 Tigris debt?

24

A. Yeah, notionally it would come in against each ship  
25 and - yes.

26

27 Q. And over time the AWB would, if it delivered a million  
28 tonnes of wheat and was paid for it, gather the whole \$8m,  
29 or whatever it was, that was due to Tigris?

30

A. Correct, sir.

31

32 Q. And what you had in mind was that it wouldn't be fair  
33 to the farmers if Tigris was paid \$8m out of the first  
34 shipment or two of the wheat, because, in effect, Tigris  
35 would be getting its debt paid off from the proceeds of the  
36 sale of wheat, the greater proportion of which was due to  
37 the growers?

38

A. Not quite right. Not quite right.

39

40 Q. Wouldn't that be the case?

41

A. No.

42

43 Q. If you paid the \$8m out of your first cheque from the  
44 escrow account, then Tigris would get its \$8m?

45

A. Yep. My point was actually the reverse - that until  
46 we had all of the money in the account and the farmers'  
47 exposure had been deleted entirely, ie the million tonnes

1 had been fully executed and paid for, that's when it would  
2 be appropriate to sit down with Tigris and pay them. And  
3 I think they were --  
4

5 Q. Is that why you didn't progress the Tigris agreement,  
6 because of issues you had as to timing of payments to  
7 Tigris, or was it really because you had a concern about  
8 the fact that the agreement was described as a service  
9 agreement?

10 A. No, I think our concerns at that time were the three -  
11 were the combination of the three. It was the comments  
12 that had been made to me by Norman about influential  
13 people; it was the fact that, in my mind and I think in  
14 Michael's mind, neither of us could reconcile this sort of  
15 service element over the debt element; and, thirdly, it was  
16 a fact that we had only agreed with the UN to execute  
17 200,000 tonnes of 1670/1680 in June and therefore there was  
18 800,000 tonnes, or the best part of - I don't know, I think  
19 when we did a calculation at the beginning of the war it  
20 was about \$110m of exposure if we didn't execute the  
21 contract. So if you pro rata that back to 800,000 tonnes,  
22 that's about \$83m worth of exposure to the farmer if we  
23 didn't execute the rest of the contract. Now, it is not,  
24 in my mind, possible to say, "Well, Norman, you are going  
25 to get your money, but we're lumping the farmer with \$83m  
26 worth of potential exposure if we don't execute the other  
27 800,000 tonnes of the contract."  
28

29 Q. You have referred to Mr Davidson Kelly's comments.  
30 Could we go to confidential exhibit 64C, please,  
31 ELG.0002.0087. If we go to the second page of this report,  
32 this was a report that you prepared for the ELG meeting?

33 A. That's right, sir.  
34

35 Q. Intending it to be read by members of the ELG?

36 A. Yes, sir.  
37

38 Q. The executive leadership group?

39 A. Yes, sir.  
40

41 Q. At page 0088 the document records under the heading  
42 "Tigris Commission":  
43

44 Tigris Petroleum (BHP) has asked for an  
45 update of status of their agreement in  
46 light [of] current contract execution and  
47 when they will begin receiving payments.

1           They intimated a number of influential  
2           people will need to start receiving funds  
3           and that further delays may cause  
4           difficulties going forward.

5  
6           The reference to "they intimated", is that a reference to  
7           Mr Davidson Kelly?

8           A.    Yes, sir.

9  
10          Q.    Is there any other person on behalf of Tigris?

11          A.    No, sir.

12  
13          Q.    Is this a reflection of a meeting that you had had in  
14          Iraq?

15          A.    No, I don't believe so, sir. I think it was a  
16          telephone call or - I believe it was a telephone call,  
17          But I can't recall --

18  
19          Q.    A conversation that you had had with Davidson Kelly?

20          A.    Yes, sir.

21  
22          Q.    You say, "They intimated a number of influential  
23          people". What did Mr Davidson Kelly say?

24          A.    Sir, I can't recall specifically, but I got a sense  
25          from him what I have said there, which was that they  
26          intimated a number of influential people may need to start  
27          receiving funds.

28  
29          THE COMMISSIONER:    Q.    That's code for what?

30          A.    It is code for the fact that he wants to pay people  
31          for funds. In my mind it set off an amber light that this  
32          was a bribe.

33  
34          MR AGIUS:    Q.    "And further delays may cause difficulties  
35          going forward" - going forward with what?

36          A.    I would think that would probably be going forward  
37          with the contract.

38  
39          Q.    The wheat contract?

40          A.    Yes. But, look, I mean I can't be specific about  
41          that. It may have been something else in my mind, but I am  
42          just trying to contextualise it.

43  
44          Q.    So in other words, unless people were bribed, the  
45          wheat contract would not be completed?

46          A.    As I say, sir, that was my - my concern when he raised  
47          it with me was exactly that. So I was raising it and I put

1 it in there - as I had heard it, I put it into the report.  
2 I wanted to report it upwards.

3

4 Q. You wanted to flag it for the ELG?

5 A. Correct, sir.

6

7 Q. That there was a problem with the completion of this  
8 contract unless people were paid money?

9 A. That there might - look, I mean, how can I say this?

10 Norman was frustrated at my slow progress. He maybe had  
11 thought, you know, "I will put the heavy on Chris and see  
12 if that chivvies him up." I mean, I don't know what was  
13 going through Norman's mind as to - and even whether, you  
14 know, this was just a bit of him trying to leverage on me.  
15 But I still took his comments seriously enough to want to  
16 report them. Did I know for sure that it was going to have  
17 an effect? I don't know that I did, but I did want to  
18 share what I had heard with my management. I thought it  
19 was important enough to do so.

20

21 Q. I am not in any way suggesting that you ought not to  
22 have done it, Mr Whitwell, and when you say "share it with  
23 your management", may we take it that you also told Mr Long  
24 about it in the discussion that you had with him prior to  
25 speaking with Mr Davidson Kelly in London?

