FEDERAL COURT OF AUSTRALIA

 Crowley v Worley Limited (No 2) [2023] FCA 1613

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| File number: |  |
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| Judgment of: | **JACKMAN J** |
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| Date of judgment: | 19 December 2023 |
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| Catchwords: | **CORPORATIONS** – representative proceedings – where listed company made announcements as to earnings expectations – whether representations constituted misleading or deceptive conduct – whether there was a reasonable basis for making the representations as to expectations of future earnings – attribution of knowledge to a corporation – whether breach of continuous disclosure obligations – contraventions established**DAMAGES** – whether group members suffered loss applying market-based causation – active indirect causation in relation to purchase of securities – primary counterfactual not made out – where there is no economic correspondence or equivalence – causation and loss not established**HIGH COURT AND FEDERAL COURT** – principles on remitter for further hearing and determination – extent to which findings of the primary judge disturbed on appeal – circumstances in which remitter judge bound by findings of appellate court and primary judge  |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BB, 12DA, 12GF*Competition and Consumer Act 2010* (Cth) Sch 2 (*Australian Consumer Law*), ss 4, 18, 236*Corporations Act 2001* (Cth) ss 9, 9AD, 674, 1041H, 1041I, 1317HA*Federal Court of Australia Act 1976* (Cth) Pt IVA, s 28 |
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| Cases cited: | *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd* [2007] FCA 40; (2007) 157 FCR 564*Australian Securities and Investments Commission v King* [2020] HCA 4; (2020) 270 CLR 1*Australian Securities and Investments Commission v M101 Nominees Pty Ltd (in liq) (No 6)* [2023] FCA 1276*Berry v CCL Secure Pty Ltd* [2020] HCA 27; (2020) 271 CLR 151*Biggin & Co Ltd v Permanite Ltd* [1951] 1KB 422*Blatch v Archer* (1774) 98 ER 969*Braham v ACN 101 482 580 Pty Ltd* [2020] VSCA 108*Browne v Dunn* (1893) 6 R 67*Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304*City of Botany Bay Council v Jazabas Pty Ltd* [2001] NSWCA 94*Comcare v Martin* [2016] HCA 43; (2016) 258 CLR 467*Community and Public Sector Union v Telstra Corp Ltd (No 2)* [2001] FCA 479; (2001) 112 FCR 324*Crowley v Worley Limited* [2020] FCA 1522*Crowley v Worley Limited* [2022] FCAFC 33; (2022) 293 FCR 438*Crowley v WorleyParsons Limited (No 2)* [2019] FCA 1535*Enzed Holdings Ltd v Wynthea Pty Ltd* [1984] FCA 373; (1984) 57 ALR 167*Fernando v Commonwealth* [2014] FCAFC 181; (2014) 231 FCR 251*Fox v Percy* (2003) 214 CLR 118*Harvard Nominees Pty Ltd v Nicoletti* [2022] FCAFC 179*Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105; (2022) 403 ALR 498*HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54; (2004) 217 CLR 640*Jones v Dunkel* (1959) 101 CLR 298*Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361*Masters v Lombe (in his capacity as liquidator of Babcock & Brown Limited) (in liq)* [2021] FCAFC 161; (2021) 392 ALR 326*Morley v Australian Securities and Investments Commission* [2010] NSWCA 331; (2010) 274 ALR 205; (2010) 81 ACSR 285*New Aim Pty Ltd v Leung (No 3)* [2023] FCA 1295*Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10; (2003) 196 ALR 257*Re DCA Enterprises Pty Ltd* [2023] NSWSC 11; (2023) 166 ACSR 156*Re HIH Insurance Ltd (in liq)* [2016] NSWSC 482; (2016) 335 ALR 320*Re Mediation & Online Dispute Resolution Operating Network Pty Ltd* [2022] NSWSC 5*Roufeil v Tarrant Enterprises Pty Ltd* [2023] FCAFC 142*Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53*Shafron v Australian Securities and Investments Commission* [2012] HCA 18; (2012) 247 CLR 465*Sykes v Reserve Bank of Australia* (1998) 88 FCR 511*Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23*TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* [2019] FCA 1747; (2019) 293 FCR 29 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 268 |
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| Date of hearing: | 27 November – 1 December 2023  |
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| Counsel for the Applicant: | Mr D Sulan SC, Mr A Edwards and Mr M Pulsford |
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| Solicitor for the Applicant: | Shine Lawyers |
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| Counsel for the Respondent: | Ms W A Harris KC, Mr R G Craig KC and Ms J A Findlay |
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| Solicitor for the Respondent: | Herbert Smith Freehills |

ORDERS

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|  | NSD 1292 of 2015 |
|   |
| BETWEEN: | LARRY CROWLEYApplicant |
| AND: | WORLEY LIMITED (ACN 096 090 158)Respondent |

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| order made by: | JACKMAN J |
| DATE OF ORDER: | 19 December 2023 |

**THE COURT ORDERS THAT:**

1. The questions set out in the Joint List of Issues for Determination be answered as follows:

Question 1: Was the FY2014 Guidance Representation a representation as to future matters and, if so, in what respects?

Answer: Yes, to the extent only that it conveyed the representation that WOR expected to achieve NPAT in excess of $322 million in FY14.

Question 2: At any time throughout the period from 14 August 2013 to 19 November 2013 (**Relevant Period**), alternatively in the period from 9 October 2013, 10 October 2013 or 15 October 2013 to the end of the Relevant Period:

2.1 in so far as the FY2014 Guidance Representation was a representation as to present matters, was it misleading or deceptive, or likely to mislead or deceive; and

2.2 in so far as the FY2014 Guidance Representation was a representation as to future matters, was it made without a reasonable basis?

Answer: Yes in relation to both questions, at all times throughout the Relevant Period.

Question 3: By making the FY14 Guidance Representation, did WOR engage in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of any of the pleaded statutes (**Misleading or Deceptive Conduct**) during all or any part of the Relevant Period (and if so, when) (**FY2014 Guidance Representation Contravention**)?

Answer: Yes, during all of the Relevant Period.

Question 4: By making the FY14 Earnings Guidance Statement, did WOR engage in Misleading or Deceptive Conduct during all or any part of the Relevant Period (and if so, when) (**FY2014 Guidance Statement Contravention**)?

Answer: Yes, during all of the Relevant Period.

Question 5: At any time during the Relevant Period, was it the fact that WOR did not have a reasonable basis for making the FY2014 Earnings Guidance Statement (**FY2014 Guidance Material Information**)?

Answer: Yes, at all times throughout the Relevant Period.

Question 6: If the answer to Question 5 is “yes”, was WOR “aware” within the meaning of ASX Listing Rule 19.12 of the FY2014 Guidance Material Information at any time during the Relevant Period (and if so, when)?

Answer: Yes, at all times throughout the Relevant Period.

Question 7: Between 14 August 2013 and immediately before WOR’s announcement to the ASX on 20 November 2013 (**20 November 2013 Announcement**), was it a fact that the consensus expectation of professional analysts covering the ASX and ordinary shares in WOR (**WOR Securities**), that WOR would deliver between $354 and $368 million in NPAT for FY2014 (**FY2014 Earnings Expectation**)?

Answer: No.

Question 8: If the answer to Question 7 above is “yes”, by 14 August 2013, was WOR aware of the FY2014 Earnings Expectation?

Answer: Does not arise.

Question 9: at any time during the Relevant Period, was it the fact that WOR’s FY2014 earnings were likely to fall materially short of the FY2014 Earnings Expectation (**FY2014 Consensus Forecast Material Information**)?

Answer: Does not arise.

Question 10: If the answer to Question 9 is “yes”, was WOR “aware” within the meaning of ASX Listing Rule 19.12 of the FY2014 Consensus Forecast Material Information at any time during the Relevant Period (and if so, when)?

Answer: Does not arise.

Question 11: Did WOR at any time prior to 20 November 2013 become obliged pursuant to Listing Rule 3.1 to tell the ASX of the FY2014 Guidance Material Information and/or the FY2014 Consensus Forecast Material Information?

Answer:

(a) in relation to the FY2014 Guidance Material Information: Yes; and

(b) in relation to the FY2014 Consensus Forecast Material Information: No.

Question 12: Did WOR contravene section 674(2) of the *Corporations Act* by not informing the ASX of:

12.1 the FY2014 Guidance Material Information on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013 (**FY2014 Guidance Material Information Contravention**); and/or

12.2 the FY2014 Consensus Forecast Material Information on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013 (**FY2014 Consensus Forecast Material Information Contravention**)?

Answer:

(a) as to Question 12.1: Yes; and

(b) as to Question 12.2: No.

Question 13: During the Relevant Period, did the Contraventions (or any of them) cause the market price for WOR Securities to be substantially greater than:

13.1 their true value; and/or

13.2 the market price that would have prevailed but for the Contraventions (or any of them),

and if so, by how much?

Answer: No, in relation to both questions 13.1 and 13.2. The question as to how much does not arise.

Question 14: In the decision to acquire an interest in WOR Securities did the Applicant rely directly on the FY2014 Guidance Representation or the FY2014 Earnings Guidance Statement and its repetition on 9, 10 and 15 October 2013?

Answer: Yes, in relation to the FY2014 Guidance Representation and the FY2014 Earnings Guidance Statement, but not in relation to its repetition on 9, 10 and 15 October 2013.

Question 15: Has the Applicant suffered loss and damage in relation to his interest in WOR Securities by and resulting from his reliance on the Contraventions, and if so by how much?

Answer: No.

2. Pursuant to s 33ZB of the *Federal Court of Australia Act 1976* (Cth) the applicant and all persons who are Group Members at the date of these orders (other than those who have opted out of the proceedings) are bound by the answers to the questions set out in Order 1 above.

3. The respondent file and serve written submissions and any affidavit(s) in support in relation to costs of the proceedings (including the costs of the initial hearing at first instance) and final orders by 2 February 2024.

4. The applicant file and serve written submissions and any affidavit(s) in support in relation to costs of the proceedings (including the costs of the initial hearing at first instance) and final orders by 16 February 2024.

5. The respondent file and serve any written submissions and affidavit(s) in reply in relation to costs and final orders by 1 March 2024.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**Definitions:**

“**Contraventions**” mean the:

(a) FY2014 Guidance Representation Contravention (as defined in Question 3);

(b) FY2014 Guidance Statement Contravention (as defined in Question 4);

(c) FY2014 Guidance Material Information Contravention (as defined in Question 12.1); and/or

(d) FY2014 Guidance Material Information Contravention (as defined in Question 12.2);

“**FY2014 Guidance Representation**” has the same meaning as defined in paragraph 51 of the Fourth Further Amended Statement of Claim. It means, individually and together, a representation made by WOR that:

(a) It expected to achieve NPAT in excess of $322 million in the financial year ended 30 June 2014; and

(b) It had reasonable grounds to expect that it would achieve NPAT in excess of $322 million in the financial year ending 30 June 2014.

“**FY2014 Earnings Guidance Statement**” has the same meaning as defined in paragraph 12(b) of the Fourth Further Amended Statement of Claim. It means the following statement made by WOR on 14 August 2013: *“While recognizing the uncertainties in world markets, we expect our geographic and sector diversification to provide a solid foundation to deliver increased earnings in FY2014”.*

REASONS FOR JUDGMENT

JACKMAN J

## Introduction

1 This is the judgment on the remitter to a single judge for determination on a reconsideration of the whole of the evidence which was ordered by the Full Court in *Crowley v Worley Limited* [2022] FCAFC 33; (2022) 293 FCR 438 (**AJ**), in allowing an appeal from the reasons of the primary judge in *Crowley v Worley Limited* [2020] FCA 1522 (**PJ**).

2 In broad terms, the proceedings concern announcements made a decade ago by Worley Limited (**WOR**), a company listed on the (then) Australian Stock Exchange (**ASX**). WOR is a provider of services in the resources, energy and infrastructure sectors. On 14 August 2013, WOR made an ASX announcement to the effect that WOR had a solid foundation for expecting earnings growth on the figure of $322 million, being WOR’s net profit after tax (**NPAT**) for the year ended 30 June 2013. WOR’s August 2013 earnings guidance statement published on 14 August 2013 was as follows:

While recognizing the uncertainties in world markets, we expect our geographic and sector diversification to provide a solid foundation to deliver increased earnings in FY2014.

That earnings guidance was based on WOR’s internal budget for the 2013/14 financial year, which its board approved on 13 August 2013, and which forecast net profit after tax in that year of $352 million. On 9 October 2013, being the date of its Annual General Meeting, WOR made a further announcement to the market, to the effect that its first-half result would be lower than in the prior year, but that it affirmed the earnings guidance statement made on 14 August 2013. On 10 and 15 October 2013, WOR repeated the earnings guidance statement initially made on 14 August 2013. However, on 20 November 2013, WOR announced revised earnings guidance in the following terms:

On current indications the company now expects to report underlying NPAT for FY2014 in the range of $260 million to $300 million with first half underlying NPAT in the range of $90 million to $100 million.

3 The proceedings have been brought by Mr Crowley as representative proceedings pursuant to Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**), on his own behalf and on behalf of other persons (with the exception of those who opted out) who purchased WOR shares in the period between 14 August 2013 and 19 November 2013 (**Relevant Period**), and who allegedly suffered loss by reason of WOR’s conduct as pleaded in the fourth further amended statement of claim (**4FASOC**) filed on the first day of the trial. That pleading alleges contraventions of WOR’s continuous disclosure obligations under s 674 of the *Corporations Act 2001* (Cth) (the **Corporations Act**) and r 3.1 of the ASX Listing Rules (**Listing Rules**), and the prohibition on misleading or deceptive conduct in s 1041H of the Corporations Act, s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) and s 18 of the *Australian Consumer Law* (being Sch 2 of the *Competition and Consumer Act 2010* (Cth)) (the **ACL**).

## Glossary

4 I have used the following defined terms in these reasons.

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| **Defined Term** | **Definition** |
| **4FASOC** | Fourth Further Amended Statement of Claim |
| **9 October 2013 Announcement** | The statement WOR published on 9 October 2013 to the effect that its first-half result would be lower than in the prior year, but that it affirmed the August 2013 earnings guidance statement |
| **27 May 2013 Draft Budget** | The proposed budgets prepared by each of the Locations in which WOR operated, which when compiled together on 27 May 2013 disclosed an NPAT of $252 million for FY14 (which NPAT increased to $284 million by the time of adoption of the FY14 Budget due to changes in foreign exchange rates) |
| **A&RC** | Audit and Risk Committee of the Board of WOR, comprised of Board members |
| **ACL**  | *Australian Consumer Law*, being Sch 2 of the *Competition and Consumer Act 2010* (Cth) |
| **AGM** | Annual General Meeting |
| **ANZ** | Australia and New Zealand |
| **ASCH** | Asia and China |
| **ASIC Act** | *Australian Securities and Investments Commission Act 2001* (Cth) |
| **ASX** | Australian Stock Exchange |
| **August 2013 Earnings Guidance Statement** | The statement published on 14 August 2013 saying: “While recognising the uncertainties in world markets, we expect our geographic and sector diversification to provide a solid foundation to deliver increased earnings in FY2014.” |
| **BEBIT** | Business earnings before interest and tax |
| **Blue Sky** | Estimated revenue from expected projects not identified at the time of forecasting |
| **Board** | WOR’s Board of Directors, on which throughout the relevant period Mr Wood was the only Executive Director |
| **CAN** | Canada |
| **CEO** | Chief Executive Officer |
| **CEOC** | The CEO’s Committee, comprising the members of ExCo, Mr Holt (in the period when he was not formally on ExCo), the eight RMDs who reported to Mr Bradie, and the three Managing Directors of the CSGs. The CEOC’s role was only to advise Mr Wood and it did not make decisions. |
| **CFO** | Chief Financial Officer |
| **Consensus Expectation** | The allegation of the existence of a consensus expectation of professional analysts covering the ASX and WOR, held between 14 August 2013 and immediately prior to the November 2013 revised earnings guidance, that WOR would deliver between $354 and $368 million in NPAT for FY14 |
| **Corporations Act** | *Corporations Act 2001* (Cth) |
| **CSGs** | The three Customer Service Groups into which WOR allocated customers for FY14, being Hydrocarbons (customers involved in extracting and processing oil and gas), Minerals, Metals & Chemicals (also referred to as MM&C) and Infrastructure, each headed by a Managing Director |
| **Earnings Expectation Material Information** | The proposition that WOR’s FY14 earnings were likely to fall materially short of the consensus expectation of professional analysts covering the ASX and WOR securities that WOR would deliver between approximately $354 and $368 million in NPAT for FY14 |
| **EBIT** | Earnings before interest and tax |
| **EBITDA** | Earnings before interest, tax, depreciation and amortisation |
| **EUR** | Europe |
| **ExCo** | The Executive Committee which reported directly to Mr Andrew Wood, WOR’s Chief Executive Officer (**CEO**), and comprising Mr Wood and six Group Managing Directors who reported directly to Mr Wood, being Mr Bradie, Mr Ross, Mr Steele, Mr Karren, Mr Bloch, and, from September 2013, Mr Holt. The ExCo met at least monthly. |
| **FCA Act** | *Federal Court of Australia Act 1976* (Cth) |
| **FY13** | The financial year ended 30 June 2013 |
| **FY14** | The financial year ended 30 June 2014 |
| **FY14 Budget** | WOR’s budget for the financial year 2013/2014 approved by WOR’s board on 13 August 2013 and which forecast NPAT of $352 million |
| **FY14 WOR Earnings Expectation** | This has the same meaning as the Consensus Expectation |
| **FY14 Guidance Representation** | The representation conveyed by WOR publishing and maintaining its August 2013 earnings guidance statement that: (a) it expected to achieve NPAT in excess of $322 million in FY14, and (b) it had reasonable grounds to expect that it would achieve NPAT in excess of $322 million in FY14 |
| **GMD** | Group Managing Director |
| **Go and Get** | An assessment of Go and Get likelihood was made for proposals and prospects in order to risk weight forecasted revenue and costs for work that may not materialise: “Go” was a percentage figure representing the likelihood that the project would be undertaken at all, and “Get” was a percentage figure representing the likelihood that WOR would be engaged for the work in the event that the project went ahead |
| **Group Members** | All persons who purchased WOR shares during the Relevant Period, and who allegedly suffered loss or damage by reason of the pleaded conduct of WOR |
| **HOH** | “Half on half” referring to the “phasing” or timing of financial results, in particular the comparison of results between the first half of a financial year, being 1 July to 31 December (**H1**), and the second half, being 1 January to 30 June (**H2**) |
| **Holt Memo Interview Notes** | The interview notes which accompany the Holt Memorandum |
| **Holt Memorandum** | A memorandum from Mr Holt, CFO, to the A&RC dated 5 December 2013 |
| **Joint List** | Joint list of issues for determination |
| **LAM** | Latin America |
| **Listing Rules** | The Listing Rules of the ASX |
| **Location** | The business locations into which each Region was divided, of which there were 43 in total |
| **Management Adjustments** | Adjustments to the 27 May 2013 Draft Budget made in or about June 2013 by senior management of WOR comprising: (i) $31.046m in operational EBIT; (ii) $12m for acquisition stretch; (iii) a further $14.093m in operational EBIT; (iv) $33m in overhead savings; and (v) $32m in foreign exchange benefit. |
| **Material Information** | The proposition that WOR did not have a reasonable basis for making the August 2013 Earnings Guidance Statement |
| **MENAI** | Middle East, North Africa, India |
| **MM&C** | The CSG known as Minerals, Metals & Chemicals. |
| **November 2013 Revised Earnings Guidance** | The statement WOR published on 20 November 2013 that: “On current indications the company now expects to report underlying NPAT for FY2014 in the range of $260 million to $300 million with first half underlying NPAT in the range of $90 million to $100 million.” |
| **NPAT** | Net profit after tax |
| **P50 Budget** | A budget using the P50 parameter, being a probabilistic Monte Carlo analysis of the statistical confidence level for an estimate, meaning that 50% of estimates exceed the P50 estimate and 50% of estimates are less than the P50 estimate; that is, there is an equal chance of exceeding or going below the estimate |
| **Proposals** | Work for which WOR had submitted a tender or had received a request for a tender, where there was usually a proposed start date for the project within the forthcoming year |
| **Prospects** | Tender processes for which WOR had not yet submitted a tender, or known projects where the tender process had not started |
| **Region** | One of the eight regions around the world into which WOR’s business was organised, known as ANZ, CAN, ASCH, USAC, LAM, MENAI, EUR and SSA |
| **Relevant Period** | 14 August 2013 to 19 November 2013 |
| **RMD** | Regional Managing Director |
| **Sandbagging**  | The suspected practice of executives in WOR’s Locations attempting to lower the expectations of senior management by submitting a draft budget that they could then exceed quite readily |
| **Secured Work** | WOR’s portfolio of work in hand, where a signed contract for the work existed |
| **SSA** | Sub-Saharan Africa |
| **SWO** | Southwest Ops, being one of five Locations in the USAC Region |
| **Unsecured Work** | Work described either as a Proposal, Prospect or Blue Sky |
| **USAC** | USA and Caribbean |
| **Vision 2017** | WOR’s objective of year-on-year growth in every year from FY13 to FY17 as described in WOR’s 2012 annual report |
| **WOR** | Worley Limited, formerly known as WorleyParsons Limited. |

## Dramatis Personae

5 The following were the key individuals at WOR involved in the relevant events:

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| **Name** | **Role** |
| John Allen | Global Director – Corporate Finance |
| Robert Ashton | RMD of MENAI Region |
| Barry Bloch | GMD People |
| Stuart Bradie | GMD of Operations |
| Frank Calderone | Controller – Global Management Reporting and Performance |
| Andy Cole | Managing Director of the Infrastructure CSG |
| Michael Daly | Global Director – Operations and Communications Support |
| Rose Dawn | Business Manager – Global Operations |
| Brian Evans | Managing Director of the Hydrocarbons CSG |
| Simon Holt | Chief Financial Officer |
| Randy Karren | GMD Improve  |
| Dennis Lucey | RMD of ASCH Region |
| Roisin McLernon | Senior Manager, Global Management Reporting |
| Iain Ross | GMD Development |
| Mark Southey | Managing Director of the Minerals, Metals & Chemicals CSG |
| David Steele | GMD New Ventures |
| Kirsty Wallace | Group Financial Controller |
| Ian Wilkinson | RMD of ANZ Region |
| Andrew Wood | CEO and Executive Director |

## Nature of the Remitter

6 The orders made by the Full Court on 11 March 2022 set aside the primary judge’s orders dismissing the originating application and 4FASOC and ordered that:

3. The matter be remitted to a single judge for such further hearing as that judge decides and for determination.

…

5. The costs of the hearing below be remitted to the single judge for such further hearing as that judge decides and for determination.

The orders for remitter would appear to have been made pursuant to s 28(1)(c) of the FCA Act. It is well established that the “further hearing and determination” referred to in s 28(1)(c) is a continuation of a trial that has already begun, though interrupted by a final order which has been set aside: *Community and Public Sector Union v Telstra Corp Ltd (No 2)* [2001] FCA 479; (2001) 112 FCR 324 at [15] and [17] (Finkelstein J); *Fernando v Commonwealth* [2014] FCAFC 181; (2014) 231 FCR 251 at [52]-[53] (Besanko and Robertson JJ, with whom Barker J agreed); *Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105; (2022) 403 ALR 498 at [43] (Jackson J); *Australian Securities and Investments Commission v M101 Nominees Pty Ltd (in liq) (No 6)* [2023] FCA 1276 at [47]-[49] (O’Callaghan J); *New Aim Pty Ltd v Leung (No 3)* [2023] FCA 1295 at [13]-[16] (O’Callaghan J).

7 The parties have prepared a joint list of issues for determination (**Joint List**) on the remitter, comprising 15 questions. Questions 1-4 deal with the misleading or deceptive conduct case, questions 5-12 deal with the continuous disclosure case, and questions 13-15 deal with causation, loss and damage. It is common ground between the parties that those questions should be answered by reference to the evidence adduced at the initial hearing before the primary judge. Neither party has sought to amend their pleadings. There is an application by Mr Crowley to reopen his case and adduce further evidence, which I deal with in my reasons in relation to Question 13 at [261]-[262] below.

8 It is common ground that the following general principles apply to the present remitter, as stated in *Harvard Nominees Pty Ltd v Tiller (No 4)* at [45]-[47] (Jackson J), and as approved by the Full Court in *Harvard Nominees Pty Ltd v Nicoletti* [2022] FCAFC 179 at [96] (Banks-Smith, Colvin and O’Sullivan JJ):

(a) the court on remitter must act consistently with the appellate court’s judgment, including not only the ultimate orders made but also the reasons for decision;

(b) where the appellate court has disturbed findings of the primary court, it will be open to the primary court to determine those issues afresh, provided that it does so in accordance with the judgment of the appellate court; and

(c) the primary court on remitter cannot go outside the scope of what is remitted, or reconsider any of its previous findings that have not been disturbed by the appellate court, unless it determines in accordance with ordinary principles that it is in the interests of the administration of justice to give leave to reopen.

As is apparent from the reasoning below, there is significant controversy between the parties as to the application of those principles in relation to the particular questions which arise for determination.

9 In my view, a further exception must be made to the principles set out in the last paragraph to deal with the circumstance of an obvious clerical error or slip either by the original primary judge or by the appellate court, which, in my view, the primary judge on remitter is able to correct. An example is provided in the present case by the finding of the Full Court at AJ[127] that Mr Bradie reported to Mr Holt, whereas the evidence unequivocally established that Mr Bradie reported to Mr Wood (as the primary judge correctly found at PJ[97(2)]). I do not regard that exception as inconsistent with the Full Court’s reasons in *Harvard Nominees Pty Ltd v Nicoletti*, as no argument was put to (let alone rejected by) the Court in that case as to the existence of such an exception, and judicial reasoning cannot be read as though it were a statute. However, that exception does not extend to the circumstances where either the original primary judge or the appellate court has made a finding which is clearly intentional but which appears to be wrong, or even plainly wrong. The principles set out in the last paragraph are not simply the result of the doctrine of legal precedent and the hierarchy of courts, but are also the result of the basal principle that the remitted hearing is a continuation of a trial that has already begun, despite having been interrupted by the orders and reasons of an appellate court which have set aside the orders of the original primary judge. There is therefore an imperative for continuity and consistency in decision-making. In the event that an appellate court takes a different view on that issue, I have identified instances below where I regard findings made by either the original primary judge or the Full Court as wrong or untenable, but where I regard myself as bound to follow and adopt that erroneous reasoning.

