

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 Tuesday, 30 May 2006, at 10.45am

1 THE COMMISSIONER: The purpose of today's hearing is to
2 address all outstanding documentary matters and hopefully
3 to establish a process to ensure that this inquiry receives
4 all the documents to which it is entitled.

5
6 I wish to make one matter absolutely clear. I will
7 not require counsel assisting me to decide whether they
8 wish to recall witnesses previously called or to call
9 further witnesses until the inquiry has all the documents
10 to which it is entitled. It is likely that there will be
11 further public hearings at which oral evidence will be
12 called from witnesses. However, a final decision on which
13 witnesses must be recalled cannot yet be made. I do not
14 intend to have more than one further block of public
15 hearings.

16
17 Regarding outstanding documents, there are at least
18 five matters which need to be addressed. First, I must be
19 satisfied that AWB has fully responded to all notices
20 served upon it. Fourteen notices have been so served.
21 I will require an affidavit or statutory declaration from
22 an appropriate person attesting that all documents within
23 the purview of those notices have been provided.

24
25 Second, there needs to be a resolution of all
26 outstanding claims for legal professional privilege. The
27 Federal Court has now ruled, as I had previously ruled,
28 that exhibit 665 is not protected by legal professional
29 privilege, and it has been made public. In consequence, it
30 is probable that Mr Lindberg will be required to give
31 further evidence.

32
33 However, Young J, in *AWB v Cole*, held that a
34 Commissioner exercising powers conferred by the Royal
35 Commissions Act 1902 did not have power to require
36 production of a document to a commission or an inquiry
37 where the document was subject to legal professional
38 privilege. Further, his Honour held that a royal
39 commissioner did not have power to make a binding decision
40 whether a claim for legal professional privilege should be
41 upheld. That decision is binding upon me and upon all
42 future royal commissioners.

43
44 It has the effect that, where a person or company was
45 given notice to produce documents to a royal commission or
46 commission of inquiry and a claim for legal professional
47 privilege was made in respect of documents the subject of

1 such a notice, a royal commissioner could not, in practice,
2 proceed in the exercise of the obligations cast upon him by
3 the letters patent without an approach to the Federal
4 Court. The inconvenience of such an arrangement is
5 obvious.

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7 It is my view that a royal commissioner, or
8 commissioner exercising the powers under the Royal
9 Commissions Act 1902, should be able to exercise the
10 functions required of him by the letters patent by
11 exercising the powers conferred upon him by the Royal
12 Commissions Act 1902 without the assistance of a court
13 being sought. The function of the court is, in appropriate
14 circumstances, to review the exercise of power by a
15 Commissioner. I wrote to the Attorney-General accordingly.

16
17 There has now been introduced into the parliament a
18 bill which, should it be passed in its present form, will
19 allow a commissioner exercising the powers under the Royal
20 Commissions Act to require all documents, including those
21 subject to legal professional privilege, to be produced in
22 answer to a notice duly served. Where there is a claim for
23 legal professional privilege for a document, the
24 commissioner can, by notice, require its production to him
25 for the purpose of ruling upon whether the claim for legal
26 professional privilege should be upheld or rejected.

27
28 If the claim is upheld, the document must be returned
29 to the recipient of the notice and its contents must be
30 disregarded for the purposes of the commission. If the
31 claim for legal professional privilege is rejected, the
32 document will become available to the commission or
33 inquiry. Royal commissioners would thus have the power to
34 determine whether the claim for legal professional
35 privilege should be upheld, but the decision of a royal
36 commissioner may be subject to review by the Federal Court.

37
38 The need for such a process will become obvious when
39 I indicate that, to date, AWB has provided lists of
40 documents or categories of documents in respect of which a
41 claim for legal professional privilege has been made. To
42 date, the lists comprise 1,240 documents or categories of
43 documents. This inquiry has been advised that there is a
44 further long list yet to be provided. I do not know how
45 many additional documents will be on that list. I am faced
46 with the need to address the claims for legal professional
47 privilege of at least 1,240 documents, and possibly many

1 more.