26 A. Yes, sir.

27

28 Q. Now, you wrote this in a report for the ELG on 6 May  
29 2003. Did any member of the ELG come and talk to you and  
30 ask you what you meant by that?

31 A. I can't recall. I can't recall that somebody actually  
32 mentioned - said anything to me.

33

34 Q. When you say you can't recall --

35 A. Honestly, I don't remember anybody coming to speak to  
36 me about it.

37

38 Q. Were you ever asked to give an oral briefing to the  
39 ELG on the basis of this report?

40 A. Yes. I was called up to the ELG to talk to them about  
41 Iraq, yes.

42

43 Q. And did you give a briefing to the ELG on the basis of  
44 this report?

45 A. The process was that I believe the paper would go up,  
46 they would have it there to read, or whatever, and my  
47 recollection of that meeting is that I came in and I was

1 asked to give an update and they were very focused on the  
2 operational side of it, how were we going with payments,  
3 and so on and so forth, how were we going on on what was  
4 really exercising the mind of the AWB management at that  
5 time, which was the huge exposure that we were facing in  
6 Iraq. I think probably, like me, they probably had a lot  
7 of the other stuff, like reconstruction and Iraqi debt and  
8 Tigris, well down their list of priorities at that moment  
9 in time.

10

11 Q. Did anybody ask you about this entry concerning Tigris  
12 commission during the course of the ELG meeting?

13

14

15 Q. We see on this copy of the document that we have your  
16 initials, "CW", in handwriting --

17

18

19 Q. -- against this paragraph. Mr Hockey's initials are  
20 against the paragraph above.

21

22

23 Q. What do the initials in handwriting signify?

24

25

26

27

28

29

30 Q. I think it suggests that Darryl and - well, I know it  
31 is Darryl and I have both said, "All right, this is the  
32 paper we have created." Prior to going into the ELG, we  
33 would have divvied up between us who was speaking about  
34 which subject, if it was brought up.

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1 A. It was - it was his - look, can you ask that question  
2 again, sorry?  
3  
4 Q. Well, was he wearing two hats in Baghdad, one for the  
5 AWB and one for AusAID, and was Operation Proton a  
6 reference to his work that he would attempt to do in the  
7 interests of AWB whilst he was in Baghdad?  
8 A. Yes, sir.  
9  
10 Q. It was?  
11 A. Yes.  
12  
13 Q. And Operation Hunta - by the way, how do you say that  
14 word?  
15 A. Hunta.  
16  
17 Q. What was that about?  
18 A. Look, it is the Iraqi for wheat. It was really - it  
19 was really the whole strategy that we were there trying to  
20 get put together for how we were going to restore our  
21 position in the market and take it forward, because we were  
22 not at all sure about what the post-war situation in Iraq  
23 was going to look like for wheat. We didn't know whether  
24 IGB was still going to be buying, we didn't know whether it  
25 was going to be the private sector. So it was just a whole  
26 series of strategic initiatives that we were putting  
27 together for our market development - nothing more than  
28 that.  
29  
30 Q. It sounds quite large?  
31 A. It was quite large, and it was - you know, it has been  
32 ongoing and we've had to deal with lots of different  
33 challenges and develop strategic and tactical plans to try  
34 to keep things going.  
35  
36 Q. Is it still continuing?  
37 A. Yeah, but I mean this is - Hunta is not an AWB project  
38 in the sense - it is just for those of us who were close to  
39 the Iraq marketing management. It is our way of just  
40 keeping it all a Hunta strategy. It is just - we know that  
41 to be an Iraq marketing strategy.  
42  
43 Q. Were there a group of you that were involved in  
44 working on this Hunta strategy?  
45 A. Yeah. I mean, it was post-war, it was really me,  
46 Darryl Hockey. We brought international business  
47 development in to help us with some of our ideas.

1  
2 Q. Who was that?  
3 A. Brett Lynch.  
4  
5 Q. Anybody else?  
6 A. No. I mean, that's the sort of core, and Brett  
7 dropped out and, you know, really it has been - it has been  
8 an international sales and marketing and really  
9 specifically those of us who have got - well, I am the only  
10 one with Iraq - I'm the one who is Iraq marketing manager  
11 but, you know, Darryl Hockey helps me, and others help me  
12 as well, with the marketing strategy post-war.  
13  
14 Q. Did it involve any input from Mr Stott?  
15 A. I seem to remember post-war that I did pop down to see  
16 Charles about two or three ideas we had had, particularly  
17 around - and a lot of this is still quite commercial in  
18 confidence, sir, so that's the only thing that I would say.  
19 It is still under some consideration.  
20  
21 Q. I don't want you to reveal commercial in confidence  
22 material, but it did involve Mr Stott?  
23 A. Yes, I counselled, or asked for his counsel on a few  
24 issues, yes.  
25  
26 Q. Does it continue to involve Mr Stott?  
27 A. No. No.  
28  
29 Q. Did he assist you, when you asked for his counsel?  
30 A. He gave me his perspectives on a few things and he was  
31 giving me assistance, yes, sir.  
32  
33 Q. Did you hear Mr Stott's evidence about Operation  
34 Hunta - were you here for that?  
35 A. I think I was, sir, yes.  
36  
37 Q. Why did you laugh?  
38 A. Because I think - I would tend to agree with him, his  
39 one idea about the transport company was one that I quickly  
40 consigned to the dust bin as well.  
41  
42 Q. That was his idea --  
43 A. No, no, it was probably --  
44  
45 Q. -- that you consigned to the dust bin?  
46 A. No, it was probably one of our - we were searching a  
47 broad range of potential things we could do. Somebody

1 turned around and said, "Well, what about a trucking  
2 company", or, you know, trucking, and we discussed it and  
3 it wasn't a flyer, so --

4  
5 Q. Did he have any involvement beyond that?

