

## The Australian Wheat Board Limited Scandal: Lessons for Corporate Responsibility

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In 1990, the Security Council imposed sanctions on Iraq. Those sanctions included resolution 661 which required all States to prevent their nationals from making available funds to the Government of Iraq or individuals or bodies within Iraq. Resolution 661 required all States to take measures to prevent the import into their territories of all commodities and products originating in Iraq or Kuwait. It required States to ensure that they not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources.

This Chapter VII resolution had serious humanitarian effects upon the people of Iraq, although its goals were both geo-political and humanitarian.

In 1995 the Security Council modified the sanctions system by adopting Resolution 986. Resolution 986 authorised States to permit the import of petroleum and petroleum products originating in Iraq subject to approval by the United Nations of the details of any such contract including details of the purchase price at fair market value, the export route, and the opening of a letter of credit payable to the escrow account to be established by the Secretary-General for the purposes of the resolution, and of any other directly related financial or other essential transaction.

Australia is a State with a dualist tradition and approach to international law. Security Council Resolutions, like other documents of treaty status, lack domestic effect unless and until incorporated into domestic law by legislative action. The leading case on this question remains the decision of the High Court of Australia in *Bradley v Commonwealth of Australia* (1973) 128 CLR 557. That case concerned action by the Australian Government seeking to implement a resolution by the Security Council in 1973 that all member States completely interrupt communications with the Rhodesian government. Consequently the Postmaster-General of the Commonwealth disconnected Mr. Bradley's telephone (he was the representative of the Rhodesian Department of Information) and prevented him from using the post or telegrams. He commenced proceedings in the original jurisdiction of the High Court seeking a declaration that the actions of the Postmaster-General were beyond power and therefore invalid and seeking orders reconnecting his telephone services and re-establishing his mail entitlements. He was successful.

Barwick CJ and Gibbs J said that:

*"In Chow Hung Ching v R<sup>2</sup> Dixon J said: "A treaty, at all events one which does not terminate a state of war, has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in*

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<sup>1</sup> Dr Christopher Ward, Barrister, Sydney & Canberra.

<sup>2</sup> (1948) 77 CLR 449, at 478;

*the Crown to compel them to obey the provisions of a treaty: Walker v Baird<sup>3</sup>”, and a similar view was expressed by Latham CJ in R v Burgess; Ex parte Henry.<sup>4</sup> Although, in those passages, mention is made of British subjects, it is clear since Johnstone v Pedlar<sup>5</sup> that an alien, other than an enemy alien, is, while resident in this country, entitled to the protection which the law affords to British subjects (see also Nissan v Attorney-General<sup>6</sup>). Section 3 of the Charter of the United Nations Act was no doubt an effective provision for the purposes of international law, but it does not reveal any intention to make the Charter binding upon persons within Australia as part the municipal law of this country, and it does not have that effect. Since the Charter and the Resolutions of the Security Council have not been carried into effect within Australia by appropriate legislation, they cannot be relied upon as a justification for executive acts that would otherwise be unjustified, or as grounds for resisting an injunction to restrain an excess of executive power, even if the acts were done with a view to complying with the Resolutions of the Security Council.”*

Australia did in fact legislate to respond to the Security Council Resolutions. The implementation within Australia of the Security Council Resolutions occurred by amendment in 1990 to the following Regulations:

- (i) Customs (Prohibited Imports) Regulation 13CA;
- (ii) Customs (Prohibited Exports) Regulations 4MA and 4QA;
- (iii) Air Navigation Regulation 119 (formerly 311D);

and by conditional exemptions granted from time to time under the Banking (Foreign Exchange) Regulation 39.

The Regulations were amended from time to time, and further regulations were also made, namely the Migration (Iraq-United Nations Security Council Resolutions) Regulations 1994. The relevant exemption under the Banking Regulations was revoked by instrument in May 2003, and the remaining regulations were repealed by the Iraq (Reconstruction and Repeal of Sanctions) Regulations 2003, so that all of these measures ceased to operate on 29 May 2003.

The Australian Wheat Board, AWB Limited was and is a grain marketing company that controls all aspects of the marketing and sale of Australia’s wheat crops. It is for that reason a flagship Australian company. It has very large export markets and is an important contributor to Australia’s foreign earnings. Because of the nature of its product it is also a significant provider of basic foodstuffs to less fortunate countries.

As we will see, the actions of the AWB and the systemic failure of its senior management to consider, respond to and honourably comply with both the letter and spirit of its obligations led to serious consequences for it and for Australia.

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<sup>3</sup> [1892] AC 491

<sup>4</sup> (1936) 55 CLR 608, at 644.

<sup>5</sup> [1921] 2 AC 262.

<sup>6</sup> [1970] AC 179, especially at 211–2, 232–3 and 235

Although it is not directly an example of a failure to comply with human rights obligations, it provides a clear analogy and is illustrative of the consequences to corporations and states of ignoring their moral and legal responsibilities.