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In relation to the lists provided to date, AWB has given a brief description of the document and has indicated the basis upon which legal professional privilege is claimed as being one of four categories or headings of legal professional privilege. One view of the decision of Young J in AWB v Cole is that two of the four categories of legal professional privilege do not apply to a royal commission or commission of inquiry. That may mean that the claim for legal professional privilege may not be maintained in respect of some of those 1,240 documents. However, I understand that counsel for AWB has indicated that AWB may not accept the interpretation of the judgment of Young J to which I have referred and, further, may seek to justify a claim for legal professional privilege on another basis.

I understand that AWB has indicated that it will provide to the inquiry a consolidated and complete list of all documents held by it or by witnesses in respect of which AWB claims legal professional privilege. The list will give a full description of the documents in respect of which the claim is made and also the basis upon which legal professional privilege is sought to be maintained. That will be helpful.

It may be that, upon consideration of such a list, I will be able to determine without further examination that some of the claims for legal professional privilege should be upheld. However, where I am unable to adopt that course, it will be necessary for AWB to place evidence before the inquiry and such evidence may need to be tested in order that a ruling can be made whether the claim should be upheld or rejected. If the claim is rejected, it will be necessary for me to give reasons for that rejection in order that AWB may, should it so desire, challenge the ruling in the Federal Court.

Of course, the process I have outlined can be implemented only if the parliament enacts the bill in its present or a similar form. One cannot presume the parliamentary outcome. I have no power to implement the procedures or make the rulings to which I have referred unless and until the parliament amends the Royal Commissions Act 1902, for I am precluded from so doing by the decision of Young J in AWB v Cole.

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Should the bill not pass through the houses of parliament, it will be necessary for AWB to commence proceedings in the Federal Court in respect of each of the documents in respect of which it wishes to maintain the claim for legal professional privilege, with attendant greatly increased cost and delay. I am not prepared to rule on a claim for legal professional privilege in respect of documents which I have not seen or which have not been described in sufficient detail to enable me to be satisfied regarding the claim.

I repeat, as a result of the decision in AWB v Cole, at present I have no power to require the production of documents in respect of which legal professional privilege is claimed. I have no entitlement to see the documents and I have no power to rule on the claims of legal professional privilege.

Should the parliament determine to amend the Royal Commissions Act 1902 in accordance with the bill introduced into the parliament, that process cannot occur before the week commencing 13 June, when the Senate will sit. Should the bill pass through the parliament, I will be anxious to commence the process of resolving the legal professional privilege claims as rapidly as possible. I am looking for an early receipt of the consolidated list of documents setting forth a description of the documents in respect of which legal professional privilege is claimed and the basis of the claim. There is no reason to delay production of that list.

Third, statements were provided from Messrs Fuller, Hargreaves and Cooper. Significant portions of those statements were blanked out on the basis of legal professional privilege. My understanding is that the claim was based in whole or in part upon the claim that the material in the statements addressed the legal advice received in respect of Project Rose or the compilation of documents associated with Project Rose.

On 7 April 2006, which was day 62 of the hearings, and after most witnesses had given their evidence, AWB conceded that the advice given by Mr Tracey QC in relation to Project Rose was not privileged because that privilege had been waived by disclosure of that advice to the Commonwealth Government. That meant that Mr Tracey's

1 brief, and perhaps documents associated with it and
2 involved in the conduct of Project Rose, became available.
3

4 The inquiry has that brief - it is confidential
5 exhibit 343 - which makes plain that AWB had a compilation
6 of many of the relevant documents assembled in a small
7 number of folders in May 2004. The documents in
8 Mr Tracey's brief were obviously those which lawyers
9 advising AWB regarded as material. There were 164
10 documents provided in Mr Tracey's brief. Of those, only
11 45, or 27 per cent, were within the documents which AWB
12 made available for examination by the Volcker Committee
13 investigators.
14