6 A. No, sir, he was purely somebody who was - I think at  
7 the time he was in mergers and acquisitions and he was  
8 somebody who knew Iraq and somebody who - you know, we were  
9 talking at that point in time about what potential  
10 investment we could make or, you know, what projects we  
11 could look at, and, you know, we were seeking his counsel  
12 as to what he thought of it. That was in the immediate  
13 post-war environment, when everybody's view was hopefully  
14 that Iraq was going to become peaceful and you were going  
15 to be able to invest there, and whatever, and unfortunately  
16 that hasn't been the case. So a lot of those ideas have  
17 been put on the back-burner for the time being.

18  
19 Q. Whilst we are dealing with May 2003, can we bring up,  
20 please, confidential exhibit 79C, which is entitled  
21 "Jordan/Iran Trip Report". It appears to have been drawn  
22 by you and Mr Edmonds-Wilson. It is EXH.0001.0070.

23  
24 THE WITNESS: I wonder, Commissioner, could I go to the  
25 toilet, please?

26  
27 THE COMMISSIONER: Yes, certainly. We will take a  
28 10-minute adjournment.

29  
30 SHORT ADJOURNMENT

31  
32 MR AGIUS: Q. Mr Whitwell, we were going to show you  
33 EXH.0001.0070. This is the Jordan/Iran trip report. You  
34 prepared that with Mr Edmonds-Wilson?

35 A. Yes, sir.

36  
37 Q. Does it accurately summarise your meetings to which it  
38 refers?

39 A. Yes, sir.

40  
41 Q. Could we go to page 0073, please.

42  
43 THE COMMISSIONER: This is confidential exhibit 79C?

44  
45 MR AGIUS: Yes.

46  
47 Q. The last two paragraphs on page 0073 have previously

1           been read on to the record. They are not confidential.  
2           Could you read those?

3           A.    Yes, sir.

4  
5           Q.    So it was apparent that 2.5 million Euros had been  
6           paid by way of inland --

7  
8           THE COMMISSIONER:    Do you wish to read the next line, on  
9           the next page?

10  
11          MR AGIUS:    Sorry.

12  
13          THE WITNESS:    Okay, sir, thank you.

14  
15          MR AGIUS:    Q.    It was apparent that 2.5 million Euros on  
16          account of inland transport had been paid for the Pearl of  
17          Fujairah, and that you discussed that matter with both  
18          Othman al-Absi and the chairman.

19          A.    Correct, sir.

20  
21          Q.    And one or both of them informed you that as soon as  
22          someone with authority to sign the appropriate  
23          documentation from the Iraqi side could be found, the money  
24          would be returned to Alia and then to the AWB and other  
25          companies that were owed money; is that right?

26          A.    Yes, sir.

27  
28          Q.    That made it absolutely plain to you, didn't it, that  
29          moneys that were paid on account of inland transport, and  
30          that were paid to Alia on account of inland transport, were  
31          transferred by Alia to the Iraqis?

32          A.    Yes, sir. I mean, I didn't know which Iraqis but,  
33          yes, sir, the money wasn't with them.

34  
35          THE COMMISSIONER:    Q.    But you knew that from these --

36          A.    I knew that before --

37  
38          Q.    -- documents produced last night?

39          A.    Yes, I did.

40  
41          MR AGIUS:    Q.    And this is entirely consistent with that?

42          A.    Yes, sir.

43  
44          Q.    And which you had set out in this trip report for the  
45          knowledge of those to whom you reported at the AWB?

46          A.    Sorry, which trip report is that - this --

47

1 Q. The one you are looking at?

2 A. Yes. Yes. Yes, sir. Well, I passed it on to them,  
3 yes. This is a report of the meeting, yes.

4  
5 Q. Was there much interest in this report of yours? It  
6 is dated May 2003. It seems to have been the first trip to  
7 the Middle East touching upon matters to do with Iraq after  
8 the invasion. Did you get the feeling there was much  
9 interest in this report when you got back to the AWB  
10 office?

11 A. People would typically ask me how it went. There was  
12 no sort of - in this instance, I was too busy, really, to  
13 sort of worry about who had read it and who hadn't read it.  
14 I was moving on already to try to deal with other issues.  
15 So it didn't really cross my mind. Nigel was with me. He  
16 had done the note taking. He had done the reporting. He  
17 had drawn up a good report. If people wanted to read it,  
18 they could read it.

19  
20 Q. How was it distributed?

21 A. By email.

22  
23 Q. To whom?

24 A. I would have to see what the - who Nigel or I sent it  
25 to to tell you who it was distributed to, but typically  
26 this would go to a reasonably wide list of people in  
27 international sales and marketing, the national pool, you  
28 know - the exec might get a copy, but --

29  
30 THE COMMISSIONER: Q. Would the ELG normally get a copy?

31 A. Look, as a matter of courtesy, I would think they  
32 would get a copy, yes, if they were interested in it.  
33 Certainly Peter Geary and Sarah would get copies, yes.

34  
35 MR AGIUS: Q. Did you give any oral briefings on the  
36 report?

37 A. I might have had a chat with Peter Geary about it, but  
38 just, you know, very high level about how did it go, you  
39 know, we would have sort of gone through it at a high  
40 level, but I can't recall the specifics of that  
41 conversation.

42  
43 Q. Let me bring you forward. We had gone back to May to  
44 capture the two trip reports. I want to come forward now  
45 to June of 2003 and exhibit 94. It is AWB.0214.0003. You  
46 will see that you have written to Zena Armstrong at DFAT,  
47 with copies to other persons, and you are responding to a

1 memorandum of instruction of 10 June 2003. I wonder if you  
2 would just take a little time and read the email that  
3 begins halfway down that page, 0003. When you get to the  
4 bottom of the page, if you indicate, we can turn it for  
5 you.

6 A. Okay, thanks.

7  
8 MR AGIUS: Commissioner, we have prepared an edited  
9 version of exhibit 64C. May I tender it as a public  
10 exhibit.

11  
12 THE COMMISSIONER: Yes. It will become exhibit 315.

13  
14 EXHIBIT #315 EDITED VERSION OF CONFIDENTIAL EXHIBIT 64C

15  
16 THE WITNESS: Okay, I have finished reading that page.