In the late 1990's after the adoption of the Oil for Food resolution, AWB developed Iraq as a very significant export market. Rolling contracts were formed between the AWB and the Iraqi Grain Board. Originally those contracts were made on CIF terms to be Free out Umm Qasr. In English, that meant the grain was to be delivered to the port of Umm Qasr to discharge the obligations of AWB. Mid way through 1999, the Iraqi Grain Board imposed a requirement that the wheat now be delivered to silos throughout Iraq. Strangely, Iraq also sought to impose a charge of USD 12 per tonne as a discharge and land transport fee. This was clearly strange because one would think that if Iraq was now to receive the land transport component from AWB Iraq would not also need additional compensation. The fee was to be paid to 'maritime agents'.

It turned out that there were only two acceptable 'maritime agents' and AWB elected to deal with an entity called Alia Shipping Co.

AWB discussed the new requirement in detail amongst senior management and it is clear from email exchanges that immediately there was an understanding by AWB that the fee was in fact a disguised payment to Iraq.

In a subsequent Australian Royal Commission, one of the officers of the AWB said:

“There was no option. There was no choice. It was \$12 or not, or if you don't make that payment then, of course, there would be no business. That was made very clear. It was in that context that I discussed it with the Chairman, and that was the nature of those discussions.”

It is now apparent with hindsight that the company closed its mind to anything except getting the deal done. That the \$12 per tonne was a sham was obvious. There was no contract with Alia to actually provide trucking services and in fact trucking was, to the knowledge of AWB, still provided by the Iraqi government exactly as it had been provided in prior contracts.

Additionally, it is now known that Alia was partly owned by the Iraqi government, lending additional problems to the arrangement.

Because I want to focus on the issue of corporate responsibility, it is useful to look in a little more detail at the level of knowledge of the senior executives of AWB. In March 2000, Mr Emons, who was the Manager of Middle East Operations for AWB, wrote an email as follows:

1. We have received approval from the United Nations to ship to Iraq 900,000 tonnes in March, April and May.
2. A requirement in the tender document and in our contract price is the inclusion of a payment of USD15 per tonne for trucking in Iraq. I have confirmed this

figure with the Iraqi official I deal with but he has not as yet confirmed how he wants it paid specifically

3. This is the twist, under UN / Australian policy no payment can be made directly to Iraq however our contracts have been endorsed by both parties to pay this trucking fee to a third party. Under the last contracts we have instructed the shipping companies under the Charter party to make payment to a Jordanian trucking company. We did this to a) simplify the process from our point of view but b) To divorce clearly from the FOB price any connection with a shipping / logistics charge should the contracts come under scrutiny. The only difference is under our own Time charters we have made the payment ourselves.
4. Now this has been going quite smoothly until recently when two of our companies ran into internal problems with making the payment. One was obviously an issue where its offshore senior management ran scared of getting caught up in sanctions etc. and everything that could entail for their business. The other companies problems stemmed from its banking route through Singapore where there are always serious concerns in that environment on money laundering and despite assurances from ourselves they obviously have more to lose than we can guess at.
5. Now why do we want to use Ronly? It would be ideal from our point of view if we have a third party that handles the freight and trucking as an item. This not only saves us time but does disguise the fee.”

As Commissioner Cole subsequently found, this meant that in March 2000, AWB knew that:

“A fee for 'trucking in Iraq' was to be included in the wheat price;

The fee was to be recovered by AWB from the UN escrow account by its inclusion in the wheat price.

AWB was to pay the US dollar fee to Iraq.

Iraq would tell AWB how the fee was to be paid to it.

AWB knew that payment of such a fee to Iraq was prohibited by UN sanctions and Australian government policy.

Accordingly, it was necessary to hide or disguise the payment of the fee to Iraq.

AWB and Iraq, through the IGB, had agreed to the fee being paid to a 'third party' as part of the hiding of the payment.”

It might be thought that such a level of corporate irresponsibility was bad enough, but regrettably the situation then deteriorated markedly.

Canada had also been supplying wheat to Iraq under the Oil for Food program. In January 2000, Iraq, clearly emboldened by its Australian successes, informed the

Canadian Wheat Board that it was required to deposit \$700,000 with a Jordanian Bank to cover transport costs of USD 14 per tonne.

The Canadian Wheat Board declined to engage in the fraud, and instead referred the matter, including a suggestion that Australia through the AWB was a party to the scam, to the United Nations. The UN then queried the Australian diplomatic representatives in New York. That triggered a chain of inquiries which led to the direct questioning of AWB executives.

Unsurprisingly given the level of corporate malfeasance, the officers of AWB asserted that there was absolutely no wrongdoing on the part of AWB. The internal response included an email between officers that:

“. We played down the issue and said that we'd look at the UN request ...