10 A further clarification of the relevant principles is required to deal with circumstances where the primary judge or the appellate court has made an error in what should be regarded as incidental remarks which do not constitute findings or operative reasoning, such as by way of merely introductory or parenthetic observations. An example is provided by the Full Court in AJ[33], which misread the primary judge’s paraphrase of Mr Crowley’s opening submissions at PJ[47] as her Honour’s own description of the Management Adjustments, whereas the primary judge’s own findings were expressed later in the judgment in different monetary amounts: see in particular PJ[201] and [243]. I refer to that at [72] below. I do not regard the Full Court as having disturbed the primary judge’s actual findings as to the amounts of the Management Adjustments.

## Misleading and Deceptive Conduct: Reasons of the Full Court

11 The Full Court’s reasons in relation to the misleading and deceptive conduct case commence with an analysis of the Holt Memorandum, in the context of the November 2013 Revised Earnings Guidance having led to reflection among WOR’s senior management about what might have gone wrong in WOR’s budgeting process: AJ[19]. Mr Holt interviewed WOR managers and others, made the Holt Memo Interview Notes, and prepared his memorandum of 5 December 2013 accompanied by his notes of the interviews: AJ[19]. The subject of the Holt Memorandum was “Financial forecasting process” and its stated purpose was quoted at AJ[20] as being:

… to provide a review of the current process that WorleyParsons [ie WOR] follows with respect to its budgeting and forecasting and to discuss certain changes to this process being actioned or considered by management.

12 The Full Court referred to the “Background” section of the Holt Memorandum as recording that in the past six years, WOR had underperformed its original budget by 10% or more five times, and re-forecasts done during the year had also proved to be less reliable than WOR would have expected: AJ[21]. That section of the Holt Memorandum also referred to WOR having been in a position where it was required to make a number of formal and informal profit downgrades, and referred to the stated intention of the budgeting process being that the budget should be a P50 Budget: AJ[21].

13 Section 3 of the Holt Memorandum was headed “Recent Results”, and included a table reproduced in AJ[22] comparing WOR’s original budget, re-forecast and final NPAT numbers, and analysts’ views over the previous five years. The Holt Memorandum said that the table showed that, with the exception of FY12, WOR had underperformed on its original budget by at least 10% for every year back to FY09, and would do so again for FY14, and said that the numbers suggested that the re-forecasts by WOR had probably not been much better than the budget from an accuracy perspective, although the figures did indicate that WOR had done a good job at year end of guiding the analysts to a consensus that was approaching the budgeted figure: AJ[23].

14 Section 4 was headed “Reasons for poor budgeting/forecasting performance”, and referred to Mr Holt having undertaken a review which included discussions with ExCo, the Managing Directors of Operations and the Finance Leadership Team including the Finance Directors: AJ[24]. The Full Court quoted the following statement of the key points about the budget referred to by Mr Holt:

* There are some practical and cultural issues around the budgeting process including whether it is the right process for all locations.
* Expectations of growth at the senior management level have been too optimistic and have not matched what the locations are seeing on the ground.
* There is insufficient allowance made in the budget process for potential downsides.
* There is continued tension between locations and senior management as to whether locations are “stretching” themselves sufficiently in preparing their budgets.

Those points were then elaborated upon in the passage extracted at AJ[26]. Under the heading “A culture of optimism”, Mr Holt said that a consistent message was that there had been an expectation at group level that the company would grow, or grow at a certain rate compared to previous years, and that expectation was then communicated back to the Locations with the consequence that, in many cases, the bottom-up build that the Location submitted did not match the expectations of growth from senior management. Further, Mr Holt said that in order to meet those expectations, the most common response was for Locations to simply include a greater level of Blue Sky revenue in the second half of their budget period; in essence, Locations were budgeting on the hope that work would materialise, rather than any real expectation that it would, and thus the probability that the budget would be met decreased and WOR’s budgets had not genuinely been P50 Budgets, as was supported by the fact that WOR had missed budget five out of the previous six years. As to there being “Insufficient allowance for potential downsides”, Mr Holt noted that the WOR business model had moved into larger and more complicated projects, such that the potential for material downside on one or more of those projects in a particular accounting period was high, but that potential downside was not built into the budgeting process; in other words, WOR’s budget assumed that everything would go right in a world where it was known that things would go wrong. Mr Holt added that the way in which WOR budgeted and operated meant that it was unlikely that there would be unknown upside sufficient to offset the potential downside. Mr Holt commented that in cases where potential problems had been identified on projects, the feedback was that Locations were actively discouraged from including potential downside in their budgets. Mr Holt dealt with the question of whether WOR was “stretching”, saying that there was an assumption that Locations were not “stretching” when they put in their initial budgets and the perceived lack of trust in the initial Location budget placed pressure on the process, and had the potential of penalising Locations which made a genuine effort to get their forecasts correct, but who were still assumed to be Sandbagging.

15 On the topic of re-forecasts, Mr Holt said that the intention behind the re-forecast process was to give management an assessment on a quarterly basis as to how WOR was tracking against its original budget, which was then used to determine whether WOR’s current market guidance was appropriate. Mr Holt said it appeared that similar issues to those identified in the budget were cropping up in the re-forecast process, and in particular, Locations were under significant pressure to “hold the line” with respect to their original Blue Sky forecasts, even in situations where the local market conditions were such that it had become less likely that this work would materialise: AJ[27].

16 Under the heading “Consequences”, Mr Holt said that WOR had been good at guiding the market to its budgeted number, but what the market did not necessarily realise was that this was a “P50” number, and in reality, was probably lower than that, and consequently the market was probably more surprised than it should have been when WOR did not reach that number: AJ[28]. Mr Holt also noted that the inaccurate budgeting had had a direct impact on WOR’s incentive schemes with very low payouts in recent years, and further that the setting of budgets that were considered unrealistic had, at least in some parts of the business, a de-motivating effect in that it was hard to engage staff when their views on budgets were not being taken into account and when they were being set targets which they believed had a low probability of being met: AJ[28]. Mr Holt concluded by noting that changes arising from a review process would be implemented in the FY15 budget process: AJ[29].

17 Appendix One to the Holt Memorandum was headed “The current budget process”, noting that the “current process is, at least in theory, a ‘bottom up’ process” which was explained as involving the following: AJ[30]. The Locations forecast their revenue and gross margin based on work that was Secured, Prospects or Blue Sky, although certain Locations budgeted based on the number of people. Revenue and gross margin were split across the three CSGs and four service lines. The Location then determined what a reasonable level of overhead was for the location, and derived the Location BEBIT, which was the EBIT of the Location before global charges. That number was subject to review by the Managing Director responsible for the Location and then by the Global Director of Operations. The BEBIT for all the Locations was then consolidated to reach a group “Operational BEBIT” number. The Global Services Group costs were then determined and subtracted from the Operational EBIT number to arrive at a Group EBITDA number, and estimates were then made of group interest, tax, depreciation and amortisation to arrive at a Group NPAT number. The full result was then reviewed by the CEO and the CFO, and after all changes were made, the final pack was presented to the Board for its review and approval. Appendix One also recorded that the stated intention of the budgeting process should be a P50 Budget: AJ[31]. As to re-forecasts, Appendix One included the statement that WOR did regular forecasts, previously 4+8 (that is, four months into the financial year for the next eight months) and 8+4 (that is, eight months into the financial year for the next four months): AJ[32].

18 The Full Court noted that WOR did not call Mr Holt to give evidence, nor did WOR call Mr Bradie, Mr Allen or Mr Daly who were directly involved in the amendments to the 27 May 2013 Draft Budget, in which a budgeted NPAT of $252 million (or $284 million with foreign exchange increases up to August 2013) was increased in the FY14 Budget to an NPAT of $352.1 million: AJ[33]. The Full Court at AJ[33] quoted from PJ[47] as to that process:

(1) the 27 May 2013 draft budget produced a forecast NPAT of $252 million;

(2) Messrs Bradie and Daly then added $34.9 million in operational EBIT and Mr Allen added $12 million for acquisition stretch with the result that the budgeted FY14 NPAT was $288.6 million;

(3) Messrs Bradie and Daly then added $20.7 million in operational EBIT with the result that budgeted FY14 NPAT increased to $295 million;

(4) CEOC then resolved to include an additional $43.8 million in overhead savings in the FY14 budget, of which $33 million would be recorded in operational EBIT; and

(5) $32 million was added to the budget NPAT figure using the current foreign exchange spot rate (Mr Crowley makes no complaint about this adjustment).

19 The Full Court referred to an email on 31 May 2013 by Mr Daly to Mr Holt and Mr Allen about the 27 May 2013 Draft Budget noting that “you see that the level of blue sky in ANZ (North and West) in particular is very high (ANZ South is high but is not such a worry given the nature of their business)”: AJ[34]. On 11 June 2013, Mr Allen made the following comments to Ms Wallace following a conversation with Mr Daly, quoted at AJ[35]:

Our guess is that Stu Stu [ie Mr Bradie] got a rocket from Andrew [Wood] last week re the budget and has been told to change everything – making somewhat of a mockery of the process. If there was going to be a top down target why didn’t we start with that in the first place??

I am also concerned that we are putting the company’s reputation at risk. If we go out with another unrealistic budget, and need to do another profit downgrade next year, it is not going to look good at all in the market. Something to discuss with Simon [Holt].

20 The Full Court referred to an email of 3 August 2013 by Mr Bradie to all RMDs about the draft budget, noting that the first and second half weighting of 43:57 was too second-half weighted and the RMDs needed to look across Locations to see if more revenue could be moved into the first half: AJ[36]. On 7 August 2013, Mr Daly emailed Mr Holt, saying the following as quoted at AJ[37]:

As an fyi only, there remains a strong sense within the business that the FY14 targets – both full year and H1 – are a stretch and I agree with that given current performance and the reliance on timely realisation of the cost saving targets. Something to bear in mind during your briefings over the coming weeks!

21 The Full Court referred to WOR releasing its final FY14 results on 27 August 2014, reporting statutory NPAT of $249 million, down 23%, and underlying NPAT of $263 million, down 18%: AJ[38]. The Full Court commented that, having represented to the market that it expected to achieve NPAT in excess of $322 million in FY14 and that it had reasonable grounds to so expect, WOR in fact achieved NPAT of only $263 million: AJ[38].

22 The Full Court then referred to some key findings made by the primary judge which were not the subject of challenge: AJ[39]. These were as follows:

(a) at AJ[39], by publishing and maintaining the August 2013 Earnings Guidance Statement, WOR made the FY14 Guidance Representation on 14 August 2013 and thereafter, including on 9, 10 and 15 October 2013, represented that it expected to achieve NPAT in excess of $322 million in FY14 and that it had reasonable grounds to so expect: PJ[29];

(b) at AJ[40], the August 2013 Earnings Guidance Statement was based on its expected NPAT, calculated by reference to WOR’s FY14 Budget: PJ[111];

(c) at AJ[41], WOR professed to adopt the P50 parameter to produce its budgets: PJ[114]; however, the FY14 Budget was not a P50 Budget: PJ[197];

(d) at AJ[42], as the FY14 Budget setting process began, WOR’s major markets were “either not growing or were deteriorating”: PJ[418]; WOR admitted that there would be “continued uncertainty in the markets for its services in FY14”: PJ[419]; the 27 May 2013 Draft Budget compiled from the budgets provided by each of the Locations resulted in an NPAT of approximately $252 million: PJ[165]; and on Mr Wood’s evidence, that draft budget generally reflected the Locations’ efforts to identify “aggressive yet achievable budget targets”: PJ[196];

(e) at AJ[43], CEOC directed a reconsideration of the draft budget as a result of which, by late June 2013, the revised draft budget instead reflected an NPAT of $352.1 million: PJ[254]-[263]; as a result of that revision ExCo was concerned that “[e]veryone will be challenged to meet their budgets” and also that the split between the first and second halves of the year needed “more work … to reduce the weighting to the second half”: PJ[286]; and the weighting to the second half of the year in fact increased as a result of further work: PJ[294]-[295];

(f) at AJ[44], on 13 August 2013 the Board approved the FY14 Budget with an NPAT of $352.1 million, a 9% increase on the FY13 result of NPAT of $322.1 million: PJ[309]; the August 2013 Earnings Guidance Statement was developed in meetings of the A&RC on 12 and 13 August 2013: PJ[303]; and the Board approved the August 2013 Earnings Guidance Statement to the market: PJ[298]-[303];

(g) at AJ[45], by statements to the market, WOR aimed to get the analysts to align with WOR’s expectations and to encourage analysts to forecast WOR’s FY14 NPAT at around $352 million: PJ[307]-[308];

(h) at AJ[46(1)], by the 23 February 2013 and 17 May 2013 ASX announcements, WOR had downgraded its earning guidance on two recent occasions before the FY14 Budget was approved and stated that the downgrades were required because of WOR’s underperformance against its internal budget, and those were additional matters that provided WOR’s officers with a basis for approaching the FY14 Budget with caution: PJ[416]-[417];

(i) at AJ[46(2)], as the FY14 Budget setting process began, WOR’s major markets were “either not growing or were deteriorating” and WOR was aware that in FY13 it had experienced challenging conditions in a number of its key markets and there would be continued uncertainty in the markets for its services in FY14, and that was a persuasive reason for approaching the FY14 Budget with caution: PJ[418]-[421];

(j) at AJ[46(3)], there was evidence that aspects of the 27 May 2013 Draft Budget were optimistic and that, overall, the draft budget was “ambitious”: PJ[423];

(k) at AJ[46(4)], the Holt Memorandum tended to support Mr Crowley’s case that WOR’s historical performance against budget reflected defects in WOR’s budgeting process: PJ[600]; and

(l) at AJ[46(5)], the Holt Memorandum demonstrated a significant record of underperformance by WOR against its internal budget every year since FY09, with the exception of FY12, stating that in five of the past six years WOR had underperformed its original budget by 10% or more: PJ[410]; the Holt Memo Interview Notes provided “a basis for suspecting that some locations may have submitted to pressure to accept adjustments to their respective budgets that they considered to be unrealistic, or may even have proposed budgets that they considered to be unrealistic”: PJ[329].

23 At AJ[53] and [75], the Full Court accepted Mr Crowley’s contentions that the primary judge’s process of reasoning had miscarried. The essence of those contentions is encapsulated at AJ[47] and [75], to the effect that the primary judge made all necessary findings to support the conclusion that WOR lacked reasonable grounds for the August 2013 Earnings Guidance Statement which conveyed the FY14 Guidance Representation other than the ultimate finding to that effect, and that failure resulted from four fundamental errors in the primary judge’s approach, namely:

(1) a focus on justifying a decision of the Board to approve the FY14 Budget and the August 2013 Earnings Guidance Statement, rather than the required focus on the reasonableness or otherwise of WOR using the FY14 Budget to justify the August 2013 Earnings Guidance Statement;

(2) an unwarranted search for a level of detail in the evidence which would permit the primary judge to identify a calculation of NPAT for FY14 which would have been reasonably based;

(3) failing to appreciate the full significance of the evidence that was tendered and the findings made by considering the issues through too narrow a lens and failing to assess the evidence in the context of the other evidence; and

(4) failing to weigh the evidence and the proper inferences to be drawn consistently with the principles in *Blatch v Archer* (1774) 98 ER 969 and *Jones v Dunkel* (1959) 101 CLR 298.

24 As to the first of those matters, the Full Court said that the relevant issue was not what was actually known by the Board, what views the Board held, or the reasonableness of the conduct of the Board, as the maker of the FY14 Guidance Representation was WOR, not the Board, and accordingly the issue was whether WOR had reasonable grounds for making the FY14 Guidance Representation, not whether the Board acted reasonably or unreasonably given the information made available to it by WOR’s officers: AJ[54]. The Full Court said that the erroneous focus of the primary judge on the conduct and knowledge of the Board, as opposed to the conduct and knowledge of WOR, was most evident in the way in which the primary judge dealt with the finding that the FY14 Budget was not a P50 Budget at PJ[428]. The Full Court said at AJ[57] that the relevant issues were that the FY14 Budget was not a P50 Budget and whether WOR knew that to be so or knew the facts from which it should be inferred that WOR knew that was so, such that if WOR knew, or by its knowledge of underlying facts should be taken to have known, that the FY14 Budget was not a P50 Budget then that would have been evidence supporting the inference that the FY14 Budget did not provide reasonable grounds for the August 2013 Earnings Guidance Statement. Further, the fact that Mr Holt, Mr Bradie, Mr Daly and Mr Allen were not called to give evidence was itself relevant to the question whether the inference should be drawn that relevant persons within WOR (whether officers of WOR or not) knew or should be taken to have known that the FY14 Budget was not a P50 Budget: AJ[57].

25 The Full Court then dealt with a pleading issue as to how it had been alleged by Mr Crowley that the FY14 Budget did not provide reasonable grounds for the making of the FY14 Guidance Representation: AJ[58]. The Full Court said that WOR’s contention that it was not part of Mr Crowley’s case that there was no reasonable basis for the FY14 Budget because it was not a P50 Budget did not withstand scrutiny: AJ[59]. While the Full Court accepted that Mr Crowley did not plead that the FY14 Budget was not a P50 Budget (at AJ[59]), the Full Court said that the 4FASOC did sufficiently plead the alleged deficiencies in the budgeting process which meant that the FY14 Budget was not a P50 Budget, and referred further to the oral and written opening submissions and oral and written closing submissions to the effect that the FY14 Budget was not a P50 Budget: AJ[60].

26 The Full Court reviewed the way in which the trial was conducted at AJ[61]-[66] and then said the following at AJ[67]:

Given the above, in particular the way WOR conducted its defence, WOR cannot now complain in the appeal that it was not part of the appellant’s case below that the FY14 budget was unreasonable and not fit for use to prepare the August 2013 earnings guidance statement because of: (a) WOR’s history of material budget underperformance, (b) WOR having to twice downgrade its earnings forecasts in 2013, (c) the fact that the FY14 budget was not a P50 budget and should have been known by WOR (and, it must be inferred, was known by some WOR employees) not to be such when it was adopted, (d) the fact that the FY14 budget did not result from a risk-adjusted approach to forecasting, (e) the fact that WOR’s markets were not growing or were deteriorating when the FY14 budget was being prepared, and (f) the fact that WOR maintained the 19% blue sky revenue, the same as 2013 when markets were buoyant, given that blue sky performance was a function of market buoyancy.

The Full Court said that it was not to the point that WOR repeatedly asserted that it held Mr Crowley to his pleading, and Mr Crowley was entitled to respond to the positive case asserted by WOR that its FY14 Budget was the result of a robust and reasonable budgeting process, that it was in fact reasonable as a matter of substance, that it was a P50 Budget, and that the FY14 Budget was suitable to found the making of the August 2013 Earnings Guidance Statement: AJ[68]. At AJ[71], the Full Court said that it was not to the point that:

(1) the 4FASOC did not refer to the FY14 Budget as not being a P50 Budget;

(2) the 4FASOC did not assert that the FY14 Budget was unreasonable and not fit for use as the foundation for the August 2013 Earnings Guidance Statement because the FY14 Budget was not a P50 Budget; and

(3) there was no evidence that the Board itself knew that the FY14 Budget was not a P50 Budget.

Further, the Full Court said that it was open to Mr Crowley to prove that the FY14 Budget was not a P50 Budget and that relevant persons within WOR knew that to be so before the FY14 Budget was adopted and before the August 2013 Earnings Guidance Statement was made: AJ[72]. The Full Court said that the primary judge was satisfied that the FY14 Budget was not a P50 Budget, and having so concluded, the issue was whether WOR knew or ought to have known that before it adopted the FY14 Budget and used it as the foundation for the August 2013 Earnings Guidance Statement: AJ[73]. Further, the Full Court said that Mr Crowley was entitled to seek to prove that WOR’s reliance on its asserted robust budget process did not establish the reasonableness of the FY14 Budget or provide reasonable grounds for the August 2013 Earnings Guidance Statement: AJ[74]. The Full Court said that the primary judge had found all the underlying facts in relation to whether WOR had reasonable grounds for the August 2013 Earnings Guidance Statement, but failed to draw the relevant inferences from those facts because of the four fundamental errors referred to at AJ[47]: AJ[75].

27 At AJ[76], the Full Court stated that the primary judge had made the following findings (and WOR had not filed a notice of contention that her Honour erred in so doing):

(1) the FY14 Budget was not a P50 Budget: PJ[197], [426];

(2) WOR had historically materially underperformed against its budgets from FY09 to FY13 (except in FY12) and had to twice downgrade its earnings guidance in 2013, and these facts provided a basis for WOR’s officers to be sceptical about the FY14 Budget, and raised an issue about systemic forecasting problems in WOR: PJ[410]-[415];

(3) the FY14 Budget process was not materially different from the process that had been followed in the preceding years: PJ[411];

(4) WOR’s markets were not growing or were deteriorating when the FY14 Budget was set which was a persuasive reason for approaching the FY14 Budget with caution: PJ[421];

(5) aspects of the 27 May 2013 Draft Budget (forecasting an NPAT of $252 million) were optimistic and that draft budget, overall, was “ambitious”, but the FY14 Budget forecast NPAT of $352.1 million: PJ[423];

(6) ExCo was concerned that the FY14 Budget meant that “[e]veryone will be challenged to meet their budgets” and the split between the first and second halves of the year needed “more work … to reduce the weighting to the second half”: PJ[286]; and

(7) the Holt Memo Interview Notes record strong criticism by senior management of “aspects of WOR’s budgeting and reforecasting processes”: PJ[602]; and

(8) consistent with the Holt Memorandum (PJ[601]):

(a) WOR’s budget setting process was affected by a culture of optimism. The Holt Memorandum and the Holt Memo Interview Notes recorded a “consistent message” of expectations of growth from senior management. There were cases where Locations inflated their projections of Blue Sky revenue in order to meet senior management expectations;

(b) insufficient allowance was made in the WOR budget setting process for potential downsides. There was feedback that Locations had been actively discouraged from including potential downside in their budgets where potential problems had been identified on projects; and

(c) there was a belief held by some of WOR’s senior management that Locations were not sufficiently stretching in their initial budgets which was not necessarily valid.

28 The Full Court said that the primary judge’s reasons did not bring all those facts together in assessing whether WOR’s defence, and Mr Crowley’s rebuttal of that defence, should be accepted, but rather, the primary judge focused on each piece of evidence explaining why, in and of itself, that piece of evidence did not support Mr Crowley’s rebuttal: AJ[77]. That explained why the primary judge repeatedly considered that to draw the required inferences more evidence and analysis would be required: AJ[77]. Further, the Full Court said that it was not apparent that the primary judge had regard to the fact that the inferences contended for by Mr Crowley were available on the whole of the evidence, including the facts as found by the primary judge, and whether or not to draw those inferences should be informed by the principles in *Blatch v Archer* and *Jones v Dunkel* respectively that “all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted” and when a party who is capable of testifying fails to give evidence without explanation “it may lead rationally to an inference that his evidence would not help his case”: AJ[78]. The Full Court said that those principles were important in the present case because the evidence established that: (a) Mr Bradie, Mr Daly and Mr Allen, as well as Mr Holt to whom they reported, were key participants in the budget process which caused the forecast NPAT to be increased from $252 million to $352.1 million, (b) Mr Bradie, Mr Daly and Mr Allen expressed significant concerns about the FY14 Budget before it was adopted, and (c) Mr Holt conducted the Holt interviews and prepared the Holt Memorandum in the aftermath of the publication of the November 2013 Revised Earnings Guidance; however, none of Mr Bradie, Mr Daly, Mr Allen and Mr Holt was called by WOR to give evidence: AJ[79].

29 At AJ[82], the Full Court referred to the statement by the primary judge at PJ[600] that the Holt Memorandum “tends to support Mr Crowley’s case that WOR’s historical performance against budget reflects defects in WOR’s budgeting process”, but the primary judge then said that the memorandum did not analyse how any particular defect affected any element of any budget, nor did it attempt to quantify the impact of any defect in the budget process, nor did it seek to test whether there might be any other explanation for the identified discrepancies between budget and actual performance apart from defects in the budgeting process, nor did it contain a broad conclusion that WOR’s budget process was “not reliable”. At AJ[83], the Full Court referred to the findings of the primary judge:

(1) at PJ[601], that the Holt Memorandum supported the conclusions that WOR’s budget setting process was affected by a culture of optimism, including cases where Locations inflated their projections of Blue Sky revenue in order to meet senior management expectations, insufficient allowance was made in the WOR budget setting process for potential downsides and active discouragement from including potential downsides in Locations’ budgets where potential problems had been identified on projects, and a belief by some of WOR’s senior management that the Locations were not sufficiently stretching in their initial budgets which was not necessarily valid; and

(2) at PJ[426], that the FY14 Budget was not a true P50 Budget because, as Mr Holt concluded:

(a) WOR’s budgeting process had been infected with optimism bias;

(b) there was an expectation of growth which was not driven by WOR’s own assessment of the markets in which it operated; and

(c) in many cases, the bottom-up build that the Locations submitted did not match the expectations of growth from senior management and the most common response was for Locations to simply include a greater level of Blue Sky revenue in the second half of their budget period, thereby budgeting on the hope that work would materialise rather than any real expectation that it would.

30 The Full Court then said that it was not easy to reconcile the primary judge’s findings about the conclusions the Holt Memorandum supported and her Honour’s rejection of it as evidence that WOR’s budget process was not reliable, and the primary judge appeared to have been looking in the Holt Memorandum for an express statement that the budget process used by WOR in FY14 was unreliable: AJ[84]. The Full Court then said the following at AJ[84]:

Given that: (a) WOR’s budget process was the same in FY14 as it had been in previous years, (b) WOR had materially underperformed against its budget in FY09 to FY13 other than in FY12, (c) WOR had to twice downgrade its earnings guidance in FY13, (d) markets in FY14 were not growing or were deteriorating when the FY14 budget was being set, the caution and scepticism with [sic] which the primary judge said WOR ought to have brought to bear on a FY14 budget which increased forecast NPAT from $322 million in FY13 to $352.1 million in FY14 would seem to involve material understatement. When the lack of evidence from Mr Bradie, Mr Daly, Mr Allen and Mr Holt are factored in, the primary judge’s approach to the drawing of inferences supports the appellant’s contentions of error in that process.