17  
18 MR AGIUS: Q. We will turn the page for you.

19 A. Okay, yes.

20  
21 Q. You will see that part of the way down the second  
22 page there is the memorandum of instruction of 10 June  
23 2003, and you have responded to various paragraphs in  
24 capital letters.

25 A. Yes.

26  
27 Q. If we go over the page, to 0005, you will see there is  
28 a paragraph marked "II" three-quarters of the way down:

29  
30 Identify which contracts have a kickback or  
31 surcharge (often 10%). We need to know  
32 what percentage kickback or "after sales  
33 service fee" was involved under the "Extra  
34 Fees" category. Your Ministry is likely  
35 aware of this charge so please work with  
36 them to identify and indicate on the  
37 matrix.

38  
39 Now, we see that you did not make any entry under that  
40 paragraph.

41 A. Yes, sir.

42  
43 Q. Why not?

44 A. Because - well, one, I didn't connect that to my  
45 contract at that point in time; two, I was very busy.  
46 I was really very focused on getting our contracts  
47 executed, and I think, as I say at the top of the page, I

1 will try and come back and give a further consideration to  
2 it, to Zena, but I was just tapping out my comments in  
3 relation to the existing contract I had. That was my first  
4 focus.

5

6 Q. Did you ever go back to Zena Armstrong and give her a  
7 reply to the paragraph marked "II"?

8 A. I don't recall, sir. Straight after that I think  
9 I went off to London and Baghdad and Jordan and - look, it  
10 may just have got lost, but I don't recall whether I went  
11 back to her or not.

12

13 Q. No such reply has been provided to the inquiry by AWB.

14

15

16 Q. I'm not suggesting that there is one and that it  
17 hasn't been provided, but I will just provide you with that  
18 information.

19

20

21

22 Q. Do you have a recollection of ever responding to  
23 paragraph II - and you would need to look at paragraph II.  
24 It is the sort of thing that if you did respond to it is  
25 unlikely that you would have forgotten?

26

27

28

29 Q. Your contract, the one that you were responsible for  
30 at the end of 2002 --

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1 the quantum of the inland transport fee?

2 A. That's right.

3

4 Q. And you applied that formula?

5 A. That's right.

6

7 Q. That was only in December of 2002. Here we are  
8 in June of 2003, and you are sent a document, we see that  
9 you provided a response in capital letters immediately  
10 above the paragraph 11, and you provided a response in  
11 capital letters immediately below the paragraph 11?

12 A. Mmm-hmm.

13

14 Q. Surely you drew a connection between the reference to  
15 "10 per cent surcharge" in 11, and the contracts which you  
16 yourself had negotiated, each of which contained a  
17 10 per cent addition to the price of the contract?

18 A. To be honest with you, sir, no. At the time my state  
19 of mind on the 10 per cent was that it was still UN  
20 approved, that my management were comfortable with it to be  
21 included in the contract when I negotiated it in December,  
22 and I didn't draw that link at that point in time. I am  
23 very busy. I am responding to what I considered the  
24 priorities. I didn't get back to her, but I also sent it  
25 on to others for their comments as well. It wasn't  
26 anything deliberate on my part.

27

28 Q. Well, we have Mr Long's evidence about it. He did  
29 draw a parallel.

30 A. Right.

31

32 Q. We have Mr Stott's evidence about it. I need not  
33 remind you of that. You see, this memo rather infers that  
34 these contracts had been UN approved, but that they had,  
35 nonetheless, contained a surcharge, and it was now a matter  
36 of identifying them, because if the contracts hadn't been  
37 UN approved there wouldn't have been any payments, there  
38 wouldn't have been any point to send round the memo,  
39 because contracts which were not UN approved would never  
40 have been able to be executed. So the fact that you  
41 thought that the fee had been UN approved really wasn't the  
42 point of this memo. The point of the memo was, at least in  
43 this paragraph, were there any contracts which included a  
44 10 per cent surcharge. Are you sure you didn't draw a  
45 parallel between the 10 per cent that you had had to add in  
46 to the contracts in December 2002 and the 10 per cent that  
47 was the subject of this paragraph?

1 A. Yes, sir. I can say my state of mind at the time was  
2 I was busy and if I had have drawn a parallel at that point  
3 in time I would have probably put something in there, but  
4 I didn't.

5  
6 Q. Did you ever discuss that matter after this email -  
7 after 13 June 2003 - right up until the end of October last  
8 year, and I choose that date because that's when the  
9 Volcker Inquiry published its final report. Between June  
10 of 2003 and the end of October 2005, did you ever discuss  
11 that 10 per cent figure with anybody at AWB?

12 A. What, how to calculate - how it was calculated in --

13  
14 Q. Well, the fact that 10 per cent had been added in to  
15 contracts and the fact that this memo had put people on  
16 inquiry about the 10 per cent - any of those matters.

17 A. I discussed with Michael the 10 per cent and I think  
18 I said to Michael at some point - and I don't remember  
19 when, but it was probably in 2004 - "Look, we need to run  
20 through this calculation with the Project Rose team,  
21 Jim Cooper". So I think I had a conversation - Michael and  
22 I had a conversation with Jim about the 10 per cent.

23  
24 Q. When did you have that conversation?

25 A. Mid-July 2004.

26  
27 Q. That was the conversation with Michael Long?

28 A. No, the conversation with Jim.

29  
30 THE COMMISSIONER: Q. There were the three of you - you  
31 and Mr Long and Mr Cooper - or just you and Mr Cooper?

32 A. No, me and Mr Long and Mr Cooper.

33  
34 Q. The three of you?

35 A. Yes. I can't remember whether there was anybody else  
36 there, but I know the three of us were there.

37  
38 MR AGIUS: Q. You said, if I have your evidence  
39 correctly, you discussed with Michael the 10 per cent, and  
40 you said, "Look, we need to run through this calculation  
41 with the Project Rose team, Jim Cooper"; is that right?