15 It is my understanding that AWB is re-examining the
16 statements of Messrs Fuller, Hargreaves and Cooper, where
17 portions of the statements provided to this inquiry have
18 been blanked out on the basis of a claim for legal
19 professional privilege stemming from Project Rose. If
20 legal professional privilege is to be maintained in respect
21 of any portion of the statements of Messrs Fuller,
22 Hargreaves and Cooper, there will need to be a
23 specification of the factual and legal basis for such
24 claim, and possibly evidence, so that it may be ruled upon.
25

26 Fourth, consideration needs to be given to any
27 documents yet to be produced to the inquiry. On Thursday
28 last, 25 May, the inquiry received a large volume
29 containing documents relating to exhibit 665 following
30 Young J's rejection of the claim for legal professional
31 privilege. I have mentioned there may be documents yet to
32 be produced to the inquiry flowing from the acceptance that
33 legal professional privilege for Mr Tracey's advice has
34 been waived. Additionally, there may be documents relating
35 to the advice of the professor from Cornell University if
36 the privilege in his advice has also been waived. There
37 may be other categories of documents.
38

39 Fifth, AWB has claimed confidentiality in respect of
40 many exhibits which I have marked as confidential. It is
41 intended that as many confidential exhibits as possible,
42 once the commercially sensitive portions have been blanked
43 out, will be tendered as public exhibits.
44

45 Yesterday afternoon the inquiry received a letter
46 addressing this topic and it is presently being considered.
47 I understand that AWB contends that 20 confidential

1 exhibits should remain as such. The date and extent of
2 future hearings is dependent upon resolution of the matters
3 I have addressed. I am anxious that they be resolved as
4 quickly, efficiently and cheaply as possible.

5
6 Mr Judd, is it convenient to address these five
7 matters in some order?

8
9 MR JUDD: Yes, I can do that, Commissioner. First of all,
10 might I apologise for the delay in my attendance this
11 morning.

12
13 THE COMMISSIONER: Not at all.

14
15 MR JUDD: There was ice on the wings. I might also say
16 that I had sought to have this hearing held on a later day
17 due to a previous engagement in court. That matter
18 adjourned yesterday and enabled me to attend today, and
19 that, I hope, is more convenient to the Commission than my
20 absence.

21
22 THE COMMISSIONER: You are always welcome, Mr Judd.

23
24 MR JUDD: And delighted to be here, sir. The first matter
25 we note - that is, the requirement of the statutory
26 declaration for compliance - we believe that we are in a
27 position to attest to the substantial compliance forthwith,
28 and so that matter can be addressed without any delay.

29
30 If I can leap over legal professional privilege just
31 for a moment and address the, if I can use the term,
32 unredacting of the statements of Messrs Cooper, Hargreaves
33 and Fuller. That is in progress and it should be done
34 within a matter of a day or so. We don't expect it to be
35 an onerous task. It is just one that has been a little
36 down the list of priorities, and it will be elevated so
37 that we can get that material to the Commission forthwith.

38
39 The question of legal professional privilege is a
40 troubling one, but we believe that we have a solution to
41 it. As presently advised, we will be commencing a
42 proceeding today to have the Federal Court resolve the
43 claims in respect of all documents, and if there are
44 documents in particular that the Commission wishes to focus
45 attention on, these can be, of course, given priority.
46 With some good management and goodwill on the part of the
47 parties, we believe that this can be done much more

1 expeditiously than the alternative processes and, indeed,
2 waiting for the new Act, if parliament sees fit to enact
3 it.
4

5 In our submission, we have a responsibility and we
6 also have a desire to have these matters resolved as
7 quickly as possible. It is our view, Commissioner, that
8 this is the most expeditious course open, and one that will
9 produce a result more rapidly than any other course that we
10 are minded to consider at this stage, particularly having
11 regard to the uncertain nature of the legislation which is
12 proposed.
13