31 At AJ[85], the Full Court referred to the primary judge’s reasoning at PJ[600] as reflecting the primary judge’s search for a line-by-line analysis of the FY14 Budget sufficient to enable the primary judge to identify the number or the range for NPAT which would have been reasonable. However, the Full Court said that it was not necessary for the appellant to identify a reasonable forecast range in order to demonstrate that WOR’s NPAT forecast in the FY14 Budget was unreasonable and did not provide reasonable grounds for the August 2013 Earnings Guidance Statement: AJ[85]. The Full Court said that a budget and earnings forecast might be proved unreasonable by a line-by-line analysis or by demonstrating that the reasonable range was materially lower than the forecast NPAT, but these were not the only methods by which a forecast might be proved to have lacked reasonable grounds when made: AJ[85].

32 At AJ[86], the Full Court dealt with the primary judge’s conclusion that the Holt Memorandum did not deal with the topic of how the FY14 Budget process miscarried, with reference to PJ[596]. The Full Court said that in circumstances where Mr Wood requested Mr Holt to prepare a memorandum after the November 2013 Revised Earnings Guidance (PJ[577]) and the Holt Memorandum records its purpose as being to “provide a review of the current process that [WOR] follows with respect to its budgeting and forecasting” (PJ[571]), it could not be the case that the Holt Memorandum did not deal with the FY14 Budget and FY14 Budget process: AJ[86]. The Full Court said that it was not reasonably open to construe the matters recorded in the Holt Memorandum as relating generally to WOR’s budget process and budgets and not also specifically to the FY14 Budget process and FY14 Budget, and that there was an obvious inference open on the face of the Holt Memorandum that Mr Holt was identifying why the FY14 Budget process and the FY14 Budget miscarried, an inference which could more readily be drawn given that Mr Holt was not called by WOR to give evidence: AJ[87]. The particular issues listed by the Full Court at AJ[87] in that connection were: (a) WOR underperforming against budget by more than 10% in five out of the last six years, (b) WOR’s budget process reflecting senior management’s too optimistic expectations of growth compared to the view of Locations, (c) Locations budgeting for Blue Sky revenue in the hope rather than the expectation that work will materialise, (d) insufficient allowance made in the budget process for potential downsides, and (e) tension between senior management and Locations in the budget process as to whether Locations were “stretching” sufficiently in their draft budgets. The Full Court said that it “must be inferred from the circumstances that the Holt memorandum is conveying Mr Holt’s assessment (in part based on senior management’s views) as to why the FY14 budget, amongst others, miscarried”: AJ[89]. The Full Court pointed out that the Holt Memorandum was a relatively contemporaneous document, brought into existence within a month of the November 2013 Revised Earnings Guidance, it was prepared by the CFO who was intimately involved in the FY14 Budget, and was identifying things said to be known about the budget process, not things said to have been uncovered or discovered about the budget process: AJ[89].

33 The Full Court said at AJ[90] that, considered in isolation, the Holt Memorandum suggested that: (a) senior management required the budgets of Locations to reflect year-on-year growth, (b) Locations used Blue Sky revenue to meet the expectations of senior management, (c) WOR’s budgeting process assumed no downsides even though managers knew downsides would emerge, and (d) these dynamics were at play in the preparation of the FY14 Budget process (which saw the Locations’ budgets forecasting NPAT of $252 million to the final NPAT forecast in the FY14 Budget of $352.1 million in the context of flat or deteriorating markets). The Full Court added that it was also relevant that Mr Holt, Mr Daly and Mr Allen were not called to give evidence: AJ[90]. The Full Court said that while the whole of the evidence must be considered, which could not be done in the context of the appeal, there was an obvious question as to whether Mr Holt should be inferred to have known that the FY14 Budget (and earlier budgets) were not P50 Budgets at all: AJ[90]. The Full Court said that none of those matters were apparent from the primary judge’s reasoning, given her Honour’s focus on the notion of a required line-by-line budget analysis and the processes of the Board in considering and adopting the FY14 Budget: AJ[90].

34 The Full Court referred to the position of Mr Allen, who reported directly to Mr Holt, and in particular the contents of Mr Allen’s email of 11 June 2013, which gave rise to the available inference that Mr Allen considered that the adjusted budget by June 2013 was unrealistic: AJ[91]. The Full Court said that the potential inference as to the basis of Mr Allen’s concerns, in the context in which they were expressed, was obvious, namely that the forecast EBIT and NPAT were too high, reinforced by the fact that WOR did not call him to give evidence, but added that whether any such inference should be drawn depended on a consideration of the whole of the evidence: AJ[91]. The Full Court referred also to Mr Daly, who also reported directly to Mr Holt, and was intimately involved in the adjustments to the draft budget after late May 2013, and wrote the email of 7 August 2013 referred to above, and also undertook the review of the FY14 Budget in mid-November 2013 which identified that $97 million of operational EBIT relating to Blue Sky projections should be removed altogether, adding that Mr Daly was not called to give evidence: AJ[92]. The Full Court said that the primary judge’s observation at PJ[69] that Mr Crowley’s case was “mostly hindsight and is not supported by detail that might have contradicted the evidence of WOR’s witnesses in substantial respects” could not be accepted to be correct: AJ[93]. The Full Court referred also to WOR not having called an RGM (which I assume was intended to mean RMD) from the ANZ or USAC Regions to seek to justify the Blue Sky revenue attributed to those Regions in the budget, noting that together with CAN, they were the main profit centres of WOR, generating 67% of aggregate revenue: AJ[94].

35 The Full Court said that, if considered in isolation, a number of those circumstances, in and of themselves, would be sufficient to support the conclusion that the FY14 Budget did not provide WOR with reasonable grounds to make the August 2013 Earnings Guidance Statement, that being WOR’s case and noting that WOR did not rely on any other matter to constitute reasonable grounds: AJ[95]. The Full Court said that the same conclusions would apply to the subsequent maintenance and reconfirmation of the August 2013 Earnings Guidance Statement: AJ[95]. However, the Full Court said that the identified circumstances could not be considered in isolation but had to be considered along with the whole of the evidence, and the appeal was not the appropriate vehicle for that reconsideration to take place: AJ[96]. It followed that the matter needed to be remitted to a single judge for determination: AJ[96].

36 The Full Court then turned to consider various other submissions which were made by WOR in the appeal.

37 As to whether the Full Court was being asked on appeal to interfere with the primary judge’s findings of fact based on the credibility of witnesses, the Full Court said that this was not such a case: AJ[99]. The Full Court said that Mr Crowley’s case challenged the primary judge’s approach to the inferences which should be drawn from the underlying facts, and (it seems with one exception) the principles in *Fox v Percy* (2003) 214 CLR 118 were not engaged: AJ[99]. The Full Court noted that, with one exception, Mr Crowley accepted and relied upon the primary judge’s factual findings, that exception being the finding of the primary judge at PJ[173(9)] and [179] based on Mr Wood’s evidence, that the 27 May 2013 Draft Budget had the revenue projections “pretty right” and “[t]he revenue picture” hardly changed from the start to the end of the budget process. The Full Court said that that finding (presumably referring to the latter piece of Mr Wood’s evidence) was demonstrated to be wrong because the undisputed evidence was that the aggregated revenue increased by $851 million between the 27 May 2013 Draft Budget and the FY14 Budget ultimately adopted and, at most, only $644 million of that increase was due to changes in foreign exchange assumptions: AJ[100].

38 On a separate matter, the Full Court at AJ[102] rejected WOR’s contention that various matters raised on appeal were not in issue before the primary judge, namely that:

(1) the FY14 Guidance Representation lacked reasonable grounds because the FY14 Budget was not a P50 Budget;

(2) the lack of reasonable grounds analysis put forward by Mr Crowley below included the fact that in four of the previous five years WOR had fallen materially short of its budget forecast;

(3) WOR’s budget process lacked a risk-adjusted review for the purpose of making statements to the market; and

(4) it was not reasonable for WOR’s management to insist on overhead reductions at the same time as retaining the Blue Sky forecast that had been embedded in the 27 May 2013 Draft Budget.

39 At AJ[105]-[108], the Full Court reiterated the point referred to at [23(1)] and [24] above that the question of whether WOR had reasonable grounds to make the FY14 Guidance Representation was a question which extended beyond the Board, and included senior executives of WOR such as Mr Holt who were involved in the decision-making process. At AJ[112], the Full Court said that Mr Crowley did not have to quantify the errors that were made in order to show that reasonable NPAT for FY14 did not exceed $322 million. Mr Crowley did not have to identify any specific line item error in the budget, and it was not to the point that the Board gave itself $30 million “headroom” between the forecast NPAT in the FY14 Budget of $352 million and the FY14 Guidance Representation referring to NPAT in excess of $322 million: AJ[112]. Further, Mr Crowley did not need to impugn the reasonableness of one or more inputs to an extent which implied that any objectively reasonable NPAT forecast was less than $322 million: AJ[112]. Further, the Full Court said that it would suffice if Mr Crowley established that the overall forecast NPAT of $352 million was unreasonable, because WOR only adduced evidence of the FY14 Budget and the process by which it was prepared, including the assertion that it was a P50 Budget, as evidence of reasonable grounds for the making of the FY14 Guidance Representation: AJ[113]. The Full Court explained that, if the budget process was inherently unsuitable for use as the basis for earnings guidance to the market because it would not produce a P50 Budget and thus, by definition, was not at least equally likely as not to be correct as to the forecast NPAT, or if the forecast NPAT in the FY14 Budget was itself unreasonable, it must follow that WOR did not have reasonable grounds for making the FY14 Guidance Representation: AJ[113].

40 As to the $30 million “headroom” argument, the Full Court said that this was misconceived because the forecast NPAT of $352 million in the FY14 Budget was either reasonable or it was unreasonable, and if it was not reasonable there were not reasonable grounds for the making of the FY14 Guidance Representation: AJ[114]. The Full Court commented that the “headroom” argument appeared to assume that even if the NPAT in the FY14 Budget had been $322 million, WOR would have made the same FY14 Guidance Representation, that there was no suggestion in the evidence to support that inference, and in any event, there were materiality considerations in play because the FY14 Guidance Representation conveyed a representation of achieving an NPAT materially in excess of $322 million: AJ[114].

41 At AJ[117], the Full Court affirmed the principle stated in *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 at 513 (Heerey J) to the effect that if there was a representation as to a future matter, the representor must show some facts or circumstances, existing at the time of the representation, which are objectively reasonable, and which support the representation made. The representor here was WOR, not the Board: AJ[117].

42 At AJ[119], the Full Court dealt with the knowledge properly attributable to WOR, which was the relevant question, not merely knowledge of the Board of WOR. The first issue was the knowledge of the relevant employee, such as Mr Holt, which included what he actually knew and what he was taken to have known in the circumstances as a matter of inference. The attribution of the knowledge of employees to WOR was then to be resolved on orthodox principles of attribution of knowledge to a corporation. The next step in the inquiry was directed to the existence or not of reasonable grounds for WOR making the FY14 Guidance Representation, which included identifying what WOR in fact relied on to make the representation and deciding if those facts in fact relied on were objectively reasonable: AJ[119]. The Full Court said that the question of the objective reasonableness of the FY14 Budget and budget process as supporting the representation made must be evaluated by reference to all of the knowledge properly attributable to WOR by reason of the knowledge of its employees as WOR’s agents: AJ[120]. The Full Court said that that does not involve impermissibly attributing to WOR what it “ought to have known”, but involves attributing to WOR what, in law, it actually knew and, by operation of orthodox principles attributing knowledge of an employee to a corporation, what it is to be taken as having known: AJ[120].

43 At AJ[125], the Full Court said that the fact that Mr Wood (and, it must be inferred, other key employees involved in the budget setting process) knew that WOR’s markets were not growing or were deteriorating when the FY14 Budget was prepared was important. The Full Court said that WOR’s markets were not growing or were deteriorating compared to FY13, but the FY14 Budget and August 2013 Earnings Guidance Statement involved a material improvement in NPAT in FY14 compared to FY13, and that improvement was not achieved solely through cutting costs but included increased revenue: AJ[125]. At AJ[126], the Full Court said that if the primary judge was accepting Mr Wood’s evidence that revenue was “flat” in the budget in early June at PJ[195], then it was clear that this concerned the 27 May 2013 Draft Budget compiled from budgets provided by each Location, not the FY14 Budget as adopted. The Full Court said that the evidence showed that ExCo decided to challenge the 27 May 2013 Draft Budget on both revenue and costs (PJ[219]), despite it being common knowledge that WOR’s markets were flat or falling (see PJ[220]). The Full Court said that Mr Bradie, to Mr Wood’s knowledge, then worked hard to push the Locations for both increased BEBIT and to make additional cuts to overheads, and it was in that context of Mr Bradie pushing the Locations hard for increased EBIT and decreased costs that Mr Allen sent his email of 11 June 2013: AJ[126]. The Full Court said that by the time the FY14 Budget was adopted, revenues were estimated to increase to give an additional operational EBIT of 13.8% greater in FY14 compared to FY13; in other words, the efforts of Mr Bradie in particular, who was said (wrongly) to have reported directly to Mr Holt (in fact he reported to Mr Wood), ensured that in flat or falling markets for WOR’s services, the FY14 Budget reflected a 13.8% increase in earnings over the buoyant FY13 market, and Mr Wood and Mr Holt must have known exactly what the process involving Mr Bradie’s hard work with the Locations involved: AJ[127].

44 At AJ[129], the Full Court said that Mr Crowley’s point about the Blue Sky Revenues and the 27 May 2013 Draft Budget prepared by the Locations being already “aggressive” seemed obvious, and said that the basis for the primary judge’s statement at PJ[133] that the submission was not made out on the available evidence was not apparent to the Full Court. The Full Court said that the available undisputed evidence included that: (a) FY13 was a buoyant market, (b) FY14 was a flat or falling market, (c) Blue Sky revenue is a function of market buoyancy, and (d) the Blue Sky gross margin percentage allowed in FY14 was the same as in FY13, namely 19%: AJ[129]. Further, the Full Court said there was sufficient evidence for the primary judge to make findings about the objective reasonableness of the Blue Sky forecast in the FY14 Budget without descending into a region-by-region analysis: AJ[130]. The fact that in November 2013 Mr Daly reviewed the FY14 Budget and stripped $110 million or $97 million of Blue Sky revenue from it was also relevant evidence: AJ[130]. The Full Court said that WOR’s reliance on what it described as Mr Wood’s uncontroverted evidence that he was “comfortable that Blue Sky was budgeted at 19% as this was within the ordinary bounds of Blue Sky that had been achieved in the past” was misplaced, as it had to be weighed along with the other evidence about the relationship between Blue Sky and market buoyancy and the flat or falling FY14 markets: AJ[131].

45 At AJ[133], the Full Court rejected WOR’s submissions that “there was nothing in the Holt Memorandum that could impugn the process by which *guidance* was arrived at, and it did not allow any inference that *guidance* was unreasonable in a given year” (emphasis in original). The Full Court said that the August 2013 Earnings Guidance Statement was founded on the FY14 Budget, and if the FY14 Budget did not provide WOR with reasonable grounds for the August 2013 Earnings Guidance Statement then the FY14 Guidance Representation conveyed by the August 2013 Earnings Guidance Statement was taken to be misleading: AJ[133]. Accordingly, the Holt Memorandum and the inferences properly to be drawn from it could establish that the FY14 Guidance Representation was misleading: AJ[133]. Whether an inference should be drawn that the fact that Mr Holt was instrumental in the process of adopting the FY14 Budget supported the reasonableness of the material placed before the Board as a foundation for approving the FY14 Budget and formulating the August 2013 Earnings Guidance Statement was a matter which depended upon the whole of the relevant evidence, including the circumstance that WOR did not call Mr Holt: AJ[135].

46 At AJ[136], the Full Court rejected WOR’s various submissions that after August 2013, WOR may have been below budget but above guidance. The issue as at August 2013 was the existence of reasonable grounds, and the issue after August 2013 was the continued existence of reasonable grounds. The fact that WOR was tracking materially below the FY14 Budget later in 2013 was highly relevant to the continued existence of reasonable grounds or otherwise: AJ[136].

47 I turn then to the particular questions in the Joint List pertaining to the misleading or deceptive conduct case, namely Questions 1-4.

## Question 1: Was the FY2014 Guidance Representation a representation as to future matters and, if so, in what respects?

48 The parties are agreed that this question should be answered as follows, consistently with the primary judge’s conclusion at PJ[687]: Yes, to the extent only that it conveyed the representation that WOR expected to achieve NPAT in excess of $322 million in FY14. I adopt that agreed position as correct.

## Question 2: At any time throughout the period from 14 August 2013 to 19 November 2013 (Relevant Period), alternatively in the period from 9 October 2013, 10 October 2013 or 15 October 2013 to the end of the Relevant Period:

## 2.1 in so far as the FY2014 Guidance Representation was a representation as to present matters, was it misleading or deceptive, or likely to mislead or deceive; and

## 2.2 in so far as the FY2014 Guidance Representation was a representation as to future matters, was it made without a reasonable basis?

49 The applicant’s position is that, while the primary judge answered this question “No” at PJ[688], that finding was disturbed on appeal and the question arises for determination on the remitter. The respondent’s position is that the finding at PJ[688] was disturbed on appeal because the primary judge failed to take into account (in combination with undisturbed findings of fact as recorded in the PJ), the following matters:

(a) whether, at the time the FY14 Guidance Representation was made, it was known to any person whose knowledge was properly attributable to WOR according to orthodox principles, that the FY14 Guidance Statement lacked reasonable grounds, referring to AJ[106], [116], and [118]; and

(b) it is not necessary for the purposes of determining liability (as distinct from quantification of loss and damage) for the applicant to identify that particular integers or portions of the FY14 Budget were overstated or understated so as to be unreasonable or unjustifiable, referring to AJ[112] and [136]-[138].

The parties appropriately have treated para 2.2 of the question as intended to include whether, in making the FY2014 Guidance Representation, WOR had “reasonable grounds for making the representation” within the meaning of s 4(1) of the ACL and s 12BB(1) of the ASIC Act.

50 There is an initial issue between the parties, reflected in WOR’s proposed answer to Question 2 set out in the preceding paragraph, as to whether the scope of the remitter is confined to the findings by the primary judge which can be shown to have been infected by the four kinds of error set out in AJ[75], or more precisely the first two of those four matters, being an erroneous focus on the conduct of the Board rather than of WOR, and a search for a level of detail in the evidence to enable the primary judge to decide what would have been a reasonable forecast of FY14 NPAT. While it is true to say that the four matters referred to at AJ[75] were the fundamental sources of error as found by the Full Court, the Full Court did not limit the remitter specifically to issues which can be demonstrated to have been infected by one or more of those errors. On the contrary, the matter was remitted in general and unlimited terms. The Full Court was emphatic that the remitter must consider the whole of the evidence (see AJ[90], [96] and [116]), and that on the remitter the single judge would have to undertake an “overall evaluative exercise” (at AJ[101]). I approach that task on the basis stated by the Full Court in *Harvard Nominees Pty Ltd v Nicoletti*, which I have summarised above, in particular that where the appellate court has disturbed the findings of the primary court, it is open to the primary court to determine those issues afresh provided that it does so in accordance with the judgment of the appellate court. On that approach, it is neither necessary to identify specifically those findings by the primary judge which were infected by one or more of the four fundamental errors identified at AJ[75], nor is such a course desirable in that it would divert attention from a consideration of the whole of the evidence in undertaking the overall evaluative exercise.

51 A further preliminary question arises concerning what WOR submits is a lack of conformity between Mr Crowley’s submissions on the remitter and the case as pleaded in the 4FASOC. Mr Crowley’s submissions in relation to the misleading and deceptive conduct case as at 14 August 2013 are structured around the matters referred to by the Full Court in AJ[67], [69] and [102]. WOR submits that those matters involve impermissible departures from the 4FASOC in relation to the allegations and particulars as to the lack of reasonable grounds for the FY14 Guidance Representation, in particular submitting that there is no pleaded allegation that the following matters deprived WOR of reasonable grounds:

(a) WOR’s historical performance against budget or its revisions to earnings guidance in FY13; and

(b) the amount of Blue Sky revenue in the FY14 Budget, except in respect of the ANZ Region and the SWO Location (in the USAC Region).

WOR does not appear to maintain the submission that it is not open to Mr Crowley to contend that there was no reasonable basis for the FY14 Budget because it was not a P50 Budget, a matter which was rejected by the Full Court at AJ[59]-[73]. However, at AJ[67], the Full Court expressly held that WOR could not complain in the appeal that it was not part of Mr Crowley’s case below that the FY14 Budget was unreasonable because of six identified matters, including WOR’s history of material budget underperformance, and WOR having twice to downgrade its earnings forecast in 2013, as well as the fact that WOR maintained the 19% Blue Sky revenue, the same as in 2013 when markets were buoyant, given that Blue Sky performance was a function of market buoyancy. Further, the Full Court specifically rejected WOR’s contentions that Mr Crowley’s case did not include WOR’s historical performance against budget (at AJ[102] and [103]) and that Mr Crowley’s pleaded case in relation to Blue Sky revenue was confined to the ANZ Region and SWO Location (at AJ[130]). In light of those findings, I am bound on the remitter to accept that those issues arose as part of Mr Crowley’s case. Accordingly, I reject WOR’s submissions on this preliminary pleading point.

52 Both parties have helpfully structured their written submissions concerning whether there was a reasonable basis for the FY14 Guidance Representation as at 14 August 2013 under seven topics. Before dealing with those seven topics individually, however, it is appropriate to deal with WOR’s general submissions concerning the Holt Memorandum, and the Holt Memo Interview Notes. WOR submits that the Holt Memorandum was created after the FY14 Budget process and after a significant revision to guidance was announced to the market on 20 November 2013, and that it did not specifically concern the FY14 Budget but was a review of WOR’s budget and forecasting processes generally. WOR submitted that, ultimately, the outcome of the Holt Memorandum and the review undertaken by WOR in relation to its budget processes do not reveal any defect in WOR’s budget processes and, as at the time of the initial trial in September 2019, the budget process remained “largely” unaltered (referring to Mr Wood’s re-examination at T610.38-611.10). WOR submits that the Holt Memorandum was written from a hindsight perspective, created after WOR revised its guidance, and well-established authority which the Full Court accepted at AJ[117]-[120] demonstrates that the existence of reasonable grounds is to be judged at the date of the representation. WOR submits that the examination of later events is relevant only insofar as it sheds light on the position at the time of the representation, and it is vital to guard against hindsight illusion, citing *City of Botany Bay Council v Jazabas Pty Ltd* [2001] NSWCA 94 at [83] (Mason P). Accordingly, WOR submits that it would be an error to find that the observations recorded by Mr Holt in the Holt Memorandum were matters that falsified the FY14 Budget and were known to him at the time he put the FY14 Budget and the August 2013 Earnings Guidance Statement before the Board for approval.

53 WOR submits that the purpose of the Holt Memorandum was to capture matters that needed to be further investigated, referring to the evidence of Mr Wood as to the memorandum being a reflection of issues that needed to be further investigated: PJ[571], [577] and [595], Wood XX at T423.25-27, the final paragraph of the Holt Memorandum itself (CB11,120), and the task list set by the A&RC (CB11,135). Accordingly, WOR submits that the Holt Memorandum should be seen as the start of that process, not the end of it. WOR also submits that the Holt Memorandum did not seek to record matters that actually happened in the setting of the FY14 Budget, or to address particular decisions, judgments or forecasts that were taken up in the FY14 Budget, although I regard those submissions (as summarised in this sentence) as contrary to the Full Court’s reasoning at AJ[89], which I am bound to follow.

54 Further, WOR submits that any inference to the effect that Mr Holt was aware that the FY14 Budget included an unreasonable NPAT figure could not be drawn having regard to the totality of the evidence. WOR submits that it was Mr Holt who, as CFO, prepared the FY14 Budget and presented it to the Board: PJ[265]; and see the Board minutes of the meeting on 13 August 2013 (CB7,022). Further, it was Mr Holt who drafted and tabled the first iteration of the draft August 2013 Earnings Guidance Statement suggesting an increase on FY13 earnings (PJ[298]), and it was Mr Holt who tabled further drafts at subsequent A&RC and Board meetings as the FY14 Guidance Representation was developed by the Board (PJ[299] and [301]). Accordingly, WOR submits that Mr Holt demonstrably supported the reasonableness of the material placed before the Board. WOR relies also on the minutes of the joint Board, ExCo and CEOC meeting on 26-27 June 2013, which was attended by Mr Holt, Mr Bradie, Mr Allen and many of their senior colleagues who made presentations to the Board on the draft budget and were questioned by the Board: PJ[265]-[267], [270]. Further, WOR submits that two of the RMDs (Messrs Lucey and Ashton), to whom Mr Holt’s notes attributed comments, were called to give evidence and cross-examined, but it was not put to either of them that the comments recorded in Mr Holt’s notes were opinions held by them at the time of preparation of the FY14 Budget or that they held the opinion that the FY14 Budget was unreasonable because of those opinions, or that any of those opinions were expressed to the Board. WOR submitted that in the absence of having put those propositions to the witnesses, it is not now open to Mr Crowley to advance a case on that basis. As to that last proposition, WOR’s submission substantially misstates the rule in *Browne v Dunn* (1893) 6 R 67, namely that there is a rule of practice to the effect that, unless notice has already clearly been given of the cross-examiner’s intention to rely upon such matters, it is necessary to put to an opponent’s witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of the witness’s evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings: *Roufeil v Tarrant Enterprises Pty Ltd* [2023] FCAFC 142 at [57] (Jackman J, with whom Derrington and Abraham JJ agreed). The Full Court stated the rule in substantially the same terms at AJ[142], adding that the fact that propositions were not put to the witnesses may be relevant to the proper process by which inferences from facts are drawn or not drawn. In the present case, there cannot be any doubt that Mr Crowley had given clear notice of the intention to rely upon the Holt Memorandum and the Holt Memo Interview Notes as evidence of matters known to a substantial number of WOR’s employees well before the cross-examination of witnesses took place: see, for example, Mr Crowley’s opening written submissions (at paras 40 and 134-5) and opening oral address (at T20.32-21.13, 24.19-22, 79.31-85.10, 161.11-25); and see AJ[60].