42 A. That's correct.

43  
44 Q. What did Mr Long say to you?

45 A. He said, "Let's" - you know, he thought about it and  
46 he said - I can't specifically recall, but I do recall that  
47 he said, "Yes, I think it is important that we do that",

1 and we went up and did it.

2

3 MR JUDD: Commissioner, I don't want to interrupt my  
4 friend's flow, save for this: I am not certain of the  
5 provenance of the conversation and whether or not it might  
6 fall within the category of a privileged one if information  
7 is being sought by counsel for the purpose of giving  
8 advice. Now, I don't know that.

9

10 THE COMMISSIONER: My initial impression would be that  
11 this would be outside any claim for privilege.

12

13 MR JUDD: It may well be, but --

14

15 THE COMMISSIONER: Because this is related to Project  
16 Rose.

17

18 MR JUDD: This is related to Project Rose, and of course  
19 one has the dominant purpose test to address, and if this  
20 is for the company to inform itself it falls into a very  
21 different category.

22

23 THE COMMISSIONER: This is for the purpose of preparing,  
24 as I understand the evidence to date, a response to the  
25 Volcker committee. That's what Project Rose, I understand,  
26 is all about.

27

28 MR JUDD: Yes, that's right. But in the context, there  
29 may be occasions when exchanges of one sort or another are  
30 privileged. The response to the Volcker Inquiry itself, of  
31 course, is not privileged, because that was published to  
32 the inquiry, but a corporation, through its counsel, would  
33 be entitled, in our submission, to inform itself and give  
34 consideration which was privileged consideration to issues  
35 for the purpose of arriving at a position that it wished to  
36 adopt in responding to an inquiry of that sort. The  
37 question as you, with respect, sir, identify, is what was  
38 the dominant purpose of the communication and thus is a  
39 privileged one. I don't know, and I only rise to raise the  
40 spectre of privilege at this stage and perhaps we can  
41 examine it a little more closely if it gets into an area  
42 where we think it might traverse that matter.

43

44 THE COMMISSIONER: I think it is just a spectre at this  
45 stage.

46

47 MR JUDD: Thank you.

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THE COMMISSIONER: Yes, Mr Agius?

MR AGIUS: Q. Before you got to see Mr Cooper you discussed it with Mr Long in the terms in which you have told us. What caused you to bring the matter up with Mr Long?

A. Look, I can't remember the specifics of what triggered that. I honestly can't. It may have been a conversation or something. Look, I would be speculating as to what triggered it; I just can't recall.

Q. What was there about the 10 per cent that caused you to think, and, indeed, caused you to say to Mr Long, "We need to run through this calculation with the Project Rose team"?

A. Oh, look, by mid 2004 I think it was important that Project Rose was informed about how the prices were put together. I thought it was an important piece of information that they ought to have.

Q. What was there about the 10 per cent, as opposed to any of the other components in the price, that caused you to think that it should be referred to Project Rose?

A. I think at that stage I probably had started - in fact, I am probably sure I had started to draw a link between that and all the media speculation.

Q. About kickbacks?

A. Yes. I mean, whatever a kickback is. I'm not too sure what it is, but, yes.

Q. I think we are content with a payment back to the Iraqis of a proportion of the contract price.

A. Right.

Q. Is that the conclusion that you were drawing, that this 10 per cent may have some relationship with money that was alleged to have been paid back to the Iraqis?

A. No, again, I'm still of the opinion, at that point in time, that we were paying for a service - an inland transport service - that was delivered and contractually delivered. What I was saying to Michael is that the Project Rose team should be aware of the calculation that we made, because if they are not aware of it, then that's an important part of the information-gathering exercise that they should have had, and I didn't draw any inference,

1 I just said, "Michael, I think this is important for us to  
2 brief them on it, and if they have any further questions,  
3 they can come back to us", but I didn't infer anything else  
4 from it.

5

6 Q. Before you went to see Mr Cooper, did you speak to  
7 Mr Hogan?

8 A. He - no.

9

10 Q. I don't mean immediately before, but during any of the  
11 period before you went to see Mr Cooper about the  
12 10 per cent, did you go to Mr Hogan and say, "Look, where  
13 did this 10 per cent come from in the first place?"

14 A. No, I - since Dom left in June 2003 the only chance,  
15 or the only time I saw him was in 2005, in mid to late  
16 2005.

17

18 Q. When you commenced at the AWB in 2002, did you read  
19 back over previous trip reports?

20 A. No, I remember reading Iraq, Iran, and a number of  
21 other market profiles, and then I was really thrown in at  
22 the deep end with the iron filings, because Dom went away.  
23 So I just didn't have time. I also then had to learn about  
24 wheat. I had been trading sugar for a number of years.  
25 I had to learn about wheat. So I had a lot of other things  
26 that seemed to be - well, were a bigger priority than going  
27 back through previous trip reports. I got a good feel for  
28 what the market was at that point, and I was then also  
29 actually handling operational issues.

30

31 Q. Did you ever discuss with Mr Hogan his fear or his  
32 belief that the addition of a 10 per cent service fee into  
33 the contract might be a mechanism for the Iraqis to extract  
34 money out of the escrow account?

35 A. No.

36

37 Q. Did you ever discuss that with Mr Borlase?

38 A. No.

39

40 THE COMMISSIONER: Q. What were the circumstances in  
41 which you met with Mr Hogan late last year?

42 A. It was the funeral of Rex Lister.

43

44 MR AGIUS: Q. After speaking with Mr Long you went and  
45 spoke to Mr Cooper.

46 A. Correct.

47

1 Q. This was at your own instigation?  
2 A. Yes, and Michael agreed and he came along and we both  
3 went and briefed Jim, yes.

4  
5 Q. Just the three of you?  
6 A. I can't remember whether anybody else was there, but  
7 I do remember the three of us were in attendance, yes.

8  
9 MR AGIUS: Mr Commissioner, at this stage I fail to see  
10 how legal professional privilege could attach to anything  
11 that this witness said to Mr Cooper.