14 We are not confident of the future of that
15 legislation. We have little doubt that parliament will
16 deal with it, but we have some concerns about the validity
17 of the legislation. That being so, we are of the view, and
18 propose to act on this view, that the claims can be most
19 expeditiously and thoroughly dealt with in the Federal
20 Court. We would seek to expedite that process, and we
21 would be assisted if the Commission, once receiving the
22 final list, which we anticipate will be here today, can
23 provide some indication of what documents are of particular
24 interest.
25

26 THE COMMISSIONER: How can we do that if we don't see the
27 documents?
28

29 MR JUDD: That, Commissioner, is an inherent difficulty
30 which any party to litigation has.
31

32 THE COMMISSIONER: No, we are not in inter partes
33 litigation.
34

35 MR JUDD: Well, with respect, Commissioner, this is not
36 unlike inter partes litigation, when one is considering as
37 between the Commission and AWB the claims that we make to
38 legal professional privilege.
39

40 THE COMMISSIONER: I don't agree with that at all.
41

42 MR JUDD: Be that as it may, this is the course that we
43 will be taking, and we would be assisted if the
44 Commissioner and the Commission were minded to identify
45 documents. If not, it will be for us to move through the
46 documents, support the claims for privilege as rapidly as
47 possible. I think I mentioned a moment ago that the final

1 list will be delivered, we anticipate, today, so that that
2 will be here.

3

4 You mentioned, sir, something to the effect that
5 counsel for AWB had conveyed a view that he or they did not
6 accept the decision of Young J in some respect. That comes
7 as a surprise to me.

8

9 THE COMMISSIONER: My understanding was that there was
10 some doubt that had been cast upon whether or not
11 categories - is it 1 and 3 or 2 and 4, the advice
12 categories, the litigation privilege claims - applied in
13 relation to commissions of inquiry.

14

15 MR JUDD: Certainly Young J concluded that, in his view,
16 litigation privilege didn't apply, and so that's the
17 position that obtains at present.

18

19 THE COMMISSIONER: Yes.

20

21 MR JUDD: In those circumstances, one of the tasks that is
22 being undertaken is to look at those documents and ensure
23 that the only basis for a claim is litigation privilege.
24 If that is the case, then so be it.

25

26 Now, I think one of the other classes so defined made
27 reference to litigation but it was in the context of advice
28 given for litigation, so it is a slightly different issue.

29

30 THE COMMISSIONER: I should say to you, I would be
31 absolutely delighted if somebody else were prepared to
32 undertake this task and I didn't have to do it.

33

34 MR JUDD: We assumed the Commission would find the
35 prospect exhilarating.

36

37 THE COMMISSIONER: However, it may be a matter for - no
38 doubt will be a matter for - the discretion of the judge of
39 the Federal Court as to whether or not he wishes to await
40 either the passing of legislation or await a preliminary
41 review from a royal commissioner.

42

43 MR JUDD: It may be so. Quite frankly, Commissioner, we
44 saw the delay as unacceptable from our point of view in
45 having this matter resolved - even a number of weeks. If
46 the likelihood is that the matter ends up in the court
47 anyway, it seems to us, with respect, to be a sensible

1 course to get the process under way as quickly as possible
2 and to get some directions for the resolution of what we
3 can identify, we think, as those documents that might be of
4 most significance to the inquiry and have those resolved
5 first.

6

7 We have no desire to prolong this process. We have
8 become concerned at the volume of correspondence passing
9 between the Commission's solicitors and my instructing
10 solicitors on the topic. It did seem to us that it
11 required an independent resolution and one that we think
12 can be achieved expeditiously.

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14 THE COMMISSIONER: You mean independently other than by
15 me?

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17 MR JUDD: Independent of the Commission. So that's the
18 course that we propose taking, and of course the Commission
19 will be both formally and informally kept fully informed of
20 the progress as that unfolds. The starting point, of
21 course, will be the lists of documents that have already
22 been prepared, including the one to come today.

23

24 THE COMMISSIONER: I think the preparation of a
25 comprehensive list, whether it be for me or the inquiry or
26 for the judge in the Federal Court, will be essential,
27 because one simply will have to work through from document
28 number 1 to document number whatever thousand it is.