55 I have set out above a number of the Full Court’s findings concerning the Holt Memorandum, including that its purpose was to review “the current process” that WOR followed with respect to its budgeting and forecasting (at AJ[86]), that there was an obvious inference open on the face of the Holt Memorandum that Mr Holt was identifying why the FY14 Budget process and the FY14 Budget miscarried (at AJ[87]), and that it identified measures said to be known about the budget process rather than matters said to have been uncovered or discovered about the budget process (at AJ[89]). The Full Court said that there was an obvious question as to whether Mr Holt should be inferred to have known that the FY14 Budget (and earlier budgets) were not P50 Budgets at all, but that was a matter to be considered in light of the whole of the evidence: AJ[90]. WOR places reliance on the primary judge’s statement at PJ[69] that the evidence that supports Mr Crowley’s case (being an apparent reference to the Holt Memorandum) was “mostly hindsight”, but that statement was expressly rejected by the Full Court at AJ[93].

56 In light of the fact that the Holt Memorandum was written only about three weeks after the November 2013 Revised Earnings Guidance of 20 November 2013, and nowhere suggested that its contents came to light only in that three week period, it is unlikely in my view that it was identifying knowledge acquired by Mr Holt and other employees of WOR only after 20 November 2013, or indeed only after 14 August 2013. That conclusion is reinforced by Mr Allen’s email of 11 June 2013 (which foreshadows a conversation between Mr Allen and Mr Holt to the same effect) and Mr Daly’s email of 7 August 2013 to Mr Holt which provide contemporaneous insight into the views held by senior management during the FY14 Budget process. I will return in due course to this topic in analysing the probative significance of the Holt Memorandum as at 14 August 2013 and at later points in time in the Relevant Period. As to the submission that Mr Holt would not have put forward a proposed budget which he did not regard as having a reasonable basis, that submission must be seen in the context of the substantial pressure on Mr Holt and other senior management of WOR, as recorded in the Holt Memorandum and elsewhere, to present a budget which showed year-on-year growth. The Holt Memorandum itself provides ample support for that contextual matter. The primary judge found at PJ[601] that: (1) WOR’s budget setting process was affected by a culture of optimism, with expectations of growth by senior management leading to Locations inflating their projections of Blue Sky revenue to meet those expectations; (2) insufficient allowance was made in the budget setting process for potential downsides including instances of active discouragement to do so; and (3) there was a belief by some of WOR’s senior management that Locations were not sufficiently stretching in their initial budgets which was not necessarily valid. I do not regard it as being at all incongruous that a CFO who was under that kind of pressure would present a budget showing an increase in NPAT over the previous financial year which he regarded as having a realistic chance of being reached, but not one which he reasonably believed had at least a 50% probability of being achieved.

### WOR’s historical performance against budget

57 Mr Crowley relies on the findings of the primary judge that WOR had shown a significant record of underperformance against its internal budget every year since FY09, with the exception of FY12 (in which WOR outperformed the budgeted NPAT by only 3.88%): PJ[410], and see [414] and [600]. The overestimation in budgeted NPAT each year was as follows: FY09, 7.97%; FY10, 19.36%, FY11, 9.55%, FY13, 18.95%: PJ[410]. The primary judge accepted that the historical NPAT figures showed “consistent, substantial underperformance” against budget: PJ[413(2)] and [414]. WOR was conscious of its history of budgeting failures during the budget process, as evidenced by the record of the 24 June 2013 CEOC meeting with the comments at item 5.0 as to the need to “solve our budget issues” and, “get the budget right this time”, with the added comment that “there is not a lot of energy left in the business for us to get to the second half next year and realise we have failed to achieve our budget again”: PJ[251].

58 Mr Crowley also places reliance on WOR, prior to finalising its FY14 Budget, having downgraded its earnings guidance for FY13 twice, on 13 February 2013 and 17 May 2013: PJ[125] and [127]; CB1,748 and 3,716 respectively. By those ASX announcements, WOR stated that the downgrades were required because of WOR’s underperformance against its internal budget: PJ[416]. On 14 August 2013 (that is, the day on which the August 2013 Earnings Guidance Statement was made), WOR announced NPAT of $322 million for FY13, down 7% on FY12: PJ[128]; CB7,215. The primary judge found that the FY14 Budget process was not materially different from the process that had been followed in the preceding years: PJ[411].

59 The primary judge accepted that WOR’s record provided WOR’s officers with a “basis for scepticism” and “caution”: PJ[415] and [417]. However, the primary judge concluded that more detailed analysis was required to make a finding about the reason or reasons for WOR’s historical underperformance against EBIT and NPAT budgets before it could provide a basis for making a finding of systemic problems in accurate forecasting or a sound basis for a conclusion that the FY14 Budget did not provide reasonable grounds for the August 2013 Earnings Guidance Statement: PJ[414]-[415] and [417]. That reasoning was identified by the Full Court as erroneous: AJ[77], and see AJ[48(2), (3), (6) and (7)], and [85]. Mr Crowley submits that WOR could not reasonably repeat a budget process that was proved to be flawed and expect a different result.

60 Putting aside the pleading point which I have dealt with above, WOR submits that the primary judge correctly found that, without identification of the reason for previous underperformance, there was no basis to find that underperformance against previous budgets was a result of systemic problems in accurately forecasting NPAT, referring to PJ[414]-[415] and [600]. WOR refers to Mr Wood’s evidence in cross-examination that he did not consider that the underperformance against budget in the preceding years demonstrated that there was much wrong with the process (T424.42-44), in circumstances where: (a) the markets for WOR’s services were very unstable in the period between FY09 and FY13, due to the global financial crisis impacting in FY09 and FY10 (T424.37-425.4), and the resources cycle thereafter (T425.6-18); and (b) notwithstanding the challenges affecting the markets for WOR’s services in those years, in three out of the five years, actual performance was within 5% of budgeted aggregated revenue (T424.38-39; Holt Memorandum p 2), and within 10% of budgeted NPAT (T424.21-26, 424.39; Holt Memorandum p 2 and PJ[580]). WOR submits that Mr Wood’s evidence was not challenged by Mr Crowley, and the primary judge formed a favourable view of Mr Wood’s credibility: PJ[79]. WOR also refers to the inference drawn by the primary judge that Mr Wood’s view of the FY09 and FY10 figures did not suggest any particular flaw in the budget process: PJ[580].

61 As to the downgrades to earnings guidance by WOR in FY13, WOR submits that the relevant question is whether WOR underperformed against its internal budgets (a) because of a systemic flaw in the budgeting process used to prepare the FY13 budget, or (b) for reasons specific to the prevailing market conditions in FY13. WOR submits that the first of those alternatives was not the subject of any detailed analysis (as distinct from mere assumption) by Mr Crowley. As to the second alternative, Mr Crowley alleged, and WOR admitted, that “in FY2013 WOR had experienced challenging conditions in a number of its key markets: 4FASOC, para 24(a); Further Amended Defence, para 24(b); PJ[419](1). Further, the ASX announcement made by WOR on 13 February 2013 (CB1,748) explained the market factors that impacted WOR’s budget forecast in FY13 and its expectation of earnings in the following terms:

Volatility in commodity prices impacted the market for our services and our growth in the first half. The market for our services improved towards the end of the period and we continue to expect growth for FY2013 on FY2012 underlying earnings.

Similarly, the ASX announcement made by WOR on 17 May 2013 (CB3,716) gave the following explanation by reference to market factors impacting on budget forecasts:

The West Australian business has been impacted by the softening of demand for resource infrastructure as clients defer major projects and implement cost management initiatives. This has particularly impacted the company’s Infrastructure & Environment and Minerals, Metals & Chemicals Business.

In addition, the company’s fabrication and construction business in Canada, WorleyParsonsCord, has been impacted by a softening in construction activity in the Canadian oil sands market and will not achieve the growth previously expected.

Outperformance in a number of other markets will serve to largely offset the decline experienced in Western Australia. The company continues to achieve outperformance in the Chemicals sector, particularly in China and Brazil, and growth in the Hydrocarbons sector has continued, particularly in the *Improve* business in Canada.

WOR submits that the reasons for the FY13 downgrades were not impugned by Mr Crowley, and there was no reason to doubt that the reasons for WOR’s underperformance against budget and guidance in FY13 were those contained in the announcements. Further, the reasons given in the ASX announcements were consistent with Mr Wood’s evidence, which was accepted by the primary judge: T425.6-18; T504.20-28; T504.30-505.6; T506.1-21; PJ[129]-[131]. Accordingly, WOR submits that on the whole of the evidence, the reasons for the FY13 downgrades related to the prevailing market conditions in FY13, which adversely affected WOR’s reasonably held expectations as to its earnings and required it to revise its guidance during that financial year, and the earnings guidance downgrades in FY13 therefore did not support an inference that there was any systemic flaw in WOR’s budget process that rendered it inherently unsuitable as a foundation for guidance, or that the FY14 Budget and guidance formulated on the basis of it were unreasonable.

62 In my view, the history of material underperformance against budgets from FY09 to FY13 did provide a basis for senior management to be sceptical about the FY14 Budget and at least raised an issue about systemic forecasting problems in WOR, as the primary judge found at PJ[410]-[415], and as recorded in AJ[76(2) and (3)]. The Holt Memorandum identified that problem over the past six years, and represented Mr Holt’s views as to the reasons for that history of overly optimistic budgeting. While I do not regard the history of underperformance against budgets as being itself determinative of any lack of reasonable grounds for the FY14 Guidance Representation, it is highly relevant in assessing the degree of scepticism and caution which senior management of WOR had to apply in preparing the FY14 Budget in order to establish that they had reasonable grounds for the FY14 Guidance Representation.

63 As to the downgrades to earnings guidance announced by WOR on 13 February 2013 and 17 May 2013, I do not attribute any significant weight to that matter in the context of the evidence as a whole. In my view, WOR has provided sufficient and cogent explanations for those downgrades as being attributable to reasons specific to market conditions in FY13, rather than demonstrating a systemic flaw in the budgeting process used to prepare the budget for FY13.

### The FY14 Budget was not a P50 Budget

64 The primary judge found that WOR professed to adopt the P50 parameter to produce its budgets, such that there was an equal chance of exceeding or going below the estimate: PJ[114]. Further, the primary judge found that the FY14 Budget was not a P50 Budget: PJ[197], [426]; affirmed by the Full Court at AJ[41], [73], [76(1)]. The primary judge’s reasoning for that conclusion was based on Mr Holt’s conclusion in the Holt Memorandum (referred to at PJ[426] by way of cross-reference to PJ[402]), which identified that WOR’s budgeting process had been infected with optimism bias, there was an expectation of growth, driven both internally and externally, but not by WOR’s own assessment of the markets in which it operated, and in many cases the bottom-up build that the Locations submitted did not match the expectations of growth expressed by senior management, quoting the Holt Memorandum as follows:

In order to meet these expectations, the most common response is for locations to simply include a greater level of “blue sky” revenue in the second half of their budget period. In essence, locations are ending up budgeting on the hope that work will materialise, rather than any real expectation that it will.

The Full Court affirmed those findings at AJ[83(2)]. Mr Holt then stated that these matters meant that WOR’s budgets have not genuinely been P50 Budgets, and that this was supported by the fact that WOR had missed budget five out of the last six years: PJ[402].

65 Further, the proposition that WOR knew or ought to have known that the FY14 Budget was not a P50 Budget, and did not provide reasonable grounds for the August 2013 Guidance Representation, is supported by comments of WOR’s senior management recorded in the Holt Memo Interview Notes. Those notes record the comments: “General recognition of P50 trending now to P25” (PJ[400]); and “We are not meeting the budget cause they are wrong” (CB11,100, last line). Mr Wilkinson, the then RMD of ANZ, made statements recorded as: “Push to achieve growth and the response was to put more Bluesky … Top of the organisation was driving … P50 but we were effectively lower, p25 in reality … Attitude that the business must grow no matter what”: PJ[401]. Similarly, Mr Bradie conducted conversations with RMDs and Location managers on 1 and 12 November 2013 and distributed a slide pack on 15 November 2013, which recorded the “common theme” (quoted at PJ[604] from CB10,418.21):

Do we create our own issues when we **bully people into accepting budgets** that cannot be supported with facts (no issues with stretch targets but they do need some form of basis to support them). A lot of time and effort goes into preparing budgets with traceable supporting evidence then they are unilaterally changed.

(Emphasis in original)

The primary judge described that as a “serious criticism” of the budget process in setting budgets that could not be supported with facts and unilaterally changing budgets after preparation on the basis of supporting evidence: PJ[606].

66 At AJ[85(1)], the Full Court said that if Mr Crowley proved that the FY14 Budget was less than a P50 Budget (which the Full Court said he did), then that “might be sufficient, in and of itself, to prove” that the FY14 Budget did not provide reasonable grounds for the August 2013 Earnings Guidance Statement, if it could also be proved that WOR knew or ought to have known that fact by reason of its knowledge of the underlying facts. Similarly at AJ[57], the Full Court said that if WOR knew, or by its knowledge of underlying facts should be taken to have known, that the FY14 Budget was not a P50 Budget then that would have been “evidence supporting the inference” that the FY14 Budget did not provide reasonable grounds for the August 2013 Earnings Guidance Statement. However, at AJ[113], the Full Court went further and said the following:

If the budget process was inherently unsuitable for use as the basis for earnings guidance to the market because it would not produce a P50 budget and thus, by definition, was not at least equally likely to be correct as the forecast NPAT as not, or if the forecast NPAT in the FY14 budget was itself unreasonable, it must follow that WOR did not have reasonable grounds for making the FY14 guidance representation.

Read literally, the finding at AJ[113], together with the finding (at AJ[83(2)] and [85(1)]) that the FY14 Budget was not a P50 Budget because of flaws in the budgeting process, appears to constitute a concluded finding that WOR did not have reasonable grounds for making the FY14 Guidance Representation. However, if the Full Court had reached that definitive conclusion, there would have been no need for the present remitter on issues of liability. Accordingly, I read that passage at AJ[113] as expressing a preliminary view based only on the limited material available to the Full Court on the appeal, rather than a conclusive finding as to a lack of reasonable grounds.

67 WOR submits that no evidence was led by Mr Crowley to prove that a process that produced a budget that was not a P50 Budget was inherently unsuitable for use as a basis for earnings guidance. Further, WOR submits that Mr Holt’s conclusion that WOR’s budgets had not been P50 Budgets was a hindsight conclusion, and the conduct of Mr Holt and Mr Bradie in relation to the presentation of the FY14 Budget was consistently supportive of its reasonableness and appropriateness. WOR submits that the primary judge did not draw any conclusion as to the reason why the FY14 Budget was not a P50 Budget, and how far off a P50 Budget it was. WOR also points to the finding by the primary judge that there was no evidence that the Board ought to have known that the FY14 Budget was not a true P50 Budget: PJ[428]. WOR submits that the proposition was not put to any of the witnesses called to give evidence on behalf of WOR at the trial, including the CEO, Mr Wood. Only Mr Ashton was questioned about the P50 parameter, but that was in connection with the MENAI Region, the budget for which was described by Mr Ashton in terms which suggested that it was in line with a P50 Budget: T668.43-669.25; and para 149 of his affidavit of 23 October 2018.

68 In my view, it is self-evident that a budget which is not broadly in line with the parameters for a P50 Budget does not provide a reasonable basis for earnings guidance announced to the market. A reasonably based budget requires that the relevant company has reasonable grounds to think that, in broad terms but not necessarily with the precision of a bookmaker, the company is at least as likely to exceed its estimate as it is to perform below it. The comments recorded by Mr Holt and Mr Bradie, to which I have referred above, provide a strong basis for finding that there was a commonly held view among WOR’s senior management at the time of preparing the FY14 Budget that it did not meet the parameters of a P50 Budget. Although those comments were recorded after the event, I regard it as unlikely that those views were formed by senior management only after the FY14 Budget had been approved and the FY14 Guidance Representation had been communicated. If that were the case, then I would expect there to be some reference to the timing and the reasoning for such a proposition, particularly given that the proposition may have absolved a number of key senior personnel from personal responsibility for what turned out to be overly optimistic budgeting. The comments recorded by Mr Holt and Mr Bradie were expressed as referring to matters which were experienced and thought of in the period when the FY14 Budget was being prepared and before it was adopted by the Board. Given the heavy involvement of Mr Holt and Mr Bradie in the process of preparing the FY14 Budget, it is likely, in my view, that Mr Holt and Mr Bradie were aware of those views as to systemic problems at the time; that is, before 14 August 2013.

69 The submissions by WOR to the effect that there was a lack of evidence as to the particular reasons why the FY14 Budget was not a P50 Budget, and a lack of evidence that the Board ought to have known that it was not a P50 Budget, reflect the errors identified by the Full Court in the primary judge’s reasoning. It is not necessary for the lack of reasonable grounds to be established in a quantitative rather than a qualitative manner, and it does not matter that the Board may itself have had reasonable grounds for adopting the FY14 Budget. Further, I do not see any significance in the lack of cross-examination of Mr Wood on this topic given the reasoning of the Full Court at AJ[59]-[74] as to Mr Crowley having clearly communicated at an earlier stage the basis on which he contended that the FY14 Budget was not a P50 Budget.

### Management Adjustments to the Draft Budget

70 The Full Court stated that if Mr Crowley proved that the 27 May 2013 Draft Budget with an NPAT of $252 million would itself be “ambitious” (which the Full Court said he did), and that the FY14 Budget forecast NPAT of $100 million more, at $352 million (which again the Full Court said he did), then that also “might be sufficient, in and of itself”, to prove that the FY14 Budget did not provide reasonable grounds for the August 2013 Earnings Guidance Statement, if it could also be proved that WOR knew or ought to have known that fact by reason of its knowledge of the underlying facts: AJ[85(2)]. I note at the outset that the reference to an additional $100 million contains an element of hyperbole, in that $32 million of that figure was made up of foreign exchange benefits, as to which Mr Crowley makes no complaint.

71 Mr Crowley submits that WOR’s 27 May 2013 Draft Budget arose from a bottom-up budget exercise. On 1 May 2013, WOR’s budget process saw Locations produce a budget NPAT of $272.944 million and WOR’s management proposed “aspirational” adjustments, resulting in a budget NPAT of $342.766 million: PJ[143]-[144]; CB3,028. These were described as “high level budgets” or “HLB”. On 3 May 2013, instructions for WOR’s detailed budget process were circulated, stipulating that “detailed budgets should be in line with the High Level Budget presented”: PJ[168]; CB3,081 at 3,084. WOR’s 27 May 2013 Draft Budget produced a forecast NPAT of approximately $252 million: PJ[165]. That draft budget overall was described by the primary judge as “ambitious”: PJ[423]. At PJ[196], the primary judge accepted Mr Wood’s evidence that the 27 May 2013 Draft Budget generally reflected the Locations’ efforts to identify “aggressive yet achievable budget targets”, but the primary judge then said:

However, I am not persuaded that I should conclude that this draft budget, as a whole, was “ambitious” or took up “all reasonable stretch”, without more evidence or supporting analysis of the integers of the budget, or at least the major integers.

I note that that finding appears to be inconsistent with the finding at PJ[423] that overall, the 27 May 2013 Draft Budget was “ambitious”, and the latter finding was affirmed by the Full Court at AJ[85(2)].

72 Mr Crowley then refers to the events between 27 May 2013 and 14 August 2013, in which approximately an additional $100 million in NPAT was added to WOR’s budget. The primary judge referred to that process as a whole at PJ[47], and while it seems most unlikely to me that the primary judge was there making findings, as distinct from recording Mr Crowley’s submissions, the Full Court at AJ[33] treated PJ[47] as the primary judge’s description of the process. PJ[47] appeared under the heading “Opening submissions” and plainly set out Mr Crowley’s contentions. The primary judge made findings later in her Honour’s judgment to similar effect, although the figure of $34.9 million (referred to as Mr Crowley’s submission at PJ[47(1)]) was actually $31.046 million (PJ[201]) and the figure of $20.7 million (referred to as Mr Crowley’s submission at PJ[47(3)]) was actually $14.093 million (PJ[243(1)]). The particular steps in the process were as follows. First, between 31 May 2013 and 3 June 2013, $31.046 million in operational EBIT was added to WOR’s budget (PJ[201] and [330]), which was less than the $34.9 million sought by Mr Bradie and Mr Daly (PJ[201]). Second, on or about 4 June 2013, Mr Allen added $12 million for acquisition stretch which resulted in budgeted FY14 NPAT of $288.6 million: PJ[210]-[212]. Third, on or about 12 June 2013, Mr Bradie and Mr Daly then proposed an additional $20.7 million in operational EBIT (PJ[233], [237], but only $14.093 million of that amount was actually taken up (PJ[243])). Fourth, on or about 25 June 2013, the CEOC committed to making an additional $42 million in overhead savings, of which $33 million would be recorded in FY14 operational EBIT: PJ[255], [257]; CB4,963 and CB5,179. Finally, on or about 26 June 2013, $32 million was added to the budget NPAT figure using the current foreign exchange spot rate: CB5,179.

73 Mr Crowley submits that, with respect to these management adjustments, it is not necessary for him to identify whether any individual adjustment was unjustifiable, or what the reasonable forecast range would have been, or any counterfactual budget NPAT, referring to AJ[115] and [136]-[138]. Mr Crowley submits that the gravamen of the complaint is the forecast in the FY14 Budget of an additional $100 million in NPAT on top of the already “ambitious” budget forecast of 27 May 2013. As I have indicated, $32 million of that additional amount is uncontroversial, with the result that the complaint is over an additional $68 million.

74 WOR submits that the primary judge did not find that the 27 May 2013 Draft Budget was “ambitious”, referring to the rejection of that submission at PJ[196], and contending that the finding at PJ[423] was merely that “there is evidence that … overall, the draft budget was ‘ambitious’”. That argument, in my view, does appear to reconcile the apparently contradictory findings in those two paragraphs, although it is contrary to the reasoning of the Full Court at AJ[76(5)], which treated the primary judge as having found that the 27 May 2013 Draft Budget “overall” was “ambitious”. Although I have reservations about the Full Court’s reading of PJ[423], I am bound by the Full Court’s reasoning. In any event, the finding expressed by the primary judge at PJ[196] is infected by the second class of error identified by the Full Court at AJ[75]. WOR also submits that Mr Crowley embraced the 27 May 2013 Draft Budget, referring to para 143 of Mr Crowley’s closing written submissions which stated that his “primary contention is that the Locations, with the benefit of reviews from the Regions and the side-checks from the CSG line, essentially got the FY2014 forecast right by 27 May 2013”.

75 WOR submits that the undisturbed findings of the primary judge were that the additional $100 million in NPAT which was added to the FY14 Budget between 27 May 2013 and 14 August 2013 was reasonable, drawing attention to the following findings of the primary judge:

(a) WOR’s budget forecasts were reviewed in advance of budget review meetings between senior management and the Board on 21-28 June 2013; Mr Bradie reviewed each Location budget with the relevant RMD and adjustments were proposed to Locations (with Regions ultimately left to find budget revisions as they considered appropriate across all Locations within their purview): PJ[203]; WOR supplemented that finding at the hearing before me with a submission, which I accept, that ultimately any amendments to the budgets had to be approved by the relevant Locations: Wood XX at T440.1-10; Lucey XX at T692.29-34, 715.6-14; 723.35-724.1, 753.37-41; Mr Lucey’s affidavit of 13 December 2018, para 129; Exhibit 6 showed as an *aide-mémoire* how that operated for the first two rounds of Management Adjustments in June 2013;

(b) on or about 31 May 2013, Group Finance added an amount of $12 million to operational EBIT to account for earnings from potential corporate acquisitions, which the primary judge said was not demonstrated to be inappropriate, unachievable, or unrealistic: PJ[213] and [342]; however, I note that in fact the $12 million was already included in the 27 May 2013 Draft Budget, but only as a provisional item “pending review” (see [254] below);

(c) the 31 May 2013 draft budget forecast NPAT of approximately $288.6 million: PJ[208];

(d) between 11 and 17 June 2013, Mr Bradie proposed budget adjustments impacting 21 of 43 Locations to RMDs based on his review of metrics in the budget submissions, and approximately $14 million of $20.7 million in adjustments proposed were taken up, none of which was demonstrated to be unreasonable or unjustified or involved artificial “ways to pump up the numbers”: PJ[247]. WOR refers also to the finding by the primary judge that almost 50% of the approximately $14 million in adjustments related to the ASCH and MENAI Regions (of which Messrs Lucey and Ashton were the RMDs) but neither was cross-examined about those adjustments: PJ[333]-[335] and [247];

(e) the 14 June 2013 draft budget forecast NPAT of $297 million: PJ[245];

(f) between 21 and 25 June 2013, the CEOC met in preparation for joint management and Board meetings on 26 and 27 June 2013 (PJ[248]); the CEOC was engaged in a “genuine effort to develop a reasonable FY14 budget”, and there was no indication in the meeting record that senior management was developing a budget that included elements that were known to be unrealistic, or that senior management was unconcerned about whether the budget would be achievable (PJ[252]); as a result of the meeting, the CEOC resolved to make overhead savings of $42 million, $33 million of which was incorporated into the draft FY14 Budget (PJ[255] and [257]); and the primary judge found that Mr Crowley had the opportunity to, but did not, cross-examine WOR’s witnesses about those adjustments or put to them that the adjustments were unreasonable (PJ[336]-[340]);

(g) on 26 June 2013, Mr Holt presented the draft FY14 Budget to the Board, forecasting NPAT of $352.1 million: PJ[261] and [265];

(h) on 10 July 2013, WOR’s senior management updated the draft FY14 Budget for changes in prevailing foreign exchange rates from those used during the draft budgeting process, resulting in forecast NPAT of approximately $370 million (PJ[282]); Mr Wood decided to maintain WOR’s FY14 Budget NPAT at $352.1 million with the result that a $16.1 million operational contingency and a $7.5 million tax contingency were created in the FY14 Budget (PJ[282]); properly understood, WOR submits that this adjustment did not increase the budgeted NPAT, but rather reduced NPAT by the inclusion of contingencies, and Mr Crowley made no complaint about this adjustment at the trial, as the primary judge stated at PJ[47(5)];

(i) Mr Holt presented the FY14 Budget to the Board on 13 August 2013 and summarised the changes since the June draft, following which the Board resolved to approve the FY14 Budget, forecasting NPAT of $352.1 million (PJ[309]), and approved the publication of the FY14 Earnings Guidance Statement.