12  
13 THE COMMISSIONER: That's my present view, unless I am  
14 persuaded to the contrary. It seems to me, if I can lay it  
15 out, Project Rose was a project undertaken by AWB, who set  
16 up a number of people to conduct it. The purpose was not  
17 the purpose of obtaining legal advice but for preparing a  
18 response to the Volcker Report. These people apparently  
19 went to see the gentleman in his capacity as a member of  
20 Project Rose and to give to him information.

21  
22 MR JUDD: Yes. I rose, Commissioner, to more or less,  
23 perhaps reluctantly, agree with my friend that if these  
24 people go to speak with Mr Cooper for the purpose of  
25 informing him, it hardly falls into the category of seeking  
26 advice. It is a matter of informing him, as the person  
27 constituting or chairing Project Rose, which has a function  
28 as you have outlined. But it may be that at some point  
29 there are privileged communications within that, but  
30 I don't press that this is one of them.

31  
32 THE COMMISSIONER: Thank you.

33  
34 MR AGIUS: Q. Well, what did you say to Mr Cooper?  
35 A. To the best of my recollection, we ran through the  
36 calculation with him.

37  
38 Q. Calculation of what?  
39 A. How we got to the end price of an AWB contract with  
40 Iraq. So what the different costs meant, and so on and so  
41 forth, including the 10 per cent calculation.

42  
43 Q. And did you tell him that the 10 per cent was a figure  
44 that had been insisted upon by the Iraqis?  
45 A. I can't recall what - whether we said that to him or  
46 not.

47

1 Q. That was your understanding, though, wasn't it?

2 A. Yes, absolutely, and this was UN approved.

3

4 THE COMMISSIONER: Q. When you say "UN approved", you  
5 have that only from what you learnt when you first arrived  
6 at AWB; is that right?

7 A. Yeah, and from Dom - Dom Hogan - and Michael. They  
8 were both - Dom ran through the calculation with me, said,  
9 "This is the inland transport fee", and, you know, we had  
10 been calculating this way for a few contracts and it's been  
11 UN approved.

12

13 Q. When you say "it's been UN approved" what do you mean?

14 A. The contracts, the contracts had been executed. So  
15 I took him at his word.

16

17 MR AGIUS: Q. You were aware, weren't you, that the  
18 contracts never disclosed any specific amount in relation  
19 to inland transport - certainly during all the time that  
20 you were at AWB?

21 A. Yeah, I mean, I only prepared one contract and it  
22 didn't break apart the inland transport fee, but, as I say,  
23 that's not an uncommon approach in commodities to just put  
24 one final price. In fact, post-war we still didn't break  
25 down the inland transport fee; we offered on a CIP basis to  
26 the Iraqis post-war. We didn't tell them what - we didn't  
27 break down the inland transport fee.

28

29 Q. That might be all well and good, Mr Whitwell, if we  
30 didn't have your trip report which refers to the 500,000  
31 tonne contract as not perhaps being big enough to carry the  
32 Tigris debt without it coming to the attention of the UN.  
33 When one puts that trip report together with your knowledge  
34 of how it is that the price was made up, surely you had an  
35 awareness that if the price got to be too large, then the  
36 UN's attention would be drawn to it.

37 A. Yes. I mean, they - the UN had a responsibility,  
38 I understood, to check the price to be fair and reasonable,  
39 but that's as far as I understood it. I didn't know any  
40 more than that.

41

42 Q. So you would have appreciated that unless the  
43 10 per cent and the trucking fee were disclosed as specific  
44 items on the face of the contract, then the UN would not  
45 have any method of determining precisely what amounts were  
46 being paid on account of inland transport.

47 A. I am sorry, could you repeat the question again?

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Q. Unless the 10 per cent and the additional trucking fee were disclosed as specific amounts on the face of the contract, the UN wouldn't have any idea as to what the specific amounts were?

A. That's correct.

MR JUDD: We object, sir, whatever the evidence of the witness might be. In our submission, it is a proposition which can't be put, given the fact that we have evidence from other witnesses, as I recall, which speaks of the ability of the UN to understand, or perhaps the mechanism of the process that was involved with the UN undertaking its analysis of what was reasonable and what wasn't. It may well be, and indeed in the end it may be said that the United Nations, looking at these contracts with even a very simplistic view of life, could determine that there was an amount of in the order of \$40, or thereabouts, which exceeded that which would ordinarily be expected to be the price of wheat plus freight plus other items.

In those circumstances, it seems difficult for my friend to put a proposition as he does. He can perhaps ask the witness whether the witness can understand how the price might be broken down, or if the witness can discern how somebody might interpret the price given his knowledge, but not to suggest that the United Nations could not do that. That seems to be the proposition, and that's one that we will take issue with.

THE COMMISSIONER: Yes. I will allow the question. In fact, it has been answered. The answer was "That's correct".

MR JUDD: Yes. I started by saying "notwithstanding the answer of the witness to the question". I wanted to rise to make that point.

MR AGIUS: Q. The next document I want to take you to is an ELG report of 15 June 2003, which is part of confidential exhibit 68C - AWB.0202.0049. Did you prepare this report?

A. It looks like it would be, yes, sir.

Q. If we go to page 0050, under "Tigris Commission", were you foreshadowing the meeting that you have already given evidence of - the meeting that you had with Mr Davidson

1 Kelly?

2 A. Yes, sir.

3

4 MR AGIUS: Mr Commissioner, I have reviewed this document.  
5 I wonder if my learned friend would also review it to see  
6 if there is any further need for this document to remain  
7 confidential.

8

9 MR JUDD: I would like a copy of it, if my friend can help  
10 me. I don't have a hard copy of it here, sir.

11

12 MR AGIUS: We can provide one.

13

14 THE COMMISSIONER: You can do that overnight, if you  
15 wouldn't mind.

16

17 MR JUDD: Yes.

18

19 MR AGIUS: Q. Then we come to another part of  
20 confidential exhibit 68C, AWB.0084.0082. Did you prepare  
21 this document?