29

30 MR JUDD: My understanding is that there are some hundreds
31 of documents to come in the list to be delivered today.

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33 THE COMMISSIONER: To be added to the 1,240?

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35 MR JUDD: Yes.

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37 THE COMMISSIONER: Those 1,240 include, as I understand
38 it, some groups?

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40 MR JUDD: Correct.

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42 THE COMMISSIONER: So we are talking about some thousands
43 of documents.

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45 MR JUDD: Some document management is going to be
46 necessary not only to present it to the court but also to
47 ensure that it can be done expeditiously. That is in

1 everyone's interests.

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As far as confidentiality is concerned,
Commissioner --

THE COMMISSIONER: It probably will also involve the Commonwealth being a respondent, no doubt, and the briefing of new counsel to address it on behalf of the Commonwealth, because this inquiry will be a consenting defendant.

MR JUDD: Yes. That may well be so or, in any event, the Commonwealth may choose to intervene. Ordinarily, the Commonwealth would be joined as a party.

As far as confidentiality is concerned, we note that the matter is under consideration by the Commission. The only other matter addressed in the enumerated topics, Commissioner, was the bundle of additional material and such further material as may emerge from document searches. Save for privileged material or material in respect of which a claim for privilege is made, we don't anticipate further material.

THE COMMISSIONER: What about the statements of Messrs Cooper and Hargreaves and --

MR JUDD: I mentioned those, I think, as my second topic.

THE COMMISSIONER: You did, but is it going to be maintained a claim for privilege for a portion of those, because, if so, that should go to the Federal Court too?

MR JUDD: We would anticipate having any issue that requires a determination dealt with. I think I said on a prior occasion that the claims for privilege, if any, in relation to the content of those will not be claims in respect of the recitation of the advice given by Mr Tracey, but will only be based upon the privilege attaching to the independent position of legal advisers. So we are conscious of the distinction that the Commission draws, and we intend to apply that in our review of those statements.

THE COMMISSIONER: And AWB will place before the Federal Court all material which might relate to any aspect of waiver of privilege? I have in mind the Cornell University professor's advice.

1 MR JUDD: Yes. We are content that the Federal Court deal
2 with all issues, so that if there is a waiver issue in the
3 wings, as it were, then that will be a matter that is
4 addressed. That, I think, has already been raised by the
5 Commission in relation to that piece of advice. We can be
6 confident, of course, that if we have overlooked anything,
7 the Commission or the Commonwealth will no doubt jog our
8 memory.

9
10 THE COMMISSIONER: It won't be the Commission. It will be
11 the Commonwealth.

12
13 MR JUDD: Yes. That's the course that we propose and, as
14 we say, Commissioner, one that we think will deal with the
15 matters expeditiously. Subject to that, I have probably
16 dealt with each of the topics that you have raised.

17
18 THE COMMISSIONER: Mr Judd, there is no comment that
19 I wish to make about that. It is a right that you have to
20 take that course. It will be a matter for the Federal
21 Court to decide whether they are agreeable, in the light of
22 this bill, to undertaking that task. Whether it turns out
23 to be a more expeditious or a less expeditious resolution
24 perhaps we will never know.

25
26 MR JUDD: Well, Commissioner, it is not just a right which
27 we have. In our view and in our submission it is a
28 responsible course. We want the matters resolved. We want
29 them resolved by the court. It seems to delay until the
30 new bill comes into effect is to delay too long. So we
31 will move forthwith.

32
33 THE COMMISSIONER: Thank you. Mr Agius, is there anything
34 you wish to say?

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36 MR AGIUS: I could take it up later with my learned
37 friend. One inquiry that occurred to me was whether or not
38 my learned friends were intending to move the Federal Court
39 for expedition in relation to any application that they
40 were proposing to make and whether they had had any
41 indication as to --

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43 THE COMMISSIONER: I rather gathered that they would be.

44
45 MR JUDD: Of course.

46
47 MR AGIUS: And whether there has been any indication as to

1 a date.

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3 MR JUDD: No.