76 Mr Crowley correctly submitted that the Full Court held that it was not necessary for Mr Crowley to identify whether any individual adjustment was unreasonable, or what figure should have been put in its place. The Full Court’s starting point on this matter was that the primary judge had found that the 27 May 2013 Draft Budget, forecasting NPAT of $252 million, was “ambitious” which, as I have said, I am bound to follow, despite my reservations about whether the primary judge actually made that finding. Once one adopts that as the starting point, an increase in the forecast NPAT of $68 million (that is, $100 million less the uncontroversial foreign exchange adjustment of $32 million), being an increase of about 27% over an NPAT of $252 million, would prima facie be likely to lack reasonable grounds. However, some of the particular integers contributing to that $100 million may have been justified. I consider this matter in relation to Question 13 at [249]-[255] below. At this stage, however, I note that in answering Question 13, I regard the “first round” of Management Adjustments of an additional $31.046 million in operational EBIT (with the exception of about $6.6 million relating to MENAI and ASCH) as not being justified. The same conclusion applies to the “second round” of Management Adjustments of $14.1 million, except for the amount of about $6.7 million relating to MENAI and ASCH. That conclusion is fortified by the comments in the Holt Memorandum as to overly optimistic expectations of growth by senior management and the tension between Locations and senior management in the budget process. Accordingly, in light of the evidence as a whole, I regard that aspect of the Management Adjustments as itself sufficient to support a finding of a lack of reasonable grounds for the FY14 Budget, which thus did not provide reasonable grounds for FY14 Guidance Representation.

### The FY14 Budget did not result from a risk-adjusted approach to forecasting

77 Mr Crowley refers to the following aspect of the Holt Memorandum (at CB11,118-11,119) under the heading “Insufficient allowance for potential downsides”, which was referred to at PJ[588] and AJ[26]:

The review identified that our budget process does not make sufficient allowance for potential downsides – whether known or unknown. As the WorleyParsons business model has moved into larger and more complicated projects, the potential for material downside on one or more of these projects in a particular accounting period is high, but this potential downside is not built into the budgeting process. Put another way, our budget assumes that everything will go right in a world where we know things will go wrong.

The size of these issues can impact not only on the ability of a location to meet its budget, but on the group as a whole. In addition, the way in which the group budgets and operates means that it is unlikely that there will be unknown upside (i.e. work that is not already in secured, prospect or blue sky that is won and executed during the financial period) sufficient to offset the potential downsides.

In cases where potential problems have been identified on projects the feedback is that locations are actively discouraged from including potential downside in their budgets (at best, these are treated as a sensitivity at group level).

Mr Crowley draws attention to similar comments contained in the Holt Memo Interview Notes, such as: “Slippage on one large project will mean the difference between success and failure in a particular year”; “Some budgetary risk is not provisioned in final budget outcomes”; and “Unrealistically high BlueSky number with little proper assessment”: CB11,094-11,099. The notes record Mr Bradie as having commented that WOR had “Stripped out of the business the provision for a rainy day”: CB11,106; PJ[161]. The primary judge accepted that the Holt Memorandum and the Holt Memo Interview Notes supported the conclusions that insufficient allowance was made in the WOR budget setting process for potential downsides, and that there was feedback that Locations had been actively discouraged from including potential downside in their budgets where potential problems had been identified on projects: PJ[601(2)]. Further, the A&RC noted at its meeting on 11 December 2013 that WOR’s “budgeting process currently is lacking a risk adjusted view” and “suggested that a risk-based analysis, such as was carried out overnight on 18 and 19 November, should be a standard part of the process”: PJ[608]; CB11,134.

78 The salient aspects of the analysis carried out on 18 and 19 November 2013 were that: (a) Mr Daly, “due to a much more critical assessment of the phasing and blue sky” proposed reducing operational EBIT by $97 million plus the $12 million included for acquisition stretch (PJ[550] and [553]); and (b) Mr Holt and Mr Bradie identified approximately $100 to $120 million in EBIT in the forecast about which they had concerns because of “prior performance, known issues in each location and current market conditions” (PJ[562]). ExCo agreed that the forecast for Blue Sky was too high and could not be achieved: PJ[565]. The Full Court said that the fact that in November 2013 Mr Daly reviewed the FY14 Budget and stripped $110 million (or $97 million) of Blue Sky revenue from it was relevant evidence, and it was possible to use that evidence without engaging in impermissible hindsight: AJ[130]. That does not mean that the entire amount (or even most of the amount) of the reduction made in November 2013 to Blue Sky revenue can be attributed to an unreasonably optimistic view having been formed by 14 August 2013. I return to this topic at [96]-[101], and to the difficulties in reasoning backwards from the adjustments made on 18-20 November 2013 to form a view as to a reasonably based budget on 14 August 2013 (and thereafter during the Relevant Period) in considering issues of loss and damage in answering Question 13 at [242]-[243] below.

79 WOR submits that the evidence relied on by Mr Crowley in relation to this aspect of the case all post-dated the November 2013 Revised Earnings Guidance and formed part of a review after the event into the budget process generally, the ultimate result of which was that the budget process remained “largely” unaltered (as Mr Wood said in his re-examination at T610.38-611.10). I do not regard that as a valid criticism. The comments referred to in the Holt Memo Interview Notes are expressed as matters of which the various members of WOR’s senior management whose views are recorded in those notes were aware at the time of the preparation of the FY14 Budget, and I read Mr Holt’s own observations in the Holt Memorandum as reflecting his views at that time, particularly in the absence of any statement to the effect that it was only after 14 August 2013 (or 20 November 2013) that those views had occurred to him or been formed by him. WOR’s submission is also contrary to the finding of the Full Court at AJ[89] that the Holt Memorandum conveyed Mr Holt’s assessment as to why the FY14 Budget, amongst others, miscarried, and identified things said to be known about the budget process, not uncovered or discovered. As to the A&RC meeting on 11 December 2013, the statements to which I have referred above were recorded immediately after Mr Holt advised the meeting “that a common query from analysts and investors was why we had not known of the issues affecting our outlook earlier than 20 November”: CB11,134. The comments as to the lack of a risk-adjusted view and a risk-based analysis thus appear to be referring to known shortcomings in the budget process as it existed in the preparation of the FY14 Budget, even if the quantification of adjustments required by a risk-based analysis were brought to light only on about 19 November 2013 in light of the then known circumstances. WOR also submits that the comment in the A&RC minutes as to the “budgeting process currently … lacking a risk adjusted view” was specifically in the context of “public commentary purposes”. However, the following sentence, stating that “a risk-based analysis, such as was carried out overnight on 18 and 19 November, should be a standard part of the process”, indicated that the proposition had a wider and more fundamental application.

80 In relation to the operational contingency of $16.1 million (referred to at PJ[344]), WOR submits that the way in which that contingency arose was not contentious, either at the trial or on appeal. WOR submits that the contingency was adopted by WOR in the final iteration of the FY14 Budget to reduce budgeted NPAT from approximately $370 million to $352.1 million, because fluctuations in foreign exchange rates would otherwise have had the effect of increasing the budgeted NPAT. The Full Court expressed the view in the last sentence of AJ[66] that this was “never a general contingency given that it arose from a short-term movement in FX rates and was fully deployed for that reason early in the FY14”. I do not accept WOR’s submission that that statement was merely a recitation of the argument put by Mr Crowley, rather than a finding by the Full Court itself, as the sentence begins with the words, “In our view”. WOR submits further that the statement was not supported by the evidence, in that:

(a) the primary judge’s finding that the $16.1 million contingency was not a contingency against foreign exchange movements (PJ[347]) was based on the documents and her Honour’s acceptance of Mr Wood’s evidence to that effect (PJ[297(1)(c)], [491], and para 162 of Mr Wood’s affidavit of 23 November 2018); and

(b) there was no evidence that the contingency was fully deployed on account of foreign exchange in early FY14; foreign exchange movements between the rates used in the FY14 Budget and the 2+10 forecast of 3 October 2013 had a $6.3 million adverse impact (being $10 million less than the operational contingency) (see CB8,939 at 8,945, second line); the foreign exchange impact in the 3+9 forecast of 19 November 2013 was not identified in the document and therefore cannot support a finding that it had been fully applied to foreign exchange movements (CB10,655), and both the 2+10 forecast and the 3+9 forecast included the operational contingency of $16.1 million in the base numbers (CB8,939 at 8,945; CB10,655 at 10,660).

That evidence causes me to have serious reservations about the correctness of the Full Court’s finding at the end of AJ[66] as to the $16.1 million contingency not being a general contingency, however I am bound to adopt that finding. In any event, I do not regard the question of the $16.1 million contingency as having a material bearing on whether there were reasonable grounds for the FY14 Guidance Representation.

### WOR’s markets were not growing or were deteriorating when the FY14 Budget was prepared

81 Mr Crowley refers to the finding that when the FY14 Budget setting process began, WOR’s major markets were either not growing or were deteriorating: PJ[418]; AJ[42]. The Full Court observed that WOR did not file a notice of contention that the primary judge erred in so finding: AJ[76(4)].The primary judge referred to reference being made at an ExCo meeting on 21 May 2013 to the overall business not growing so that functional group budgets should be “flat if not less” (at PJ[177]), and also referred to an email pertaining to the Australian market on 31 May 2013 describing the market as “falling” (PJ[220]). The Full Court said with reference to May or June 2013 that it was “common knowledge that WOR’s markets were flat or falling”: AJ[126]. Further, WOR was aware that in FY13 it had experienced challenging conditions in a number of its key markets and there would be continued uncertainty in the markets for its services in FY14: PJ[418]-[421]; AJ[128]. Mr Crowley attributed to the Full Court an acceptance of the proposition that the fact that WOR’s markets were flat and falling was sufficient to permit a conclusion that the FY14 Budget did not provide reasonable grounds for the August 2013 Earnings Guidance Statement, with reference to AJ[125]. I do not read the Full Court as having gone that far in its reasoning. The relevant finding was that the fact that Mr Wood (and, it must be inferred other key employees involved in the budget setting process) knew that WOR’s markets were not growing or were deteriorating when the FY14 Budget was prepared was (and is) “important”: AJ[125]. The Full Court did not say that no further analysis was required to conclude that the FY14 Budget did not provide reasonable grounds, and any such reasoning would be inconsistent with the perceived need for this remitted hearing on issues of liability. The Full Court did state that the FY14 Budget forecasted both increased revenue and decreased costs: AJ[127]. The Full Court said the following at AJ[127]:

In other words, the efforts of Mr Bradie, in particular, who reported directly to Mr Holt [sic; in fact, he reported directly to Mr Wood], ensured that in flat or falling markets for WOR’s services the FY14 budget reflected a 13.8% increase in earnings over the buoyant FY13 market. Mr Wood (and by inference Mr Holt) must have known exactly what the process involving Mr Bradie’s hard work with the locations involved.

In the rhetorical question of an unnamed interviewee in the Holt Memo Interview Notes, “How do you grow by 10% in a flat market?”: PJ[74].

82 WOR submits that Mr Crowley’s submissions in relation to WOR’s markets in FY14 ignore the complexity of WOR’s business, being a global business which operated out of 165 offices in 43 countries in FY13 and 157 offices in 46 countries in FY14: PJ[90]. The business also operated in different customer sectors, namely Hydrocarbons (which contributed 70% of WOR’s FY13 aggregated revenue: PJ[95]), Minerals, Metals & Chemicals, and Infrastructure: PJ[93]. Each of the Locations and CSGs were subject to different markets, as illustrated by the FY14 Budget itself which shows a summary of each Location’s FYI4 Budget financial metrics compared to FY13 actuals, and at the BEBIT line, 24 of the 42 Locations budgeted an increase, 15 budgeted a decrease, and 3 budgeted to stay the same: CB6,717 at 6,728-9.

83 Further, WOR submits that it is wrong to say, as a generalisation of the markets in which WOR operated, that they were not growing or were deteriorating, referring to Mr Wood’s undisputed evidence, which was accepted by the primary judge at PJ[130], that in early 2013:

(1) Hydrocarbons was broadly stable;

(2) the minerals and metals part of MM&C continued to struggle, and was particularly affected by delays and deferrals on major projects, especially in Australia;

(3) the chemicals part of MM&C was fine, especially in the USA and China;

(4) the infrastructure and environment sector was continuing to struggle in some places; and

(5) the power business was “okay”.

In the context of Mr Wood’s evidence that “power, infrastructure and minerals and metals were each overall small contributors to EBIT, while ‘Hydrocarbons was the big one’” (PJ[131]), the primary judge’s finding that WOR’s markets were “either not growing or were deteriorating” was said by WOR to have been overstated, as is indicated by the primary judge’s rejection of Mr Crowley’s submission in respect of Blue Sky revenue estimates at PJ[132]-[133]. In relation to Hydrocarbons, the primary judge accepted Mr Wood’s evidence as to the state of the Hydrocarbons sector in FY13 and into FY14 to the effect that there was significant activity in the Hydrocarbons market with high oil prices and a continued outlook from most of the major forecasters and WOR’s customers that they expected that to continue: PJ[129]. Mr Wood referred to the oil and gas business remaining “robust” through to FY14, and even at the beginning of FY14 it looked “pretty good” until spending stopped and WOR ended up with a very deep recession or a deep bottoming-out of the cycle: T425.06-18. Further, on 24 June 2013, the CEOC received presentations from UBS Investment Bank, Macquarie Securities and Bank of America Merrill Lynch, which all reflected optimism in the Hydrocarbons and MM&C sectors: CB4,887 at 4,902 and 4,903 (UBS); CB4,915 at 4,918 and 4,920 (Bank of America Merrill Lynch); CB4,932 at 4,935 (Macquarie Securities). Further, Mr Ashton gave evidence in his cross-examination that the markets in MENAI in 2013 were “very buoyant” (quoted at PJ[361]) and there was nothing he observed in the market conditions or operating conditions of MENAI that gave him concerns in delivering the MENAI budget (para 162 of his affidavit of 23 October 2018). Mr Lucey gave evidence that China (being the largest Location in ASCH) was “a growing market” and “a hub for the chemical sector” (para 157 of his affidavit of 13 December 2018, and see also T697.40-41). In relation to MENAI and ASCH, however, I note that WOR’s annual report for FY13 states that those two Regions were responsible for only 8% and 7% respectively of WOR’s aggregated revenue: CB7,222 at 7,242.

84 WOR also challenges the Full Court’s observation at AJ[127] and [129] that the FY13 market had been “buoyant”. WOR points to the admission on the pleadings that “in FY2013 WOR had experienced challenging conditions in a number of its key markets” (para 24(a) of the 4FASOC), as the August 2013 Earnings Guidance Statement had recognised. As I read AJ[46(2)] in light of the first sentence of AJ[39], the Full Court accepted as uncontroversial that the primary judge concluded that in FY13 WOR had experienced challenges in a number of its key markets, a point which may have been overlooked by the time the Full Court reached AJ[127] and [129]. As indicated above, in FY13 WOR underperformed against its budget and twice downgraded its earnings guidance. Mr Wood described FY13 “as an incredibly turbulent period” (T504.37-45, quoted at PJ[129]). The combined efforts of counsel for both parties at the hearing before me could only identify the following evidence which might be thought to relate to a finding that the markets in which WOR operated were buoyant in FY13:

(a) the statement in an ASX and media release by WOR on 29 August 2012 that WOR expected margins and earnings in the Hydrocarbons sector to improve in FY13 (CB861 at 866) and that “Subject to the markets for our services remaining strong, we expect to achieve good growth in FY2013 compared to FY2012 underlying earnings” (CB870). However, those comments were made only two months into FY13, and thus cannot prove what the state of the markets actually was in FY13, and the second statement was expressed to be subject to the very matter in question;

(b) the statement by the Chairman at WOR’s Annual General Meeting on 23 October 2012 (CB888 at 896) that:

As we said at the time of our results announcement, subject to the markets for our services remaining strong, we expect to achieve good growth in FY2013 compared to FY2012 underlying earnings.

Since that announcement, the volatility in our markets has increased and there is greater uncertainty about them remaining strong which will make growth harder to achieve. Notwithstanding these challenges, we maintain our previous guidance.

That statement was made less than four months into FY13, and was so heavily qualified that it could not conceivably prove that the markets were “buoyant” in FY13;

(c) the evidence of Mr Wood in cross-examination that in the period from FY09 to FY13, “one of the surprising things was how robust the oil-and-gas business remained all the way through to when we got to FY14” (T424.45-425.18). However, that was a generalised statement concerning a period of four years as a whole, rather than a statement concerning FY13 in particular, which Mr Wood described as “incredibly turbulent”; and

(d) the evidence of Mr Ashton in his cross-examination quoted at PJ[361] to the effect that in 2013 the markets in the MENAI Region were “very buoyant”. However, MENAI accounted only for 8% of WOR’s aggregated revenue in FY13 (Annual Report for FY13: CB7,222 at 7,242).

85 What appears to have happened is that the then Senior Counsel for Mr Crowley made a submission to the Full Court that “in 2013, the markets were buoyant” and “the court will see that from the 29 August 2012 media release” (T12.33-35). As I have indicated at [84(a)] above, in my view, that statement, made only two months into FY13 and qualified by doubt over the very matter it is said to establish, could not possibly prove that WOR’s markets in FY13 were actually buoyant. However, the Full Court seems to have accepted uncritically the submission thus made. Accordingly, what the Full Court described at AJ[129] as “undisputed evidence” that “FY13 was a buoyant market” should have been described as an unfounded submission by counsel for Mr Crowley. However, I am bound to follow the Full Court’s reasoning, despite the obvious flaws in it, and I do so with great reservation.

86 As to WOR’s submissions in relation to the market conditions in FY14, those submissions are also contrary to the findings of the Full Court. Indeed, Mr Wood himself said that during the budget setting process for FY14, “some of our markets were falling and our primary market was flat” (T478.14-16). The Full Court clearly held at AJ[127] that the markets for WOR’s services when the FY14 Budget was prepared were “flat or falling” and that the FY13 market had been “buoyant”. I am bound by those findings, which then give rise to the question as to how a 13.8% increase in earnings (with apparent reference to operational EBIT: CB6,721) could be justified. On the whole of the evidence, I do not think that WOR has established that it had reasonable grounds to forecast a 13.8% increase in earnings, in circumstances which I am bound to accept involved the Full Court’s findings as to the state of the market in FY13 and FY14. Accordingly, on the basis on which this remitter must be conducted, I regard this aspect of the case as another demonstration of the lack of reasonable grounds for the FY14 Guidance Representation.

### WOR maintained the 19% Blue Sky revenue, being the same as FY13 when markets were buoyant

87 The FY14 Budget made significant allowance for Blue Sky revenue. The Board pack in relation to the final FY14 Budget stated that “FY14 has been budgeted with a 53% secured backlog, 28% prospects and proposals and 19% blue sky”: PJ[297(4)]; CB6,731. The 19% Blue Sky figure was in line with historical metrics, according to Mr Wood: PJ[350], as stated at para 191 of Mr Wood’s affidavit of 23 November 2018. At AJ[129], the Full Court said the following:

The available undisputed evidence included that: (a) FY13 was a buoyant market, (b) FY14 was a flat or falling market, (c) blue sky revenue is a function of market buoyancy, and (d) the blue sky gross margin percentage allowed in FY14 was the same as in FY13, 19%. Again, the primary judge appears to have found all of the relevant facts but not drawn the inevitable inference those facts would require to be drawn.

88 I have considerable reservations, which I have indicated at [84]-[85] above, as to whether proposition (a) in that extract is sound, and I do not regard it as correct to say that there was any cogent evidence to that effect or that such evidence as there may have been on that matter was “undisputed”. However, I am bound by the Full Court’s reasoning as expressed in that passage at AJ[129]. It also seems to me that proposition (c) is an oversimplification, as Blue Sky revenue is not merely a function of market buoyancy, but as Mr Wood said, it is also a function of the nature of the work, in that there tends to be more Blue Sky revenue from consultancy work (being of a short duration) than from major projects which are put to tender, and thus WOR has good visibility in relation to that latter work: T465.33-42; para 286 of Mr Wood’s affidavit of 23 November 2018; T466.9-41; T468.22-39. However, I must put that reservation aside also, as I am bound by the Full Court’s finding that Blue Sky revenue is a function of market buoyancy.

89 Mr Crowley does not rely simply on the Full Court’s reasoning at AJ[129]. Mr Crowley draws attention also to the references in the Holt Memorandum considered above as to the historical budgeting problems caused by including optimistic and undiscounted Blue Sky figures. The Holt Memo Interview Notes referred to “Unrealistically high BlueSky number with little proper risk assessment”: PJ[76]. Mr Daly said in his email of 7 November 2013 that “some locations added blue sky to increase their figures to maintain budget”: PJ[404]. The primary judge found that there were cases where Locations inflated their projections of Blue Sky revenue in order to meet senior management expectations: PJ[601]. The primary judge accepted Mr Lucey’s description that growth was “pretty well mandatory (unless there’s a very good reason for not complying)”: PJ[587].

90 Mr Crowley’s attack on the overly optimistic Blue Sky revenue in the FY14 Budget included specific attention to the ANZ and USAC Regions: PJ[376]. Together with Canada, they were the main profit centres of WOR, generating 67% of aggregate revenue: PJ[95]. The 27 May 2013 Draft Budget included 12% and 10% increases in Blue Sky revenue for Australia South and Australia North as a percentage of gross margin over the FY13 budget: PJ[188]. Blue Sky constituted 29% of gross margin for Australia North, with the budget reporting pack for Australia North dated 27 May 2013 including the statement that “The high % of unsecured work coming from blue sky is a risk in the current trading environment”: PJ[189]. Mr Daly’s email of 31 May 2013 to Mr Holt and Mr Allen expressed concern about the revenue, commenting that “when you look at the detail, you see that the level of blue sky in ANZ (North and West) in particular is very high (ANZ South is high but is not such a worry given the nature of their business)”: PJ[198(2)] and [389]. Mr Wood conceded that the Blue Sky revenue for Locations within Australia was optimistic: PJ[188] and [383].

91 For USAC, the SWO budget reporting pack dated 16 May 2013 forecast that Blue Sky revenue would contribute 10% of gross margin, and recorded the risk that Blue Sky accounts for about 29% of unsecured gross margin (being $17.9 million out of $62.4 million): PJ[396]. Despite having identified that risk, adjustments in the FY14 Budget increased that particular forecast for Blue Sky revenue by a further $1.73 million: PJ[398]. The Full Court said that WOR did not call any RMD from the ANZ or USAC Regions to seek to justify the Blue Sky revenue attributed to those regions in the FY14 Budget: AJ[94].

92 Mr Crowley also submits that the lower overheads in the FY14 Budget tended to reduce the likelihood of higher revenues from Blue Sky, referring to the primary judge’s findings at PJ[404] and [541]. The Full Court commented that Mr Crowley “could also contend” that maintaining the overall percentage of Blue Sky revenue as WOR did in the FY14 Budget was objectively unreasonable in circumstances where overall revenue was forecast to increase but costs were cut: AJ[130].

93 Putting to one side the pleading point raised by WOR, which I have dealt with at [51] above, WOR criticises the premise that the FY13 markets were “buoyant” and the proposition that Blue Sky is a function of market buoyancy. As I have stated at [85] and [88] above, I am bound to adopt those findings, despite my reservations as to their correctness and completeness respectively. WOR relies upon Mr Wood’s evidence that the nature of the smaller work and consultancy work available in Australia West, Australia North and SWO supported the Blue Sky forecasts in those regions: T466.9-41, T468.22-39, and para 149 of Mr Wood’s affidavit of 23 November 2018. WOR points out that Mr Wood had previously been the RMD of the ANZ Region, and was therefore able to give cogent evidence in relation to the Blue Sky estimates included in the FY14 Budget, including the ANZ Region in particular. WOR submits that it was not put to Mr Wood that a review of Blue Sky forecasts before the FY14 Budget was approved would have indicated any particular Location which should have been reduced, but in my view that submission reflects the error made by the primary judge in focusing on whether individual integers of the FY14 Budget were demonstrated to be erroneous.

94 WOR submits that there is no evidence to support Mr Crowley’s submission that the overhead cuts made following the CEOC meeting on 26 June 2013 made achieving Blue Sky revenue riskier due to the relationship between overheads and Blue Sky, being a submission which was rejected by the primary judge at PJ[134]. Mr Ashton gave evidence that the exercise undertaken by the CEOC was one of “removing or consolidating roles to reduce overheads”, and Mr Ashton formed the view that the roles removed would have a minimal impact on his team’s ability to generate profit: paras 129 and 130 of his affidavit of 23 October 2018. Mr Ashton was accepted as a truthful and credible witness: PJ[79].

95 Even if I were impermissibly to disregard the Full Court’s reasoning at AJ[129], viewing the evidence as a whole, there is force in the contention that WOR did not have reasonable grounds for the estimate of Blue Sky revenue in the FY14 Budget. The comments in the Holt Memorandum and Holt Memo Interview Notes point strongly towards that conclusion, together with Mr Daly’s comments in his email of 31 May 2013. I do not regard the evidence of Mr Wood and Mr Ashton as sufficiently strong or detailed to displace the primary judge’s conclusions at PJ[601] that WOR’s budget setting process was affected by a culture of optimism and that there were cases were Locations inflated their projections of Blue Sky revenue in order to meet senior management expectations. Further, I am bound by the Full Court’s reasoning at AJ[129], which comes very close to finding a lack of reasonable grounds in relation to this aspect of the case.