22

23 A. Yes, sir.

24

25 Q. There is a reference to:

26

27 Meetings in London

28

29 Tigris Petroleum - Norman Davidson Kelly &

30

31 Malcolm Rifkind (former UK foreign Sec).

32

33 Who from AWB attended that meeting?

34

35 A. Michael and myself.

36

37 Q. Is that the meeting of which you have earlier given

38

39 evidence?

40

41 A. No, this was a meeting with Malcolm - we met Norman  
42 first, we discussed the issues that I have already raised  
43 with you with Norman separately, and then - we then went to  
44 breakfast and Malcolm Rifkind joined us at breakfast, he  
45 was running late, and we then went on to discuss --

46

47 Q. I don't want to go into the rest of the matter, but  
you didn't discuss the Tigris matter after that?

48

49 A. No.

50

51 Q. Is it an accurate record of your discussions with  
52 Mr Davidson Kelly that the plan was after that meeting to  
53 keep in contact over progress of the contracts and to look

1 at possibly ring-fencing the commissions that were  
2 received?

3 A. Yes, that's right.

4  
5 Q. Why did you call them commissions as at the date of  
6 this report - 23 to 30 June 2003?

7 A. Sir, there is no particular reason. I am writing out  
8 a report. I can't say I turned my mind to it.

9  
10 Q. You didn't regard them as commissions - you regarded  
11 those as discrete portions of the debt which were being  
12 recovered by AWB, didn't you?

13 A. Correct, sir.

14  
15 Q. But you here call them commissions. Did Mr Long  
16 regard them as commissions?

17 A. No.

18  
19 Q. Did you and he speak of them as commissions?

20 A. We might have done, but that doesn't mean that - that  
21 was just a term that we used because it was easier to - it  
22 was an easier term to use, rather than anything else, if  
23 you understand what I mean. It just became accepted to  
24 talk about it as a Tigris commission rather than - but it  
25 didn't change either of our view of what it was just by  
26 calling it a Tigris commission. It was just something that  
27 it was reasonably easy to say. I could - in two  
28 conversations I could have called it Tigris debt or Tigris  
29 commission. To us, we all knew that it meant the same  
30 thing.

31  
32 Q. Well, I was going to ask you about that, because it  
33 seems in two documents on the same day you have referred to  
34 it as a debt and as a commission?

35 A. Yes. So that's what I am saying. It kind of meant  
36 the same thing to us, it was just a way of identifying it.

37  
38 Q. Can we bring up the first of those, which is part of  
39 confidential exhibit 68C - AWB.0202.0072. When I say "the  
40 first", I am not suggesting that this was necessarily the  
41 first in point of time. Both documents are dated 26 August  
42 2003. This is a memo from you to Mr Owen, copied to  
43 Mr Aucher. Mr Owen and Mr Aucher worked in which section  
44 of AWB?

45 A. Sorry, sir? I was reviewing the document. I do  
46 apologise.

47

1 Q. Why don't you finish reading it first.

2

3 MR JUDD: While the witness is doing that, we have  
4 reviewed that document, Commissioner, and marked a couple  
5 of small passages that identify the names of third-party  
6 customers or end customers in Iraq. Otherwise the document  
7 can be made a public document.

8

9 THE COMMISSIONER: Thank you. We will tender it tomorrow  
10 morning, perhaps, with a clean copy.

11

12 THE WITNESS: Yes, sir.

13

14 MR AGIUS: Q. Have you read page 0072 - that document?

15 A. Yes, sir.

16

17 Q. Mr Owen and Mr Aucher were AWB employees working in  
18 which department?

19 A. Trade finance.

20

21 Q. In this memo you speak of a debt recovery process, and  
22 you speak of the money as being a debt which became due on  
23 26 January 2001.

24 A. Yes.

25

26 Q. If we go to the next document, page 0077, this is  
27 another memo from you, also to Mr Owen, copied to  
28 Mr Aucher, but this time to Chinlook Tan and three other  
29 persons, and here you speak of the same subject matter, but  
30 the title is "Tigris Petroleum Commission"?

31 A. In hindsight, I should have tried to avoid the  
32 confusion by using the same term. It would be better to  
33 have said "Tigris Petroleum debt", but, again, it is at a  
34 time when I was working very hard and had a lot of things  
35 on and I didn't really focus on whether I used the word  
36 "commission" or "debt" when I was putting it in memos.

37

38 Q. Well, I wonder if that's right. If you look at this  
39 document, you say:

40

41 Following Telephone conversation of  
42 yesterday and your request for a memo on  
43 the subject, I confirm that with the  
44 agreement of the Pool and the (Iraq  
45 Emergency response committee) --

46

47 That was an AWB committee, wasn't it, the Iraq Emergency

1 Response committee - AWB?  
2 A. Correct.  
3  
4 Q.  
5 -- it has been agreed to provide for a  
6 payment of a commission to Tigris Petroleum  
7 that was agreed at time of concluding  
8 contract.  
9  
10 Do you see that?  
11 A. Yes, I do.  
12  
13 Q. You go on then to consistently speak of this as a  
14 commission; do you see that? You use the word "commission"  
15 or "commissions" many times in that document?  
16 A. Right.  
17  
18 Q. You actually sign it off, "Regards Chris Whitwell"; do  
19 you see that?  
20 A. Right.  
21  
22 Q. If we go back to the previous document, 0072, this  
23 appears more as a draft, where you refer to the matter as a  
24 debt. I say "more as a draft" because, (a), it is not  
25 signed off by you --  
26 A. Right.  
27  
28 Q. -- and in the last paragraph you have put in a series  
29 of "x"s --  
30 A. Right.  
31  
32 Q. -- for the amount. Might this not be the situation -  
33 think about this, Mr Whitwell, if you would - you had been  
34 asked to provide a memo on the subject --  
35 A. Yes.  
36  
37 Q. -- the day before; that you had drafted the memo that  
38 you have on the screen now --  
39 A. Yes.  
40  
41 Q. -- which is just a draft; that you provided that memo,  
42 and that, in that form, the memo was rejected and you were  
43 asked to redraft it, and that is why we have it in the form  
44 of a document which refers to the Tigris Petroleum  
45 commission. Might that not be the way in which these  
46 documents came to be in existence?  
47 A. I can't recall.