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5 MR AGIUS: I have nothing to say about that. Those
6 matters will take their own course, and, hopefully, will be
7 resolved at least at first instance.

8
9 There are some other matters that I would wish to deal
10 with. The inquiry has obtained statutory declarations from
11 six directors of AWB. I have copies of those statutory
12 declarations together with a schedule marked "Schedule A",
13 which covers the six statutory declarations. It refers to
14 their date, their barcode, and any documents that they
15 refer to. We have taken the liberty of assigning
16 notionally exhibit numbers to them. I will tender the six
17 statutory declarations, together with schedule A which
18 records them.

19
20 EXHIBIT #973 ADDITIONAL STATEMENT OF MR BARRY,
21 BARCODED WST. 0033. 0093_R-0095_R

22
23 EXHIBIT #974 ADDITIONAL STATEMENT OF MR CHARMARETTE,
24 BARCODED WST. 0033. 0062_R-0065_R

25
26 EXHIBIT #975 ADDITIONAL STATEMENT OF MR HOWARTH,
27 BARCODED WST. 0033. 0002_R-0004_R

28
29 EXHIBIT #976 ADDITIONAL STATEMENT OF MR MARTIN,
30 BARCODED WST. 0033. 0154_R-0157_R

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32 EXHIBIT #977 ADDITIONAL STATEMENT OF MR McCLELLAND,
33 BARCODED WST. 0033. 0123_R-0126_R

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35 EXHIBIT #978 ADDITIONAL STATEMENT OF MR SCHMOLL,
36 BARCODED WST. 0033. 0032_R-0034_R

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38 MR AGIUS: Mr Commissioner, we have also obtained
39 additional statutory declarations from present and past
40 officers or employees of the Commonwealth. We have 11 of
41 those. I have copies of them. They are covered by a
42 schedule, schedule B. In this case we have taken the
43 precaution of leaving blank the column which is provided on
44 the schedule for the exhibit numbers. I tender those 11
45 further statutory declarations.

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1 EXHIBIT #979 STATEMENT FROM MR BROWN,
2 BARCODED DFT. 0023. 0328-0331

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4 EXHIBIT #980 STATEMENT FROM MR WILLIAMS,
5 BARCODED DFT. 0037. 0029-0035

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7 EXHIBIT #981 STATEMENT FROM MR McCARTHY,
8 BARCODED DFT. 0037. 0002-0005

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10 EXHIBIT #982 STATEMENT FROM MR RICHARDSON,
11 BARCODED DFT. 0037. 0006-0020

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13 EXHIBIT #983 STATEMENT FROM MS OWEN,
14 BARCODED DFT. 0037. 0021_R-0028_R

15
16 EXHIBIT #984 STATEMENT FROM MS BIRGIN,
17 BARCODED DFT. 0037. 0037-0038

18
19 EXHIBIT #985 STATEMENT FROM MR ATKIN,
20 BARCODED DFT. 0037. 0039-0040

21
22 EXHIBIT #986 STATEMENT FROM MR QUINN,
23 BARCODED DFT. 0037. 0041-0045

24
25 EXHIBIT #987 STATEMENT FROM MR HENNESSY,
26 BARCODED DFT. 0037. 0047_R-0050_R

27
28 EXHIBIT #988 STATEMENT FROM MR DORAN,
29 BARCODED DFT. 0037. 0062-0067

30
31 EXHIBIT #989 STATEMENT FROM MR AYYASH,
32 BARCODED DFT. 0037. 0052-0060

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34 MR AGIUS: Those statutory declarations and statements
35 will be, now that they have been marked as exhibits, posted
36 on our web site, probably overnight, and thereby made
37 available to those who have leave to appear, and, indeed,
38 to anybody who wishes to access them.

39
40 That is the total of the additional matters that I
41 have to deal with today.

42
43 THE COMMISSIONER: Very well. Thank you. Then I shall
44 adjourn to a date to be fixed.

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46 AT 11.18AM THE COMMISSION WAS ADJOURNED TO A DATE TO BE
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