96 WOR, however, submits that, in effect, whatever criticism may be made of the amount of Blue Sky included in the FY14 Budget, that criticism must be made good in relation to the 27 May 2013 Draft Budget because the amount of Blue Sky did not move significantly between 27 May 2013 and 14 August 2013. The 27 May 2013 Draft Budget included an amount equal to 19% of gross margin (or “GM”) (CB4,287), and gross margin for FY13 was then forecast to be $2,092,367,000 (CB4,289). Each individual Location put forward its own figure for Blue Sky as a percentage of gross margin, and those figures varied widely, but overall amounted to 19% of gross margin (CB4,287). By the time that the second round of Management Adjustments was recorded in the FY14 Budget tracker on 14 June 2013 (PJ[243(1)]), various changes were made to Blue Sky for different Locations but the amount of Blue Sky as a percentage of gross margin overall remained at 19% (CB4,600). The gross margin which was forecast in the FY14 Budget tracker as at 14 June 2013 was $2,084,352,000 (CB4,602), which included an amount of $12 million for acquisition stretch (CB4,602) which had not been included in the gross margin as at 27 May 2013 (CB4,289), although it had been included in the operational EBIT figure as at 27 May 2013 (CB4,287). Therefore, WOR submits that the gross margin had declined slightly between 27 May 2013 and 14 June 2013, but the amount of Blue Sky as a percentage of gross margin remained the same at 19%. Accordingly, WOR submits that there was no increase in the amount of Blue Sky overall as a result of those first two rounds of the Management Adjustments. The other Management Adjustments (being the overhead reduction of $33 million, the acquisition stretch of $12 million, and the foreign exchange benefit of $32 million) do not relate to the amount of Blue Sky, and the evidence does not suggest that any adjustment was made to Blue Sky after 14 June 2013.

97 WOR also points out that the Full Court’s reasoning at AJ[100], to the effect that the aggregated revenue increased by $851 million between the 27 May 2013 Draft Budget and the FY14 Budget ultimately adopted on 14 August 2013 (of which, at most, only $644 million was due to changes in foreign exchange assumptions), does not deal with the particular issue as to Blue Sky. Further, in answer to a question posed by the Full Court as to the amount of any increase in budgeted total revenue between 27 May 2013 and 14 August 2013, the parties agreed that “aggregated revenue” (being total revenue but excluding procurement revenue at nil margin) increased by $851.1 million, including only $87.1 million in Locations revenue submissions (CB Part B, Tab 12). However, the detailed answer provided by the parties did not deal specifically with Blue Sky, and nor did the Full Court’s question request that it do so.

98 However, Mr Crowley submits that an amount of $7.831 million was in fact added to the Blue Sky amount in the 27 May 2013 Draft Budget in the first two rounds of Management Adjustments; that is, by 14 June 2023. That figure is obtained by adding up the particular figures for Blue Sky for individual Locations shown in WOR’s *aide-mémoire* (Exhibit R1) (which are based on the FY14 NPAT Budget tracker for 31 May 2013 and 14 June 2013, being CB4,286-4,289 and CB4,599-4,602 respectively), rather than relying on the total gross margin figure multiplied by the rounded figure of 19% for Blue Sky. The calculation is shown in Mr Crowley’s *aide-mémoire* marked as MFI 4. I accept that submission.

99 The primary judge stated at PJ[377] that Mr Crowley agreed in opening that WOR had reasonable grounds for a budget that it developed with a forecast NPAT of $284 million, being the sum of the 27 May 2013 Draft Budget forecast NPAT of $252 million plus the $32 million allowance for foreign exchange effects accrued between that time and the FY14 Budget of 14 August 2013, and thus stated that Mr Crowley accepted that there was a reasonable basis for the Blue Sky revenue forecasts in the 27 May 2013 Draft Budget. Further, the primary judge stated that the argument put in closing submissions for Mr Crowley was that the 27 May 2013 Draft Budget included “optimistic” Blue Sky forecasts, and not that there were no reasonable grounds for any of those forecasts: PJ[380]. Mr Crowley adhered to that position at the hearing before me: T16.6-19, 93.13-19, 94.15-16, 111.38-39, 120.10-14, 408.42-409.5. I do not regard that concession as inconsistent with Mr Crowley’s reliance on the Full Court’s finding that such a forecast was “ambitious” and nor did Mr Crowley’s submissions at the hearing before me suggest any inconsistency: see T111.20-22 and 111.38-39.

100 Mr Crowley submitted that the primary judge’s reasoning at PJ[377], as to Mr Crowley having accepted that there was a reasonable basis for the Blue Sky revenue forecasts in the 27 May 2013 Draft Budget, was disturbed by the Full Court’s reasoning at AJ[67], [109], [129]-[130]. In particular, the Full Court said at AJ[109] that Mr Crowley’s acceptance that the 27 May 2013 Draft Budget forecast of NPAT of $252 million was not inconsistent with the balance of his case, although the primary judge incorrectly appeared to have accepted WOR’s submission to that effect to some extent at PJ[377]. That appears to be a reference to the primary judge saying at PJ[377] that Mr Crowley accepted that there was a reasonable basis for the Blue Sky forecasts in the 27 May 2013 Draft Budget. I do not understand how that reasoning could be described as erroneous, unless it could be shown that a reduction in Blue Sky forecast by the Locations could be matched by the Locations’ increasing earnings in some other way as at 27 May 2013 so as to make the then overall budgeted NPAT of $252 million reasonably based. Mr Crowley made no attempt to demonstrate how that could be done. I accept that the Full Court at AJ[109] did disturb the primary judge’s reasoning that Mr Crowley had implicitly accepted that there was a reasonable basis for the Blue Sky revenue forecasts in the 27 May 2013 Draft Budget. However, the Full Court did not ultimately decide the point in relation to the reasonableness or otherwise of the amount of Blue Sky in the FY14 Budget, and thus the issue is open for me to decide. The repeated concession made at the hearing before me by Mr Crowley as to the reasonableness of the 27 May 2013 Draft Budget expressly included acceptance of the reasonableness of what the Locations had submitted for that draft budget (T93.13-19), which plainly included their budgeted Blue Sky. I am unable to see how the 27 May 2013 Draft Budget could be accepted as reasonable as the budget comprising the Locations’ budgetary submissions if the very substantial amount of Blue Sky included in it was not reasonably based, and Mr Crowley made no attempt to show how that could be done. Accordingly, I regard it as inconsistent with Mr Crowley’s concession as to the reasonableness of the 27 May 2013 Draft Budget for Mr Crowley to submit, and for the Court to find, that the amount of Blue Sky revenue forecast by the Locations in that draft budget was not reasonably based.

101 However, the granular analysis performed by Mr Crowley and shown in MFI 4 demonstrates that a net amount of $7.831 million was added in Blue Sky between 27 May 2013 and 14 August 2013. In light of the evidence to which I have referred above as to the problems with Blue Sky forecasts identified in the Holt Memorandum and the Holt Memo Interview Notes, together with Mr Daly’s email of 31 May 2013, I find that most of the additional $7.831 million in Blue Sky which arose between 27 May 2013 and 14 June 2013 was not reasonably based, and accordingly there was a lack of reasonable grounds for incorporating that amount of Blue Sky in the revenue component of the FY14 Budget. An exception to that last proportion is for such part of that additional Blue Sky that relates to ASCH and MENAI, by reason of my reasoning at [253] below in relation to the Management Adjustments of $6.6 million and $6.7 million for those Regions being reasonably based. It appears from the last column in Exhibit R1 that the Blue Sky for ASCH out of the net amount of $7.831 million was negative $172,000 and the Blue Sky for MENAI was an additional $1,709,000, being a total net amount of $1,537,000. Accordingly, I find that the balance of the net $7.831 million in additional Blue Sky, being $6.294 million, was not reasonably based. I recognise that on this occasion I have descended into a level of detail in relation to a particular integer of the FY14 Budget, which the Full Court said in general terms was an unnecessary and erroneous approach, but I regard that approach as necessary and appropriate on this particular issue given the effect of Mr Crowley’s concession as to the reasonableness of the Locations’ budgetary submissions adopted in the 27 May 2013 Draft Budget.

### Awareness of WOR as to defects in its FY14 Budget process and FY14 Budget

102 The Full Court accepted the principle that where there is a representation as to a future matter, which is alleged to constitute misleading or deceptive conduct, the representor must show some facts or circumstances existing at the time of the representation on which the representor in fact relied, which are objectively reasonable and which support the representation made: AJ[117]. In the present case, the representor is WOR, not the Board, and the knowledge attributable to WOR depends upon ordinary principles of agency: AJ[117]. The Full Court accepted that a relevant issue is whether the representor was aware of matters that falsified the representation of opinion, being a question to be answered by reference to the knowledge properly attributable to WOR according to orthodox principles, not merely knowledge of the Board: AJ[118].

103 Mr Crowley’s submissions as to WOR’s awareness of defects in the FY14 Budget process and FY14 Budget focus on Mr Holt, Mr Bradie, Mr Daly and Mr Allen, none of whom were called by WOR as witnesses in the proceedings: AJ[33], [57], [79], [82], [84], [85], [123] and [124]. Each of Mr Holt, Mr Bradie, Mr Daly and Mr Allen was a senior employee of WOR, whose knowledge is to be attributed to WOR. The real issue is whether they were aware of defects in the FY14 Budget process and the FY14 Budget. As discussed above, one of the fundamental errors identified by the Full Court in the primary judge’s approach was failing to weigh the evidence and the proper inferences to be drawn consistently with the principle in *Jones v Dunkel*, which may be stated as follows, that the unexplained failure by a party to call a witness may in appropriate circumstances:

(a) support an inference that the uncalled evidence would not have assisted the party’s case, particularly where it is the party who is the uncalled witness; and

(b) permit the court to draw, with greater confidence, any inference unfavourable to the party who failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn.

See *Jones v Dunkel* at 308 (Kitto J), 312 (Menzies J) and 320-21 (Windeyer J); *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361 at [63] (Heydon, Crennan and Bell JJ); *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 at [79] (Besanko, Perram and Katzmann JJ). In addition, the principle in *Blatch v Archer* is to the effect that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

#### Mr Holt

104 I have referred extensively above to the Holt Memorandum, which the primary judge described as a “download of the issues as people saw them”: PJ[577]. Mr Holt’s review was conducted with the ExCo, Managing Directors of Operations and Finance Directors: PJ[581]. The Full Court held that the Holt Memorandum dealt with the FY14 Budget and the FY14 Budget process and why they miscarried: AJ[86]-[87] and [89]. The primary judge said that there was no reason to doubt the accuracy of facts stated in the Holt Memorandum or that the opinions recorded were “informed and thoughtful”: PJ[578]. Similarly, the primary judge said that the Holt Memo Interview Notes “reflect candid and genuinely held views of WOR senior management” and “record strong criticism of aspects of WOR’s budgeting and reforecasting processes”: PJ[602]. The Full Court held that the Holt Memorandum and the inferences properly to be drawn from it “could establish” that the FY14 Guidance Representation was misleading: AJ[133]. The Full Court said that, given the circumstances and time at which it was created, its contents and the fact that Mr Holt was not called to give evidence by WOR, the Holt Memorandum could not be dismissed as hindsight reflection: AJ[132]-[133]. I have referred above to the Full Court’s description of the Holt Memorandum as a “relatively contemporaneous document”, prepared by the CFO of WOR who was intimately involved in the FY14 Budget, and it identifies “things said to be known about the budget process, not things said to have been uncovered or discovered about the budget process”: AJ[89], [92].

105 Mr Crowley submits, and I accept, that the Holt Memorandum and the Holt Memo Interview Notes exposed why the FY14 Budget and budget process did not provide reasonable grounds for the FY14 Guidance Representation. In light of the clarity and strength with which the criticisms are expressed in those documents, the central role of Mr Holt in preparing the FY14 Budget and the proximity in time to the FY14 Budget process, I infer that the views expressed in those documents were held by at least a substantial proportion of WOR’s senior management at the time of the FY14 Budget process, and that Mr Holt himself was aware of those views in the period up to 14 August 2013 when the FY14 Budget was being prepared. Further, I infer that Mr Holt held those views himself by 14 August 2013, given that there is nothing in the Holt Memorandum or the Holt Memo Interview Notes which indicates that Mr Holt regarded it as appropriate to distance himself from the views expressed, or to suggest that the views were not shared by him at the time of preparing the FY14 Budget. As the CFO, with primary responsibility for preparing and presenting the FY14 Budget to the Board for approval, one would expect that Mr Holt would have stated expressly if he disagreed with the views being expressed, or if he thought that those views either had not been formed or had not been expressed during the process of preparing the FY14 Budget. As I have indicated above, I do not regard it as incongruous that Mr Holt would have presented the FY14 Budget to the Board for approval despite holding substantial reservations concerning its reasonableness, in circumstances where he, along with other members of senior management, were under very considerable pressure to produce a budget which showed continued growth over the previous financial year. While I would not infer that as at 14 August 2013 Mr Holt regarded the FY14 Budget as unachievable, I do infer that Mr Holt was aware of defects in that budget and the process adopted in preparing it which meant that the chance of achieving the FY14 Budget was substantially less than a 50% likelihood.

106 Consistently with the rule in *Jones v Dunkel*, I draw those inferences with greater confidence given that Mr Holt was in a position to cast light on whether the inferences should be drawn. Mr Holt was no longer employed by WOR at the time of the initial trial: PJ[70(1)]. Mr Wood said that Mr Holt was then employed by Centuria Capital, another ASX listed company: para 21(a) of his affidavit of 23 November 2018. However, that is not sufficient to explain the failure to call Mr Holt, which would require evidence to the effect that Mr Holt was not prepared to co-operate with WOR’s legal representatives by giving evidence at the trial. The primary judge implicitly accepted that Mr Holt was in WOR’s camp, referring to Brereton J’s reasoning in *Re HIH Insurance Ltd (in liq)* [2016] NSWSC 482; (2016) 335 ALR 320 at [33] to the effect that the former CFO in that case was in the defendants’ camp in that a former officer was obliged to assist the liquidators and would more naturally be called by the defendants to deny that he had guilty knowledge than by the plaintiff to confess that he did: PJ[70]-[72]. Mr Wertheim, a solicitor acting for Mr Crowley, attempted to contact Mr Holt by telephone and email in February 2019 but did not receive a response (affidavit of Mr Wertheim of 2 September 2019 at [14]-[16]), which indicates that Mr Holt was not willing to co-operate with Mr Crowley’s legal representatives and was therefore not in the applicant’s camp.

#### Mr Bradie

107 Mr Bradie was the GMD Operations, reported directly to Mr Wood and was a member of ExCo, and the eight RMDs reported to Mr Bradie: PJ[97]-[98] and [100].

108 Mr Crowley’s submissions concerning Mr Bradie focus on the concerns which he expressed with the “phasing” of WOR’s budget, being the HOH split in the timing of forecast results between H1 and H2 of the financial year. The primary judge accepted Mr Wood’s explanation that the HOH analysis provided a “sense check”, in that it “might” indicate that a budget is unrealistic: PJ[172]. The primary judge referred also to Mr Wood’s evidence in cross-examination that the phasing in the FY14 Budget reflected “a very careful consideration of the likely timing of revenue, operating costs and overheads”: PJ[172]. On 30 July 2013, in considering a draft FY14 group budget showing an HOH split of 34:66, ExCo was concerned about the phasing split and the need to reduce the weighting to the second half of the financial year: PJ[286]-[287]; CB6,431 at 6,445 and CB6,484 at 6,485. On 3 August 2013, Mr Bradie sent an email to all RMDs referring to the “need to … sort out the phasing. At 43/57 this is too 2nd half weighted … For the big locations if we can even move 1 or 2 % this will make a difference”, and asked them to let Mr Daly know what they thought could be achieved: PJ[288]. After speaking to RMDs and Finance Directors, on 5 August 2013, Mr Daly explained by email to Mr Holt and Mr Bradie the difficulty in adjusting the HOH by reference to various locations, including a comment on SWO that “H2 a real stretch” and in relation to Saudi “H2 has very low level of secured work”: CB6,710-6,711. On 6 August 2013, Mr Bradie responded by saying that he would like “to move another 1%”: CB6,710. In spite of Mr Bradie’s concern and efforts, the phasing in favour of H2 actually increased in the FY14 Budget, which had HOH phasing of 41:59: PJ[294]; CB6,717 at 6,719.

109 The Holt Memo Interview Notes (CB11,106) record the following statements being made by Mr Bradie in his interview with Mr Holt:

Stripped out of the business the provision for a rainy day

We set a stupidly high target and then exceed it

Lack of maturity

Culture of expectation both market and ourselves

We need realism in the room

The budget process itself is fine, but then we talk it up

Hurdles are too high

Managing to market expectation is a cultural problem

Tell the market the truth

I infer that those views were held by Mr Bradie during the process of preparing the FY14 Budget.

110 I accept that the split of earnings could legitimately be biased in favour of one half or the other and WOR’s earnings were usually biased to the second half, as WOR submits. However, I accept Mr Wood’s explanation as to the usefulness of phasing as a “sense check” as to the reasonableness of budget forecasts. While I accept that Mr Bradie is likely to have thought that the FY14 Budget was achievable, and I accept WOR’s submission that Mr Bradie was determined to do his best to achieve the FY14 Budget, believing that that could be done, I infer that Mr Bradie thought that it was more likely than not that the FY14 Budget would not be achieved. Mr Bradie’s comments recorded in the Holt Memo Interview Notes strongly indicate that he thought the FY14 Budget (along with previous budgets) was unreasonably optimistic.

111 As to whether a *Jones v Dunkel* inference should be drawn against Mr Bradie, Mr Wood gave evidence that Mr Bradie was employed as the CEO of KBR at the time of the initial hearing (T498.1-2), which WOR says is a direct competitor of WOR and thus explains his absence as a witness for WOR. However, without more, I do not accept that Mr Bradie was not prepared to co-operate with his former employer in litigation which, in part, concerned his own conduct. Further, Mr Crowley submits, and I accept, that there is an implicit finding by the primary judge at PJ[72] (which the Full Court quoted with apparent approval at AJ[80]) that Mr Bradie (among others) was in WOR’s camp.

#### Mr Daly

112 Mr Daly was the Global Director of Operations and Communications Support, reporting directly to Mr Holt: PJ[101]. He was described as “effectively the financial lead for Mr Bradie”: PJ[101]. I have referred above to Mr Daly’s email of 5 August 2013, expressing concerns about adjusting the HOH by reference to various locations. On 7 August 2013, Mr Daly wrote to Mr Holt about Mr Bradie’s request to move another 1%, declining to make further changes to the budget and saying the following, as quoted at PJ[293] and AJ[92]:

As an fyi only, there remains a strong sense within the business that the FY14 targets – both full year and H1 – are a stretch and I agree with that given current performance and the reliance on timely realisation of the cost saving targets. Something to bear in mind during your briefings over the coming weeks!

113 Mr Daly’s email of 7 August 2013 does, in my opinion, support the inference that Mr Daly thought that the FY14 Budget targets, both full year and H1, were relatively unlikely to be achieved, describing them as “a stretch”. Further, Mr Daly’s email indicates that he was aware that that was a reasonably widespread view among WOR’s management, referring to “a strong sense within the business”. As Mr Daly remained an employee of WOR at the time of the initial hearing, his unexplained failure to give evidence justifies that inference being drawn more confidently. Accordingly, I find that Mr Daly was aware that there was a lack of reasonable grounds for the FY14 Budget, in that while he thought that the forecasts were achievable, he thought it relatively unlikely that they would in fact be achieved, and was aware that that was a view which was widespread in WOR.

114 I have referred above to Mr Daly’s email of 31 May 2013 to Mr Holt and Mr Allen expressing concern about Blue Sky revenue being “very high” in ANZ: PJ[198(2)] and [389]. However, Mr Daly’s email also referred to the Secured Work of approximately 53% being “about right” and Blue Sky of approximately 19% being “ok”. Accordingly, I do not regard that email in particular as evidence of a belief by Mr Daly that the FY14 Budget overall lacked reasonable grounds.

#### Mr Allen

115 Mr Allen was the Global Director of Corporate Finance, reporting to Mr Holt: PJ[101(2)]. I have referred above to his email to Ms Wallace on 11 June 2013 (CB4,425). At that time, approximately $43.05 million had already been added to the 27 May 2013 Draft Budget which had been prepared by the Locations and which forecast NPAT of $252 million, being the amounts of $31.046 million in operational EBIT (which was added between 31 May and 3 June 2013), and the amount of $12 million for acquisition stretch (which was added on or about 4 June 2013). A further contextual matter is that on 10 June 2013, Mr Bradie had sent an email to all RMDs seeking improvements in BEBIT: PJ[ 223]. Mr Allen wrote in his email of 11 June 2013, quoted at PJ[224]:

Had a very interesting conversation with Michael [Daly] on this and other topics. He really doesnt seem to have any concept of the amount of work involved in this.

Our guess is that Stu Stu [Mr Bradie] got a rocket from Andrew [Wood] last week re the budget and has been told to change everything – making somewhat of a mockery of the process. If there was going to be a top down target why didn’t we start with that in the first place??

I am also concerned that we are putting the company’s reputation at risk. If we go out with another unrealistic budget, and need to do another profit downgrade next year, it is not going to look good at all in the market. Something to discuss with Simon [Holt].

The Full Court said that, considering that email in isolation, it was an obvious inference to draw that, at the least, Mr Allen considered in June 2013 that the draft budget was “too stretched” and unreasonable, and that he had “foundational concerns” with the process by which the draft budget had been developed: AJ[123]. Having considered the whole of the evidence, I consider that such an inference should be drawn. Contrary to WOR’s submission made in writing (but not orally), I do not regard Mr Allen’s email of 11 June 2013 as a complaint merely about the amount of work involved in Mr Daly’s request to the RMDs to review their budgets and find additional cost savings. Nor do I regard the email as mere “banter” between a couple of close associates, as Mr Wood suggested in his cross-examination: T496.1-2. Further, I draw the inference more confidently in light of WOR’s failure to call Mr Allen, who remained an employee of WOR at the time of the hearing: PJ[70(3)] and AJ[91]. Accordingly, I find that Mr Allen was aware by 14 August 2013 that the FY14 Budget lacked reasonable grounds.

### Conclusion as at 14 August 2013

116 It follows from the analysis that I have set out above that WOR lacked reasonable grounds for the FY14 Budget and accordingly that it lacked reasonable grounds for the FY14 Guidance Representation. The Full Court observed that the only basis advanced by WOR as reasonable grounds for making the FY14 Guidance Representation was the FY14 Budget and the process by which it was prepared: AJ[111]-[113] and [136]. It also follows that that lack of reasonable grounds persisted throughout the Relevant Period. However, for completeness, I will deal with the evidence concerning matters which arose during the Relevant Period.

### Misleading and deceptive conduct between 14 August 2013 and 20 November 2013

117 In early September 2013, WOR commenced preparations for a 2+10 forecast, comparing the results of the first two months of the financial year against the full year budget and a high-level reappraisal of expectations for the remaining ten months of the year: PJ[436]. The forecast was prepared for a market update at the AGM: PJ[470]. The August FY14 finance report to ExCo (which was sent to Mr Holt on 20 September 2013) referred to NPAT as being below the FY14 Budget by $14.2 million or 49%, and below the prior year by $23.6 million or 61%, and that, although one-third of the half-year had elapsed, NPAT was just 10% of the half-year target: PJ[449]. On 21 September 2013, Mr Daly emailed Mr Bradie providing an update on the 2+10 process, and advised that WOR was “adverse to budget at an operational EBIT level by approximately $23m” and that he expected “this order of magnitude variance to continue through the ‘3+9’ update when the locations do a more thorough review of their forecasts”: PJ[443]. On the same day, Mr Bradie forwarded Mr Daly’s email to Mr Wood and Mr Holt, advising that WOR needed “a major reset out of the CEOC/ExCo. Doing what we are doing today will not get us there …”: PJ[446]. Mr Wood agreed that a major reset was required: PJ[447]. Mr Crowley submits that the “reset” being referred to was a reappraisal of the FY14 Budget, whereas WOR submits that Mr Brady was talking about properly managing the operations of the business to deliver the budgeted earnings. At PJ[448], the primary judge extracted a passage of cross-examination in which Mr Wood was asked why he took the view that a major reset was required in respect of the company’s financial performance, and in his answer Mr Wood said “a reset of expectations was necessary” (T547.1-13). However, it is not apparent whose expectations were being referred to (for example, internal management or market participants), or whether the expectations were as to WOR’s business operations generally or the FY14 Budget forecast for NPAT. Mr Wood stated in his cross-examination (at T547.1-13) that at that stage WOR did not consider that it would not meet guidance, which points towards the “reset” pertaining to WOR’s business operations with the aim of achieving the forecast NPAT announced on 14 August 2013. That is consistent with Mr Crowley’s acceptance of Mr Wood’s denial that he had a subjective belief that the FY14 Budget was unachievable at that time (T71.33-72.22). Accordingly, I find that the “reset” being referred to related to changes in WOR’s business operations rather than a change to budgeted NPAT for FY14.

118 On 27 September 2013, a first draft of the 2+10 forecast became available (PJ[471]), and was distributed in a Board pack on 4 October 2013 (PJ[476]). It forecast NPAT for the first half of the year to be $120.2 million, which was a decrease of $24.8 million from the FY14 Budget and a decrease of $34.9 million from the previous year: PJ[476](1). Mr Crowley submits that that would require NPAT in the second half of FY14 to be $231.1 million in order to reach the FY14 Budget of $252 million, yet the largest second half year ever achieved by WOR was $192 million (CB10,615) and WOR’s markets were perceived to be flat or falling. The HOH split was forecast to be 36:64 for the year compared to the split in the FY14 Budget of 41:59: PJ[476(1)]; [471]. Mr Wood accepted that this was a “significant shift” in phasing early in the year (PJ[482]) and Mr Holt said to the Board at its meetings on 4 and 5 October 2013 that it made the “required second half a big ask” (PJ[488]). I interpret that latter comment as meaning that in Mr Holt’s view, the required second half performance was unlikely to be achieved. The primary judge referred to all budget contingencies having been deployed, just two months into the year: PJ[476]-[477], including the $16.1 million operational contingency. The primary judge referred to Mr Wood agreeing that a like-for-like comparison with the FY14 Budget of $352 million NPAT would be the 2+10 forecast of NPAT of only $333 million: PJ[477]; CB8,944.