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Q. What does that mean?

A. I can't recall what you are saying - you know, the proposition you are making, that somebody turned around to me and said, "Change the methodology" - change what the memo said.

Q. Well, do you agree that page 0072 appears to be a draft?

A. Yes, I would agree that it looks like a draft, yes, sir.

Q. Do you agree that page 0077, which we might go back to, appears to be a completed memo with all relevant detail included?

A. Yes, sir.

Q. Isn't the only rational inference that the draft was rejected and that you recast the memo as we see it on page 0077?

A. Look, because I can't recall, I can't speculate as to what the reason was.

THE COMMISSIONER: Perhaps you could think about that overnight.

MR AGIUS: Might these two documents be public exhibits, Mr Commissioner? I can't see anything commercial in confidence about them.

THE COMMISSIONER: Any objection?

MR JUDD: I can't think of a good reason either, sir.

THE COMMISSIONER: I will mark the documents AWB.0202.0072 and 0077 as exhibit 316.

EXHIBIT #316 TWO EMAILS FROM MR WHITWELL TO GRAHAM OWEN AND OTHERS, DATED 26/8/2003, BARCODED AWB.0202.0072 AND AWB.0202.0077

MR AGIUS: Commissioner, would that be a suitable time?

THE COMMISSIONER: Yes, we will adjourn until 10am.

AT 4.33PM THE HEARING WAS ADJOURNED  
TO THURSDAY, 16 FEBRUARY 2006 AT 10AM

<b>#</b>	2760:36 <b>0088</b> [1] - 2737:41 <b>01</b> [2] - 2677:13, 2677:14 <b>01/02</b> [1] - 2678:32 <b>0102</b> [2] - 2692:23, 2692:40 <b>0125</b> [1] - 2722:6 <b>02</b> [2] - 2677:18, 2679:34 <b>02/03</b> [1] - 2678:37 <b>0217</b> [1] - 2707:27 <b>0218</b> [1] - 2708:17 <b>0220</b> [1] - 2697:45 <b>0222</b> [1] - 2695:40 <b>0241</b> [1] - 2720:12 <b>0301</b> [1] - 2724:45 <b>081102.doc</b> [1] - 2679:35	<b>127</b> [1] - 2678:6 <b>127c</b> [1] - 2685:46 <b>128c</b> [1] - 2688:43 <b>13</b> [3] - 2676:32, 2698:8, 2749:7 <b>13/2/2006</b> [3] - 2675:16, 2675:17, 2675:38 <b>14</b> [1] - 2710:16 <b>15</b> [3] - 2665:34, 2677:21, 2755:40 <b>16</b> [3] - 2677:14, 2677:21, 2760:47 <b>1670</b> [6] - 2702:13, 2713:10, 2713:21, 2717:31, 2728:13, 2747:32 <b>1670/1680</b> [1] - 2737:17 <b>1680</b> [10] - 2702:14, 2710:37, 2713:10, 2713:21, 2717:31, 2720:13, 2720:31, 2728:12, 2728:13, 2747:32 <b>17</b> [3] - 2677:21, 2718:6, 2718:22 <b>18</b> [6] - 2673:7, 2678:21, 2688:47, 2689:6, 2693:8, 2719:44 <b>18/10/2002</b> [1] - 2693:32 <b>1996</b> [1] - 2704:43 <b>1999/2000</b> [1] - 2676:35	2747:29, 2748:7, 2748:46, 2752:18 <b>2002/2003</b> [3] - 2679:4, 2679:5, 2684:8 <b>2003</b> [24] - 2706:18, 2706:24, 2713:4, 2714:25, 2716:7, 2719:45, 2721:14, 2722:7, 2722:14, 2724:45, 2731:3, 2739:29, 2743:19, 2745:6, 2745:45, 2746:1, 2746:23, 2748:8, 2749:7, 2749:10, 2752:14, 2755:40, 2757:6, 2757:42 <b>2004</b> [5] - 2714:25, 2722:11, 2749:19, 2749:25, 2751:17 <b>2005</b> [3] - 2749:10, 2752:15, 2752:16 <b>2006</b> [2] - 2665:34, 2760:47 <b>21</b> [2] - 2671:25, 2729:21 <b>23</b> [2] - 2671:33, 2757:6 <b>24/4/02</b> [1] - 2680:29 <b>25</b> [2] - 2699:26, 2699:27 <b>26</b> [5] - 2675:27, 2690:6, 2699:24, 2757:41, 2758:23 <b>26-page</b> [1] - 2675:36 <b>26/8/2003</b> [1] - 2760:39 <b>27/11/2002</b> [1] - 2701:22 <b>28</b> [8] - 2706:19, 2706:25, 2706:29, 2707:1, 2725:14, 2727:46, 2729:27, 2731:3 <b>281</b> [1] - 2719:34 <b>283</b> [1] - 2725:11 <b>29</b> [6] - 2710:7, 2711:31, 2711:33, 2712:2, 2712:38, 2713:37 <b>29th</b> [1] - 2695:43 <b>2nd</b> [1] - 2730:23	2713:16, 2731:2 <b>500</b> [8] - 2688:9, 2696:10, 2696:30, 2725:44, 2726:24, 2726:28, 2727:11, 2729:10 <b>500,000</b> [16] - 2696:38, 2696:46, 2697:12, 2697:20, 2697:29, 2697:35, 2702:14, 2720:14, 2720:23, 2723:5, 2725:36, 2726:4, 2726:5, 2727:1, 2727:33, 2754:30 <b>55</b> [1] - 2665:31 <b>55.17</b> [1] - 2676:1 <b>55.40</b> [1] - 2676:1
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