Bronte (Moules) confirmed that the UN were asking for information on the contract clause above. She has put this request through to DFAT in Canberra and DFAT will contact you. If all the UN wants is some understanding on the standard terms and conditions in AWB contracts then I think we have nothing to worry about. We should ensure that we do provide something to DFAT when they contact you.”

In February 2000, knowing that it was under scrutiny, AWB continued with the scam, and agreed to increase the fee payable from 12 to 15 USD per tonne. In April 2000, AWB found itself unable to achieve some commercial goals with the Iraqi Grain Board. It responded with perhaps the greatest moral failing of the entire episode, by essentially blackmailing the IGB to enter into meetings and discussions.

AWB did this by writing to IGB and threatening to expose the scam to the UN in the following terms:

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

We had hoped to discuss at our meeting the issue of the payment of the trucking fee. You will be aware of the restrictions that the UN has placed on such payments and as you are aware this now means that we must halt further payments. We have endeavoured to meet the requirements of the IGB but without direct consultation we are now restricted to the accepted methods of payment to be used. We had hoped that we could discuss personally with your good selves this issue due to the sensitivity however if you would prefer we can discuss with the UN as to the appropriate method of paying for the trucking fee? Please respond by Monday 10th April so an alternative action can be undertaken that does not result in the delay of vessels.”

Although there were suggestions made that the department of Foreign Affairs and Trade was itself aware of the conspiracy, the Cole Inquiry did not reach that conclusion. It instead found that AWB had engaged in a pattern of deceptive correspondence with DFAT designed to conceal the true state of affairs in relation to the provision of trucking services in Iraq. It wrote to AWB in terms that suggested repeatedly that AWB was in fact providing trucking services to Iraq at an agreed fee,

when in truth all trucking services were provided by the Iraqi government and not by Alia or AWB.

By October 2000 the bubble was getting ready to burst. Iraq had now demanded payments of USD 44.50 per tonne, and those payments were agreed to by AWB.

Why were these exorbitant payments agreed to so readily by AWB? The answer of course is that there was no cost to AWB: the payments came from the Escrow account held by the UN. There was no real cost to AWB. There was an enormous benefit to Iraq as the USD flooded into the country in breach of resolution 661.

By the end of 2000, alarm bells were ringing at board level within AWB. An internal inquiry done by Arthur Andersen accountants found 'red flags' that required further investigation, and suggested that an assessment of the "ethical culture" of AWB be undertaken as a priority.

Despite that recommendation, in 2001 further contracts were negotiated with Iraq.

More significantly, also in 2001, AWB entered into a further and quite discrete sham transaction designed to gather a windfall gain, known as the Tigris transaction. Again, it involved the funnelling of money to Iraq through the Alia trucking fee fiction.

In 2006 the Cole Inquiry reported and described in graphic detail these events. It recommended the consideration of criminal charges against several executives, and civil prosecutions and actions under corporations legislation. It also recommended the amendment of laws to strengthen the ability to prosecute companies directly for breaches of Security Council sanctions.

So what was the outcome of all of this?

First, the scale of the fraud was staggering. Between November 1999 and March 2003 AWB paid to Alia a total of US\$224,128,189.98. The diversion of funds from the escrow account to the corrupt regime of Saddam Hussain was an outrage, with humanitarian implications for the ordinary citizens of Iraq.

The effect on AWB represents a clear demonstration of the risks to corporations that come from neglecting internal compliance. AWB is a shell of its former self. It is now tightly controlled. Its share price has collapsed. It has a reputation that will take years to develop.

It has seriously damaged Australia's reputation in international trade; damage which is slowly being made good, but as always, these things take time. The damage to Australia's trading reputation demonstrates beyond any doubt the need for States to proactively engage with the Guiding Principles and ensure not only that States themselves take human rights seriously, but that they ensure that their domestic laws also provide sufficient backing for human rights and international law enforceability. As the Commentary to the Guiding Principles state, it is important for States to leave sufficient domestic flexibility in their legal systems to enable them to effectively draw

corporations under their jurisdiction or in their territory towards compliance with human rights and international law responsibilities.

The last word should go to Commissioner Cole, who described the effects of these failings like this:

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

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

I consider the answer obvious.

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

What must be done to maintain sales to Iraq?

The answer given was:

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

No one asked, 'What is the right thing to do?' Instead, much time and money was spent trying to determine if arrangements could be formulated in such a way as to avoid breaching the law or sanctions, whether conduct could be protected, by various subterfuges, from discovery or scrutiny, and whether actions were legal or illegal. There was a lack of openness and frankness in AWB's dealing with the Australian Government and the United Nations. At no time did AWB tell the Australian Government or the United Nations of its true

arrangements with Iraq. And when inquiries were mounted into its activities it took all available measures to restrict and minimise disclosure of what had occurred. Necessarily, one asks, 'Why?'

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

Reference to the Guiding Principles would have avoided all of these unintended and appalling consequences. Corporate attention to compliance with international law, as opposed to creative searches for avoidance techniques, must surely be seen as a commercial, as well as a moral, imperative.