119 WOR’s confirmation of the August 2013 Earnings Guidance Statement on 9 October 2013 prompted the following email from Mr Allen to Mr Daly on 11 October 2013 (CB9,376), quoted by the primary judge at PJ[499]:

Andrew [Wood] did talk to a lower H1, but unless we get some very good answers on ATM and some of our other disputed amounts, my personal view is that our first half number is going to shock the market – they will simply not believe that we can do double our first half in the second half (and I would have to say that I understand where they are coming from). I actually encouraged a more pessimistic outlook but Andrew and Simon remain optimistic.

Mr Wood did not recall that conversation with Mr Allen (PJ[500]), but did not deny that it took place.

120 The primary judge referred to the EBIT improvement program considered by the CEOC and the EBIT improvement steering committee in October 2013: PJ[450]. The minutes of the ExCo meetings on 22 October 2013 (CB9,788) and 30 October to 1 November 2013 (CB10,032 at 10,033 and 10,036) demonstrate serious attention being given to substantial reductions in overheads. The primary judge said that her Honour was not persuaded that WOR was not capable of taking positive action to ensure that WOR would achieve an NPAT in the order of $352 million in accordance with the FY14 Budget: PJ[463]. WOR submits that that finding was not disturbed on appeal. In my view, what the primary judge found at PJ[463] was that Mr Crowley had not established that it was beyond WOR’s ability to achieve an NPAT in the order of $352 million, not that there were reasonable grounds to think that WOR was likely actually to do so. The question is not whether it was within the realm of possibilities or within WOR’s capability for it to achieve an NPAT of $352 million; rather, the issue is whether there were reasonable grounds to think that there was at least as great a likelihood of it doing so as there was of WOR failing to achieve that budgeted NPAT. The evidence relating to the circumstances between 14 August 2013 and 20 November 2013, taken as a whole, is strongly against such a proposition.

121 WOR also submits that it is not to the point that WOR’s financial results in July, August and September were below budget, and submits that the question is not whether WOR was behind budget but whether it could take positive action to achieve NPAT in excess of $322 million. The use of $322 million as the relevant benchmark for questions of liability was clearly rejected by the Full Court, which said at AJ[136]:

The point is that WOR relied on the FY14 budget with its forecast NPAT of $352.1 million as reasonable grounds for its FY14 guidance representation. WOR cannot defend the claim by arguing that while a forecast NPAT of $352.1 million might not have been reasonable, a forecast NPAT in excess of $322 million was reasonable. This is because the ground on which WOR in fact relied to make the FY14 guidance representation was the FY14 budget with its forecast NPAT of $352.1 million. For this reason, WOR’s various submissions that, after August 2013, it may have been below budget but above guidance are misconceived. The issue at August 2013 is the existence of reasonable grounds. The issue after August 2013 is the continued existence of reasonable grounds. The fact that WOR was tracking materially below the FY14 budget later in 2013 is highly relevant to the continued existence of reasonable grounds or otherwise.

I am bound to follow that reasoning.

122 On 14 October 2013, Mr Allen emailed Mr Holt with WOR’s September 2013 results, which the primary judge quoted relevantly as follows at PJ[393] and [508]:

Not good news so far on September. Operational EBIT is currently down $17m for the month v budget and, even more disappointing, over $11m v the 2 + 10… Year to date we are effectively down around $5m to forecast and $20m to budget at the NPAT line.

A few hours later, Mr Allen sent Mr Holt a September NPAT tracker with the comment, “the major [Locations] are those in my earlier email, and pretty much everyone else is down a little bit, which adds up to down a lot”: PJ[509]. Despite the 2+10 forecast and the September results, WOR repeated the August 2013 Earnings Guidance Statement in its public statements on 15 October 2013.

123 In late October 2013, WOR commenced its quarterly 3+9 budget review at the same time that it was preparing its September 2013 results: PJ[514]. By 19 October 2013, Mr Holt and Mr Allen received the September FY14 finance report to ExCo which the primary judge described as showing a continuation of the trend reported in the previous month, with NPAT of $28.6 million, being below budget by $19.8 million: PJ[515]. On 22 October 2013, Mr Daly sent Mr Holt an email entitled “high level ‘guesstimate’ of 3+9 forecast” saying that the “expected guesstimate” of the 3+9 forecast was that operational EBIT would be approximately $30-35 million off budget: PJ[518]. At the ExCo meeting that day, Mr Holt said that “most metrics were below budget and revenues appear to be falling”: PJ[516]. On 24 October 2013, a first cut of the 3+9 forecast sent by Mr Calderone to Mr Daly and Mr Allen referred to operational EBIT being down $50.8 million against budget and $24 million against the 2+10 forecast: PJ[523]. NPAT was down $39 million against budget and $20 million against the 2+10 forecast: PJ[524]. The HOH weighting was 28:72 against the budget of 41:59: PJ[524]. On 15 November 2013, Mr Holt sent Mr Wood the October FY14 financial report to ExCo: PJ[546]-[547]. It showed that NPAT of $46.7 million was below the FY14 Budget by $29.5 million or 39% and below the prior the year by $41.1 million or 47%: PJ[547]. Mr Holt commented in an email a few hours later that the results were not good and said that he was “extremely concerned on the revenue line in relation to the blue sky in the back half of the second half” and said that “Based on this assessment I just cannot see how we are going to get there and I certainly feel extremely uncomfortable that we are likely to achieve growth on last year”: PJ[548].

124 In light of that evidence in relation to the circumstances known to WOR after 14 August 2013, even if I had been of the view that WOR had established reasonable grounds for the FY14 Guidance Representation as at 14 August 2013, I would have concluded that there was a lack of reasonable grounds for maintaining the FY14 Guidance Representation on 9, 10 and 15 October 2013. As the Full Court said at AJ[136], the only basis advanced by WOR as to reasonable grounds for maintaining the FY14 Guidance Representation after 14 August 2013 was the FY14 Budget and the process of preparing it, and there was no longer a reasonable basis for the FY14 Budget even if there had originally been a reasonable basis for it.

### Conclusion on Question 2

125 Accordingly in my view, Question 2 should be answered: Yes, at all times throughout the Relevant Period.

## Question 3: By making the FY14 Guidance Representation, did WOR engage in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of any of the pleaded statutes (Misleading or Deceptive Conduct) during all or any part of the Relevant Period (and if so, when) (FY2014 Guidance Representation Contravention)?

126 It follows from the answer that I have given to Question 2 above that this question should be answered: Yes, during all of the Relevant Period.

## Question 4: By making the FY14 Earnings Guidance Statement, did WOR engage in Misleading or Deceptive Conduct during all or any part of the Relevant Period (and if so, when) (FY2014 Guidance Statement Contravention)?

127 It follows from the answers to Questions 2 and 3 above, that this question should be answered: Yes, during all of the Relevant Period.

## The Continuous Disclosure Case: Reasons of the Full Court

128 Mr Crowley relied on the same facts as in the misleading and deceptive conduct case to support the claim that WOR had contravened its continuous disclosure requirements: AJ[144]. The Full Court said that, given the errors which it had identified in the primary judge’s process of reasoning in respect of the inferences to be drawn from the facts as found, it could not be concluded that the primary judge would have reached the same conclusions as her Honour did about the continuous disclosure case had those errors not been made: AJ[144]. For that reason alone, the primary judge’s dismissal of the continuous disclosure case had to be set aside: AJ[144]. The Full Court said that it followed from the primary judge not accepting Mr Crowley’s case that WOR did not have reasonable grounds for the August 2013 Earnings Guidance Statement, that the alleged Material Information and Earnings Expectation Material Information did not exist, and accordingly no breach of s 674 of the Corporations Act was found: AJ[145], referring to PJ[617]-[620]. I observe at this point that the Full Court did not refer in that passage to the additional and self-sufficient reason given by the primary judge at PJ[618] for the failure of Mr Crowley’s case based on contraventions of s 674 arising out of non-disclosure of the Earnings Expectation Material Information, namely that at all relevant times it was not the case that there was a consensus expectation of professional analysts covering the ASX and WOR securities that WOR would deliver between approximately $354 million and $368 million in NPAT for FY14, and accordingly the Earnings Expectation Material Information was not “information” to which s 674(2) could have applied. That is a matter which is of central relevance to Questions 7-10, considered below.

129 The Full Court then referred to the submission by Mr Crowley on appeal that the primary judge erred by not deciding whether Mr Allen and Mr Daly were officers of WOR at the relevant time: AJ[146]. Mr Crowley submitted that they were officers and that the primary judge should have found that by August 2013, Mr Allen and Mr Daly knew or ought to have known that the FY14 Budget did not provide a reasonable basis for the FY14 Guidance Representation, and submitted further that the position was even plainer by early October 2013, by which time senior executives of WOR, including the CEO, knew that WOR was tracking at a level very materially below the FY14 Budget: AJ[146]. In response, WOR submitted that: (a) pursuant to the ASX Listing Rules and s 674 of the Corporations Act, opinions which were not actually formed were not required to be disclosed; (b) Mr Allen and Mr Daly were not alleged in the 4FASOC to know, and did not know, the alleged Material Information; and (c) in any event, Mr Allen and Mr Daly were not officers of WOR whose opinion should have been disclosed: AJ[146].

130 At AJ[147], the Full Court set out the terms of s 674, in the form in which that provision then appeared, which relevantly provided:

**Continuous disclosure – listed disclosing entity bound by a disclosure requirement in market listing rules**

*Obligation to disclose in accordance with listing rules*

(1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.

(2) If:

(a) this subsection applies to a listed disclosing entity; and

(b) the entity has information that those provisions require the entity to notify to the market operator; and

(c) that information:

(i) is not generally available; and

(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of that entity;

the entity must notify the market operator of that information in accordance with those provisions.

The Full Court said that it was uncontentious that at all material times the ASX was a prescribed financial market, the Listing Rules applied to WOR, WOR shares were ED securities and WOR was a disclosing entity and subject to the continuous disclosure obligations in s 674 of the Corporations Act: AJ[148].

131 At AJ[149], the Full Court set out the terms of Listing Rule 3.1 as follows:

Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities, the entity must immediately tell ASX that information.

The definition of “aware” in Listing Rule 19.12 was as follows:

an entity becomes aware of information if, and as soon as, an officer of the entity … has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

Listing Rule 19.12 defined “information” for the purpose of Listing Rule 3.1 from 1 May 2013 as including “matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market” and “matters relating to the intentions, or likely intentions, of a person”: AJ[150].

132 At AJ[151] the Full Court set out the definition of “officer” in s 9 of the Corporations Act, which applied to the Listing Rules pursuant to Listing Rule 19.3, and provided relevantly as follows:

“**officer**” of a corporation means:

(a) a director or secretary of the corporation; or

(b) a person;

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation’s financial standing; or

(iii) in accordance with whose instruction or wishes the directors of the corporation are accustomed to act …

133 WOR admitted in the proceedings below that at all material times Mr Wood and Mr Bradie were officers of WOR and that Mr Holt was an officer of WOR from September 2013 when he became a member of ExCo, but denied that Mr Allen or Mr Daly were officers: AJ[152]. The primary judge found that Mr Holt was an officer of WOR from at least 1 February 2013 (PJ[106]), but considered it unnecessary to decide whether Mr Allen or Mr Daly were officers of WOR at any material time (PJ[109]): AJ[152]. The Full Court said that whether or not Mr Daly and Mr Allen were officers of WOR at all material times would need to be decided in the remitted hearing, being an issue of fact to be decided on the whole of the evidence: AJ[153].

134 The Full Court then dealt with WOR’s submissions that the alleged Material Information was an opinion, and that s 674 and Listing Rule 3.1 required only the disclosure of opinions actually held or possessed by the company, and did not require the disclosure of opinions not actually held, even if it could be said that they ought to have been: AJ[154]-[178]. The Full Court rejected those submissions (AJ[156]), and accepted the submissions put by Mr Crowley to the following effect (at AJ[160]):

(1) s 674(2) operates by reference to the material information the Listing Rules requires the listed corporation to notify to the ASX. The obligation is to do whatever the Listing Rules requires [sic]. If a listing rule deems a corporation to have information which it ought to have, and establishes an obligation to disclose that information, then the obligation applies by operation of the Corporations Act;

(2) the material information the Listing Rules requires [sic] the corporation to notify includes information an officer of the entity has, or ought reasonably to have – as that is the information of which the corporation is “aware” pursuant to Listing Rule 19.12;

(3) the information required to be disclosed extends to opinions of officers of the corporation. If, for example, officers hold opinions about market sensitive matters which are not generally available then, subject to the other requirements and exceptions in the Listing Rules, these are required to be disclosed to the market. WOR did not contend otherwise; and

(4) the information that a corporation has or ought reasonably to have is not confined to information (including opinions) that an employee of the company has and ought to have informed the corporation about. … [I]n our view the information that a corporation ought reasonably to have includes opinions that an officer ought to have held by reason of facts known to the officer.

135 After reviewing the authorities, the Full Court said that the relevant provisions did not use the term “opinion” but used the term “information” and there was no need to substitute references to “opinion” as the provisions did not distinguish between classes of “information”; “facts”, “circumstances” and “opinions” were all capable of constituting “information”: AJ[176]. The Full Court then said the following at AJ[177]:

In a case like the present, where the allegations is [sic] that the company issued an overstated profit guidance, the proper question is not whether WOR ought to have held an opinion that its NPAT for FY14 was likely to fall materially short of the amount forecast or the market consensus as to the NPAT, but whether the company had or ought reasonably to have had *information* to that effect. The proper questions for the Court are:

(1) whether it was the fact that there were not reasonable grounds for the forecast (that fact being the relevant material information); and

(2) whether that information – the fact that there were not reasonable grounds – was information of which the officer(s) ought reasonably to have been aware.

136 The Full Court then said the following at AJ[178]:

If the evidence shows that: (a) the information in fact existed, (b) reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer, and (c) acting reasonably the company officer ought to have discerned the significance of the information, then s 674 and the Listing Rules deem the company to have had the information.

The Full Court said that WOR’s approach imposed pre-conceived distinctions between classes of information which would undermine the legislative purpose of the provisions, and effectively reward a publicly listed company for having such poor information systems and management procedures that the company does not come into possession of important, market-sensitive information and does not form an opinion based on known facts which it reasonably should have formed, and would also reward a company or its officers holding back from the board an opinion they had formed about such matters: AJ[178].

137 At AJ[180], the Full Court said that the issue as to whether there were reasonable grounds for making the FY14 Guidance Representation required an evaluation of whether the FY14 Budget was objectively reasonable, because WOR contended that it relied on the FY14 Budget with its NPAT of $352.1 million to make the FY14 Guidance Representation: AJ[180]. The Full Court said that, given the statutory provisions, to confine the inquiry to the question whether an officer or employee under a duty to inform an officer in fact formed an opinion or drew an inference consistent with the Material Information and the Earnings Expectation Material Information would be in error: AJ[182]. The Full Court said that the required inquiry extended to the question whether an officer or employee under a duty to inform an officer knew facts from which they reasonably ought to have formed an opinion or drawn an inference consistent with the Material Information and the Earnings Expectation Material Information, and the required inquiry then extended to whether WOR should be attributed with that deemed state of knowledge: AJ[182]. The Full Court commented that the evidence extended to documents from which inferences could properly be drawn about the states of mind of, at least, Mr Allen, Mr Daly, Mr Bradie and Mr Holt, particularly given that they were not called by WOR to give evidence, but whether those inferences should be drawn or not could not be answered without consideration of the entirety of the evidence which was not before the Full Court: AJ[182].

138 At AJ[183], the Full Court said that the fact that the Board may be inferred to have considered that they did have reasonable grounds for adopting the FY14 Budget and the August 2013 Earnings Guidance Statement was not fatal to Mr Crowley’s case, given that WOR was the representor (which I interpret to mean the disclosing entity) and the orthodox process by which states of mind may be attributed to a corporation through the corporation’s officers and employees. The Full Court said that the officers and employees relied upon by Mr Crowley were either of the requisite seniority (such as Mr Holt) or so intimately involved in the FY14 Budget process that, on Mr Crowley’s case, they should be taken to have known more than the Board, including the Material Information and the Earnings Expectation Material Information. The Full Court said that Mr Crowley’s case theory was cogent but it remained to be seen whether it was established once the process of drawing inferences from facts was properly performed: AJ[183].

139 At AJ[184], the Full Court said that the relevance of Mr Allen’s email of 11 June 2013, whether or not Mr Allen conveyed those views to Mr Holt and Mr Wood, was that a person directly involved in the FY14 Budget process at a relatively high level apparently considered that the Management Adjustments made to the 27 May 2013 Draft Budget to ensure the FY14 Budget showed growth in NPAT could be inferred to have held the view that the result of that process would be an unrealistic budget and involve the real risk of the need for forecast earnings to be downgraded. The Full Court said that if that was the proper inference to be drawn (which depended on the entirety of the evidence) then the questions which arose were the likely basis for Mr Allen holding that opinion and the likelihood of others sharing that opinion, absent wilful blindness, reckless indifference, or objective unreasonableness, and the same kind of reasoning applied to the evidence relating to the views of Mr Daly and Mr Bradie: AJ[184].

140 At AJ[185], the Full Court said that WOR’s proposition that the “evidence reflected that the CEO, Mr Wood, and the CFO, Mr Holt, regarded the FY14 Budget (and, correlatively, the FY14 guidance representation) as reasonable not only at the time they presented it to the Board for adoption, but in the ensuing period” involved contested inferences in respect of which the primary judge’s process of reasoning was undermined by the identified errors. The Full Court said the fact that Mr Allen recorded on 11 October 2013 that, while he encouraged a more pessimistic outlook, Mr Wood and Mr Holt remained optimistic, did not prove that the states of mind of Mr Wood and Mr Holt were objectively reasonable on the facts as then known or that they were objectively reasonable on the facts as known on 13 August 2013: AJ[185]. The Full Court said that those issues of inference were not answered by the proposition that the “correct opinion for disclosure purposes was the opinion of the Board”, which might be true if a board was in the same position as the relevant officers, but was not necessarily the case if the officers were in a different position with respect to what they knew or ought to have known compared to the board: AJ[185].

141 I turn then to the particular questions raised in the Joint List pertaining to the continuous disclosure case.

## Question 5: At any time during the Relevant Period, was it the fact that WOR did not have a reasonable basis for making the FY2014 Earnings Guidance Statement (FY2014 Guidance Material Information)?

142 Mr Crowley’s position is that the primary judge answered “No” to this question at PJ[679], but that this is a question for determination on the remitter. WOR’s position is that the primary judge’s finding was disturbed on appeal for the reasons set out in relation to Question 2 at [49] above.

143 This is essentially the same question as that raised by Question 2, and should be answered in the same way. That is, the question should be answered as follows: Yes, at all times throughout the Relevant Period.

## Question 6: If the answer to Question 5 is “yes”, was WOR “aware” within the meaning of ASX Listing Rule 19.2 of the FY2014 Guidance Material Information at any time during the Relevant Period (and if so, when)?

144 Mr Crowley’s position is that the primary judge answered this question “not applicable” at PJ[680], and this is a question for determination on the remitter. WOR’s position is that the primary judge’s finding was disturbed on appeal:

(a) for the reasons set out in relation to Question 2 at [49] above; and

(b) because the primary judge failed to determine, on the whole of the evidence, whether Mr Daly and Mr Allen were officers of WOR at all material times, referring to AJ[153].

145 As the Full Court made clear, the knowledge of employees of WOR is generally attributable to WOR itself for the purpose of the misleading and deceptive conduct case. However, the definition of “aware” in Listing Rule 19.12 refers to “an officer” of the entity coming into “possession of the information in the course of the performance of their duties as an officer of that entity”. As I have indicated at [133] above, it was admitted on the pleadings that Mr Wood and Mr Bradie were officers of WOR, and the primary judge found that Mr Holt was an officer of WOR from at least 1 February 2013. There is an issue to be decided on this remitted hearing as to whether Mr Daly and Mr Allen were officers of WOR at all material times. The Full Court described Mr Daly and Mr Allen as “key participants in the budget process” (AJ[79]), but expressly stated that whether they were officers of WOR was an issue of fact to be decided in the remitted hearing on the whole of the evidence (AJ[153]).

146 Before dealing with that issue, it follows from my reasoning at [104]-[115] above in relation to Question 2 that each of Mr Holt, Mr Bradie, Mr Allen and Mr Daly was aware throughout the Relevant Period that WOR did not have a reasonable basis for making the FY2014 Earnings Guidance Statement. In my view, not only did they know the facts on which that opinion ought to have been formed, but they actually formed that opinion themselves.

147 Turning then to the question of whether Mr Allen and Mr Daly were “officers” of WOR at all material times, Mr Crowley submits that they were officers within the meaning of subpara (b)(i) of the definition in s 9 of the Corporations Act (now contained in s 9AD) on the basis that each was a person who “makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation”. In *Shafron v Australian Securities and Investments Commission* [2012] HCA 18; (2012) 247 CLR 465 at [26], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said that subpara (b)(i) distinguishes between “making” decisions of a particular character and “participating in making” those decisions, such that “participating in making” decisions should not be understood as intended primarily or exclusively to deal with cases where there are joint decision makers. Rather, the idea of “participation” directs attention to the role that a person has in the ultimate act of making a decision, even if that final act is undertaken by some other person or persons. Their Honours said that the notion of participation in making decisions presents a question of fact and degree in which the significance to be given to the role played by the person in question must be assessed. In that passage, their Honours expressly approved the reasoning of the New South Wales Court of Appeal in *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331; (2010) 274 ALR 205; (2010) 81 ACSR 285 at [892]-[893]. At [893], the Court of Appeal (comprising Spigelman CJ, Beazley and Giles JJA) said that participation is more than administrative arrangement, and there must be a real contribution from the postulated participation to the making of the decisions, but beyond that it is a question of fact. The reasoning in *Shafron* at [26] was also cited with approval in *Australian Securities and Investments Commission v King* [2020] HCA 4; (2020) 270 CLR 1 at [89] (Nettle and Gordon JJ).

148 Mr Allen was Global Director – Corporate Finance, reporting directly to Mr Holt, but also participated in direct formal and informal discussions with Mr Wood: PJ[101(2)]. Mr Allen regularly participated in meetings of the CEOC, ExCo, and the Board as follows:

(a) on 12 February 2013, Mr Allen attended a Board meeting in relation to “Project Roxy”, which related to the acquisition of the Norwegian company Bergen Group Rosenberg AS, the minutes of which show that Mr Allen attended the meeting for about 50 minutes, in the course of which Mr Allen discussed the valuation of Bergen Group Rosenberg AS with the Board and, along with Mr Kalban, responded to questions about the growth prospects of the business, and was present when the Board resolved to approve that an offer be made to acquire 100% of the share capital of the company: CB2,276 at 2,279;

(b) Mr Allen attended the 29 April and 17 May 2013 Board meetings: SCB 101 and 131;

(c) Mr Allen attended an ExCo meeting on 24 June 2013 for the purpose of discussing the May FY13 results and outlook sensitivities with ExCo: CB4,765 at 4,771;

(d) Mr Allen participated in the meeting of the CEOC where the CEOC overhead reduction commitments were determined on 24 and 25 June 2013: CB4,960;

(e) Mr Allen attended the joint CEOC, ExCo and Board meeting on 26 and 27 June 2013, which discussed the Location budgets and the budget issues for FY14: CB5,312;

(f) Mr Allen attended a meeting of the A&RC on 12 August 2014 to present his paper entitled “Tax Report – 30 June 2013”, which summarised the current state of various tax issues and various revenue office reviews and the level of tax provisions as at 30 June 2013, and which was discussed and amended by the A&RC: CB6,975 at 6,977;

(g) Mr Allen attended a Board meeting on 25 October 2013 and an ExCo meeting on 31 October 2013, which were focused on “Project Zeus”: CB9,881 and 9,909; Project Zeus appears to have been a potential acquisition which did not proceed (CB10,043); and

(h) Mr Allen was present at the Board meeting on 1 November 2013, in which the minutes record the WOR “deal team” and management explaining to the Board their assessment of Project Zeus: CB10,043.

149 That evidence demonstrates, in my view, that Mr Allen was a senior manager who participated in the making of decisions by the Board that affected at least a substantial part of WOR’s business. In particular, the minutes of the 12 February 2013 Board meeting demonstrate his participation in a major, Board-level decision concerning an acquisition, and I infer also that he was part of the Project Zeus “deal team”. I also find that he participated in decisions of WOR concerning the financial performance and forecasts of WOR, despite not being a decision-maker himself. I draw those inferences more confidently by reason of Mr Allen’s unexplained failure to give evidence.

150 Mr Daly was the Global Finance Director – Operations and Communications Support, and was described by Mr Ashton as “effectively the financial lead for Mr Bradie” (at T634.2-4) and found to be so by the primary judge (at PJ[101(1)]). Mr Daly reported directly to Mr Holt, but Mr Wood had direct formal and informal discussions with him: PJ[101(1)]. Unlike Mr Allen, he did not participate in meetings of the CEOC, ExCo or the Board. However, the evidence shows that Mr Daly:

(a) communicated instructions for the “High Level Budgets” in FY14 (CB2,874), and participated in the reviews of those High Level Budgets (CB2,888, 2,952, 2,974-5);

(b) attended monthly financial performance reviews for Locations (CB2,980, 5,742, 8,379 and 8,414);

(c) conveyed instructions to Locations in relation to the Management Adjustments (CB4,427, 4,430 and 4,446);

(d) participated in the “EBIT Improvement Project” (an overhead reduction program) (CB6,376, 10,080 and 10,269);

(e) participated in the development of the 2+10 forecast (CB8,477.1, 8,575 and 9,133);

(f) participated in the development of the 3+9 reforecast (CB9,709, 9,860, 9,915, 10,269 and 10,596); and

(g) was the first person to take a “very critical look” at WOR’s financial information on 18 November 2013 (CB10,613), that review being a critical step towards the November 2013 Revised Guidance.

151 Mr Daly appears to have been the most senior head office operational finance manager, responsible for managing the operational finance of WOR’s business. He had a responsibility for presenting financial information in relation to the business as a whole to the most senior members of WOR’s executive management. Mr Daly played a significant role in WOR’s decisions in relation to formulating, maintaining and revising budget forecasts. Accordingly, I infer that Mr Daly did participate in the making of decisions that affected a substantial part of WOR’s business, and I draw that inference more confidently by reason of his unexplained failure to give evidence.

152 Accordingly, I answer Question 6 as follows: Yes, at all times throughout the Relevant Period.

## Question 7: Between 14 August 2013 and immediately before WOR’s announcement to the ASX on 20 November 2013 (20 November 2013 Announcement), was it a fact that the consensus expectation of professional analysts covering the ASX and ordinary shares in WOR (WOR Securities), that WOR would deliver between $354 and $368 million in NPAT for FY2014 (FY2014 Earnings Expectation)?

153 Mr Crowley’s position is that the primary judge answered “No” to this question at PJ[681]. Mr Crowley says that the finding was disturbed on appeal, with reference to AJ[144]-[145], and the question must be determined on the remitter. Mr Crowley further submits that the proper construction of the primary judge’s reasons is that a consensus expectation did exist, referring to PJ[82], [83], [87], and [619]. WOR’s position is that this question does not arise for determination on the remitter, having been determined by the primary judge, with reference to PJ[83] and [618], and accordingly should be answered “As found: No”. The answer to this question thus raises important issues concerning the proper interpretation to be given to the reasons of both the primary judge and the Full Court.

154 At PJ[80], the primary judge set out para 22D of the 4FASOC, which alleged:

By 14 August 2013, WOR was aware, and it was the fact, that at all material times between 14 August 2013 and immediately before the 20 November 2013 Announcement and 20 November 2013 Presentation, the consensus expectation of professional analysts covering the ASX and WOR Securities was that WOR would deliver between approximately $354 and $368m in NPAT for FY14 (**FY14 WOR Earnings Expectation**).

The primary judge did not refer to the particulars to para 22D which identified different consensus expectations and different “average” analyst estimates in relation to NPAT from time to time during the Relevant Period. Reference to those particulars would have readily resolved what has now emerged as an ambiguity in para 22D as between: (a) a literal reading of the allegation, namely that throughout the Relevant Period there was a single consensus expectation of NPAT for FY14, being the range of $354m to $368m; and (b) a less confined allegation to the effect that the consensus (meaning the average) of analysts’ expectations of NPAT for FY14 varied during the Relevant Period from time to time but at all times in the Relevant Period fell within the range of $354 million to $368 million. In my view, reference to the particulars to para 22D would have indicated that the latter was clearly the intended meaning of para 22D.

155 The primary judge then referred at PJ[81] to Listings Rules Guidance Note 8 in referring to “consensus estimate” in the following passage:

ASX does not believe that a listed entity has any obligation, whether under the Listing Rules or otherwise, to correct the earnings forecast of any individual analyst or the consensus estimate of any individual information vendor to bring them into alignment with its own internal earnings forecast.

156 At PJ[82], the primary judge said that the evidence did not refer to any consensus expectation of NPAT expressed as a range, but did identify consensus NPAT figures within the Relevant Period as follows:

(a) on 15 August 2013, Macquarie Equities Research stated in relation to its forecast of WOR’s FY14 NPAT that “Consensus is similar at $368m”, cross-referring to PJ [320];

(b) on about 24 September 2013, the FY14 August financial report ExCo pack stated “FY14 internal forecast NPAT of $352.1m is $12.5m or 3.5% below the average analyst estimate of $364.6m”, cross-referring to PJ[469]; and

(c) on 19 October 2013, Mr Holt received the “Finance Report – ExCo September FY14” slide pack which recorded an average of analysts’ earnings estimates of $353.6 million and noted the Bloomberg consensus of $356.3 million, cross-referring to PJ[504].

157 The primary judge said the following at PJ[83]:

This evidence suggests that there was no single consensus expectation of professional analysts during the relevant period. However, WOR considered that there was a consensus expectation of professional analysts covering the ASX and WOR Securities throughout the Relevant Period, calculated by WOR to be $364.6 million on about 24 September 2013 and $353.6 million on about 19 October 2013.

158 The primary judge then turned to the topic of whether WOR’s FY14 earnings were likely to fall “materially short of” the Consensus Expectation. At PJ[87], the primary judge adopted Beach J’s approach in *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* [2019] FCA 1747; (2019) 293 FCR 29 (***Myer***) at [1166] of treating “materially lower” as meaning at least 5% lower, and said the following:

Accordingly, the relevant question is whether at the pleaded dates, WOR’s FY14 NPAT was likely to fall materially short of (more than 5% below) the following figures:

(1) by no later than 14 August 2013, $368 million (that is, below $349.6 million);

(2) by no later than 21 September 2013, $364.6 million (that is, below $346.37 million);

(3) by no later than 9 October 2013, $364.6 million (that is, below $346.37 million);

(4) by no later than 15 October 2013, $364.6 million (that is, below $346.37 million).

159 In expressing conclusions on the continuous disclosure case later in the judgment, the primary judge noted that Mr Crowley alleged that WOR had contravened s 674(2) of the Corporations Act in two ways, the first being non-disclosure of the Material Information (namely the proposition that WOR did not have a reasonable basis for making the August 2013 Earnings Guidance Statement), and the second being non-disclosure of the Earnings Expectation Material Information (namely the proposition that WOR’s FY14 earnings were likely to fall materially short of the Consensus Expectation): PJ[616]. The primary judge said that Mr Crowley’s case based on non-disclosure of the Material Information failed because, on her Honour’s findings, at all relevant times it was not the case that WOR did not have a reasonable basis for making the August 2013 Earnings Guidance Statement, and thus the Material Information was not “information” to which s 674(2) could have applied: PJ[617]. The primary judge then said the following at PJ[618]:

Similarly, Mr Crowley’s case based on contraventions of s 674 arising out of non-disclosure of the so-called Earnings Expectation Material Information also fails because, at all relevant times, it was not the case that there was a consensus expectation of professional analysts covering the ASX and WOR securities that WOR would deliver between approximately $354 and $368m in NPAT for FY14. Accordingly, the so-called Earnings Expectation Material Information was not “information” to which s 674(2) could have applied.

The primary judge then said that even to the extent that her Honour had found that there was a consensus expectation about WOR’s FY14 earnings, it was not the case at any relevant time that WOR’s FY14 earnings were likely to fall materially short of the consensus expectation, and thus there was no “information” of the kind identified by Mr Crowley in the 4FASOC: PJ[619].

160 In the reasons of the Full Court, no separate analysis was conducted as to whether the Consensus Expectation was established, or what the pleading in para 22D of the 4FASOC should be construed as alleging. The Full Court undertook a detailed analysis of the misleading and deceptive conduct case from AJ[47] to AJ[143]. The nature of that case corresponded very closely to the aspect of the continuous disclosure case which concerned the Material Information. The misleading and deceptive conduct case also overlapped in some respects with the continuous disclosure case concerning the Earnings Expectation Material Information. However, the aspect of the continuous disclosure case concerning the Earnings Expectation Material Information also involved an entirely separate issue, as to whether the Consensus Expectation was established as a matter of fact. If that was not established, that would in itself have been a sufficient reason for that aspect of the continuous disclosure case to be rejected, as the primary judge made clear at PJ[618]. Despite that clear difference in the two aspects of the continuous disclosure case, the Full Court said the following at AJ[144]-[145], immediately after the lengthy analysis of the misleading and deceptive conduct case:

The appellant relied on the same facts to support the claim that WOR had contravened its continuous disclosure requirements. Given the errors identified above about the primary judge’s process of reasoning in respect of the inferences to be drawn from the facts as found, it could not be concluded that the primary judge would have reached the same conclusions as she did about the continuous disclosure case had those errors not been made. This is clear from the primary judge’s reasons at J[617]-[618]. For this reason alone, the primary judge’s dismissal of the continuous disclosure case must be set aside.

As we have explained, the primary judge did not accept the appellant’s case that WOR did not have reasonable grounds for the August 2013 earnings guidance statement, and therefore the alleged Material Information and Earnings Expectation Material Information did not exist. It followed that no breach of s 674 was found: J[617]-[620]. The primary judge did not deal with the parties’ submissions as to the operation of s 674(2) of the Corporations Act and the ASX Listing Rules (**Listing Rules**) having regard to the possibility that her Honour’s conclusion about the alleged Material Information and Earnings Expectation Material Information was wrong.

161 While that reasoning is plainly correct in relation to the Material Information, having regard to the Full Court’s reasons concerning the misleading and deceptive conduct case, I do not see how that reasoning could apply to the primary judge’s self-sufficient reason at PJ[618] for rejecting the Earnings Expectation Material Information aspect of the continuous disclosure case on the ground that the Consensus Expectation was not established as a matter of fact. As the express reasoning in AJ[144]-[145] indicates, the references in AJ[144]-[145] to the primary judge’s reasons at PJ[618], and the primary judge’s reasons generally concerning the Earnings Expectation Material Information, were intended to refer to those aspects of the case based on non-disclosure of the Earnings Expectation Material Information which overlapped with the misleading and deceptive conduct case and with the non-disclosure case based on the Material Information. I am unable to see how, as a matter of logic, the reasoning of the Full Court has disturbed the finding of the primary judge at PJ[83] and [618] that the Consensus Expectation was not made out. This reasoning by the primary judge appears not to have been considered by the Full Court at AJ[144]-[145]. Mr Crowley accepted at the hearing before me that there is no indication in the Full Court’s reasoning that their Honours turned their minds to the meaning of “consensus expectation” and the meaning of para 22D of the 4FASOC: T77.8-12. That is readily explicable by reason of the fact that no argument was put by Mr Crowley to the Full Court, either orally or in writing, to the effect that the primary judge’s construction of the Consensus Expectation at PJ[83] and [618] was wrong, despite the width of three of the grounds of appeal (namely grounds 3(c), 9(b) and 13(b)) conceivably permitting such a contention. Indeed, WOR submitted to the Full Court (at T86.27-28) that there was no challenge to the primary judge’s conclusion on the Consensus Expectation, including her Honour’s construction of para 22D of the 4FASOC, and Mr Crowley did not seek to make any such challenge when the broad topic was referred to in reply (at T104.8-46). For completeness, I note that the primary judge did say at PJ[83] that WOR “considered” that the Consensus Expectation existed, but firmly rejected the proposition that that was the case as a matter of fact. I note further, contrary to Mr Crowley’s submission, that the primary judge’s reasons at PJ[87] were not findings as to the existence of the Consensus Expectation but were concerned with an alternative ground for rejecting the continuous disclosure case, namely that even if the Consensus Expectation had existed, it was not the case that at any relevant time that WOR’s FY14 earnings were likely to fall materially short of that Consensus Expectation, as her Honour made clear at PJ[619].

162 Accordingly, in my view there is an undisturbed finding by the primary judge that the Consensus Expectation did not exist as a matter of fact, and accordingly the continuous disclosure case failed for that reason. I am therefore bound to adopt that reasoning. I should add that I do so with very great reservations. The primary judge’s reasons appear to me to involve a construction of para 22D of the 4FASOC which is plainly wrong, given that any ambiguity in the text of para 22D is readily resolved by having regard to the particulars which indicate that Mr Crowley was alleging that the consensus (meaning the average) expectation of analysts varied from time to time during the Relevant Period, but remained during that period within the range of $354 million and $368 million. All relevant lay and expert witnesses proceeded on the basis that the concept of an analysts’ consensus means an average of views of the principal analysts, rather than the analysts coming together and reaching a common view as to what the figure should be, consistently with what they regarded as the conventional usage of the term: Wood at T526.14-527.3; Torchio at T842.18-19, T951.4-952.6 and see to similar effect Torchio’s first report of 2 April 2018 at [38]-[39]; Holzwarth at T930.6-9 and see to similar effect Holzwarth’s report of 15 November 2018 at [180]; Samuel at T951.5-10. In fact, in an interlocutory judgment on evidentiary rulings given during the trial, the primary judge said that her Honour assumed that “the analyst consensus” in Mr Torchio’s report referred to the average of analysts’ expectations of NPAT, which her Honour noted was the same or similar to WOR’s use of the term: *Crowley v WorleyParsons Limited (No 2)* [2019] FCA 1535 at [4]. Similarly in *Myer*, Beach J referred at [1221] to the expert evidence measuring market expectations by reference to the “Bloomberg consensus”, which is an average of analysts’ forecasts at a particular point in time: [1674]-[1678]. An average would not typically be expressed as a range, and thus the pleaded range must have referred to the bounds within which the average varied from time to time. While I regard that as an error by the primary judge, it cannot be regarded as either a slip of the pen or an incidental remark of the kind which, in my view, should be regarded as an exception to the principle that the primary judge on remitter is bound by any of the previous primary judge’s findings that have not been disturbed by the appellate court.

163 Accordingly, and with very considerable reservations, I answer Question 7: No.

## Question 8: If the answer to Question 7 above is “Yes”, by 14 August 2013, was WOR aware of the FY2014 Earnings Expectation?

164 In light of my answer to Question 7, this question does not arise.

## Question 9: At any time during the Relevant Period, was it the fact that WOR’s FY2014 earnings were likely to fall materially short of the FY2014 Earnings Expectation (FY2014 Consensus Forecast Material Information)?

165 In light of my answer to Question 7, the Consensus Expectation (being the same as the defined term in the question “the FY2014 Earnings Expectation”) was not established, and therefore the question does not arise.

## Question 10: If the answer to question 9 is “yes”, was WOR “aware” within the meaning of ASX Listing Rule 19.2 of the FY2014 Consensus Forecast Material Information at any time during the Relevant Period (and if so, when)?

166 In light of my answer to Question 7, this question does not arise.

## Question 11: Did WOR at any time prior to 20 November 2013 become obliged pursuant to Listing Rule 3.1 to tell the ASX of the FY2014 Guidance Material Information and/or the FY2014 Consensus Forecast Material Information?

167 In light of my answers to Questions 5 and 7 above, this question should be answered as follows:

(a) in relation to the FY2014 Guidance Material Information (being the same as what I have referred to as the Material Information): “yes”; and

(b) in relation to the FY2014 Consensus Forecast Material Information (being the same as what I have referred to as the Earnings Expectation Material Information): “no”.

## Question 12: Did WOR contravene section 674(2) of the Corporations Act by not informing the ASX of:

## 12.1 the FY2014 Guidance Material Information on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013 (FY2014 Guidance Material Information Contravention); and/or

## 12.2 the FY2014 Consensus Forecast Material Information on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013 (FY2014 Consensus Forecast Material Information Contravention)?

168 In light of my answer to Question 11, this question should be answered as follows:

(a) as to Question 12.1: “yes”; and

(b) as to Question 12.2: “no”.

## Causation, Loss and Damage

169 The claims for compensation by Mr Crowley are brought pursuant to a number of different statutory provisions as follows:

(a) in relation to the contravention of s 18 of the ACL (for misleading or deceptive conduct), s 236 of the ACL allows for the recovery of loss or damage suffered “because of” contravening conduct;

(b) in relation to ss 12DA and 12GF(1) of the ASIC Act (for misleading or deceptive conduct), s 1041I of the Corporations Act and s 12GF of the ASIC Act allow for the recovery of loss or damage which an applicant suffers “by” the contravening conduct; and

(c) in relation to the contravention of s 674(2) of the Corporations Act (continuous disclosure), s 1317HA of the Corporations Act allows for recovery where damage “resulted from” such conduct.

Mr Crowley submits, and I accept, that the different expressions used do not alter the relevant inquiry, and that he must identify a causal connection between the contravening conduct and the loss and damage suffered: *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 at [102] (Gummow, Hayne, Heydon and Kiefel JJ). Mr Crowley also relies on the principle that the application of a causal term in a statutory provision is always to be determined by reference to the statutory text, construed and applied in its statutory context in a manner which best fulfils its statutory purpose, given that causation in a legal context is always purposive: *Comcare v Martin* [2016] HCA 43; (2016) 258 CLR 467 at [42] (French CJ, Bell, Gageler, Keane and Nettle JJ). Further, Mr Crowley relies on the principle that where there is some evidence of loss or damage, the Court must do the best it can in assessing damages: *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54; (2004) 217 CLR 640 (***HTW Valuers***)at [47] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 26 (Barwick CJ). Mr Crowley, as the claimant, bears the onus of proof of establishing the existence and amount of loss suffered by WOR’s wrongful conduct: *Berry v CCL Secure Pty Ltd* [2020] HCA 27; (2020) 271 CLR 151 at [28] (Bell, Keane and Nettle JJ); [65] (Gageler and Edelman JJ).

170 Mr Crowley’s primary damages claim is that he and Group Members have suffered loss applying market-based causation, and that, for the purposes of the relevant statutory provisions, it is not necessary to prove direct reliance on a misrepresentation or non-disclosure. The fundamental proposition advanced by Mr Crowley is that, where the evidence has established that a contravention or contraventions have led or materially contributed to shares trading on the ASX at a higher price than would have otherwise prevailed, market-based causation is a valid means of proving the necessary connection between the contravening conduct and the claimed loss of a purchaser of those shares at an over-value.

171 The concept of market-based causation in this context was the subject of thorough analysis by Beach J in *Myer*, in which it was accepted that market-based causation is a valid means under Australian law of establishing causally-connected loss where misconduct has caused the price of securities in an efficient, publicly-traded market to be inflated. Beach J held that there were three well-established mechanisms for causation in misleading or deceptive conduct cases: [1656]. The first category is direct causation, which requires proof that the applicant relied upon some impression created by the respondent’s misleading act or omission: [1657]. Second, there is “active indirect causation”, being the scenario where a respondent’s misleading conduct induces some reaction in a particular person, and the applicant would have acted differently but for that reaction by the particular person, but there is no additional requirement that the applicant was aware of or relied on the respondent’s conduct: [1659]. Third, there is “passive indirect causation”, being the scenario where the respondent’s misleading conduct induces some reaction in a person or persons, and that reaction itself causes loss to the applicant without any requirement for a reaction by the applicant: [1660]. Pausing there, that reasoning, and in particular the existence of the category of “passive indirect causation”, was expressly approved in *Braham v ACN 101 482 580 Pty Ltd* [2020] VSCA 108 at [155]-[156] (Tate, McLeish and Niall JJA); *Re DCA Enterprises Pty Ltd* [2023] NSWSC 11; (2023) 166 ACSR 156 at [164]-[165] (Black J); and *Re Mediation & Online Dispute Resolution Operating Network Pty Ltd* [2022] NSWSC 5 at [103]-[105] (Rees J).

172 At [1662], Beach J summarised the applicant’s case in *Myer* as being that:

(a) Myer’s disclosure failures caused the actions of intermediaries, namely the buyers and sellers in the market, to inflate the trading price of the relevant securities above the price which a properly-informed market would have set;

(b) the applicant acquired its securities, that is, it was active not passive in that inflated market; and

(c) the applicant would not have acquired those securities, at that price, but for the market’s reaction to Myer’s misleading or deceptive conduct and disclosure failures.

Accordingly, Beach J characterised the case as one of “active indirect causation”: [1663]. Beach J then expressed the view that it is enough, in terms of causation, that the applicant unknowingly acted by acquiring the relevant securities at the prevailing market price during the period of inflation: [1663]. I gratefully adopt the meticulous and compelling analysis of the relevant authorities and principles undertaken by Beach J in leading to those conclusions. I am in complete agreement with Beach J’s analysis of the relevant principles.

173 I reject WOR’s submission that Beach J’s endorsement of market-based causation is plainly wrong. That argument is based on the proposition that the market comprises a range of disparate actors with differing or unknown reasons for investing, with different information and views as to the value of shares, including arbitragers who typically do not have regard to the underlying fundamentals of the securities in which they trade. Accordingly, WOR submits, once it is accepted that there is no uniform correlation between the publicly available information about a company and either the market price or the “value” ascribed to its shares by market participants, market-based causation becomes impossible to sustain. That argument, however, is met by Beach J’s observation in *Myer* at [1629] that if the efficient market hypothesis (discussed at [180] below) is not a good assumption in a particular case involving a particular class of securities, then factually market-based causation and the “inflation-based measure” of loss in that case may fail, but that would not undermine market-based causation as a matter of law. In the present case it is not in dispute that WOR’s shares traded in an efficient market in the relevant sense (as discussed at [180] and [204] below). The opinion of Mr Torchio (expert witness engaged by Mr Crowley) was that the market for WOR shares was “informationally efficient” during the Relevant Period (as explained at [180] below), and Mr Holzwarth (expert witness engaged by WOR) assumed that to be the case: Joint Expert Report dated 5 August 2019 at B.1.2; Mr Torchio’s first report dated 2 April 2018 at [138] and Appendix A.

174 WOR also sought to distinguish *Myer* on the basis that there was no evidence in the present case that the alleged disclosure failures caused or induced buyers and sellers in the market to inflate the trading price. Indeed, Mr Holzwarth gave oral evidence that there was no change in analysts’ expectations of FY14 NPAT before and after the August 2013 Earnings Guidance Statement such as might have enabled one to infer a causal relationship between the statement and the analysts’ estimate: T845.6-14, 846.5-15. In any event, WOR submitted that an analysts’ consensus does not evidence what caused buyers and sellers in the market to act, referring to *Myer* at [1246].

175 WOR’s argument proceeds on a misunderstanding of the first of the three elements referred to in *Myer* at [1662], namely that the disclosure failures caused buyers and sellers in the market to inflate the trading price of the relevant securities “above the price which a properly-informed market would have set”. Those quoted words are apt to include a case where wrongful earnings guidance confirms what market participants were (wrongly) expecting, and thus where they had already factored that erroneous expectation into the market price. As Mr Torchio said in his oral evidence, he regarded the August 2013 Earnings Guidance as “confirmatory”, in that it reinforced what the company had previously said, and thus he would not have expected to see a price reaction: T846.17-34. Mr Torchio’s statement in that passage that “it’s not de facto a causal relationship” (T846.30-31) was made in relation to the absence of a price reaction by reason of the confirmatory nature of the announcement. The question whether Mr Crowley has actually established that the August 2013 Earnings Guidance Statement and the FY14 Guidance Representation did in fact cause the WOR share price to be above the price which a properly-informed market would have set, and if so by how much, are matters to be considered in answering Question 13 below.

## Question 13: During the Relevant Period, did the Contraventions (or any of them) cause the market price for WOR Securities to be substantially greater than:

## 13.1 their true value; and/or

## 13.2 the market price that would have prevailed but for the Contraventions (or any of them), and if so, by how much?

176 The primary judge answered this question: “Not applicable. There were no contraventions.”: [697]. The parties agree that that finding was disturbed by the Full Court, and that the question must be determined on this remitter. Neither the primary judge nor the Full Court directly addressed this question as a substantive matter.

### Expert evidence on event studies

177 Mr Crowley relied on the expert evidence of Mr Frank C Torchio, an economist who is the President of Forensic Economics, Inc., located in Rochester, New York. Mr Torchio made three reports, and references to paragraph numbers below are to his first report dated 2 April 2018, unless otherwise stated. WOR relied on the expert evidence of Mr John W Holzwarth, an economist who is a Partner in OSKR, LLC, a consulting firm specialising in economic and financial analysis in litigation, based in the United States. Mr Holzwarth made an expert report on 15 November 2018. Mr Torchio and Mr Holzwarth also prepared a joint report dated 5 August 2019. WOR also relied on an expert report of Mr Tony Samuel, a Chartered Accountant with particular expertise in the valuation of shares, businesses and other assets. It is convenient to begin by setting out the salient aspects of Mr Torchio’s first report, which deals in detail with the principles and methodology concerning event studies. At the level of principle and methodology, those matters were not in any significant dispute.

178 Mr Torchio stated that, as a general proposition, modern finance theory holds that the market price of a share equals the discounted present value of the market’s consensus of expected future profits available to shareholders (para 35). The sum of future cashflows discounted to today’s dollars is called a Discounted Cash Flow (**DCF**) analysis (para 36). On any given day, investors may learn of new information that changes the market’s consensus forecast of that company’s future annual profits; the reference to “market’s consensus forecast” of future profit does not mean that every investor has precisely the same forecast as the consensus, but refers to an economic equilibrium representing the trading behaviour of investors who may think a share is overvalued and investors who may think that it is undervalued (para 38). Thus, when the market receives new information, a new equilibrium is reached, reflecting the market’s new consensus about how such information has altered the prior market consensus, and one of the most useful financial-economic tools used to understand how the market incorporates any new information into its valuation of a company’s shares is an event study (para 39).

179 The event study methodology is an empirical analysis which measures the effect on market prices of new information relevant to a company’s equity valuation (para 40). When significant new information about the company is disclosed to the market, event study analysis is used to measure the component of the security’s price change on a given day that is attributed to new company-specific information (as distinct from price changes caused by general market movements) (para 41). In addition, event study analysis allows the researcher to assess the probability or likelihood that a security’s price movement is caused by new information disclosed on a particular date rather than because of chance, the measure of the probability being called “statistical significance” (para 42).

180 Because an event study measures the price reaction to newly disclosed information, an event study analysis is most useful when the stock in question is traded in an “informationally” efficient market (para 44). The term efficient market refers to the Efficient Market Hypothesis (**EMH**), which is conventionally divided into three categories by economists, each dealing with a different type of information:

(a) in its weak form, the EMH states that information contained in historic prices is fully reflected in current prices;

(b) in its semi-strong form, the EMH states that publicly available information is fully reflected in current prices; and

(c) in its strong form, the EMH states that all information, both public and non-public, is fully reflected in current prices (para 45).

Generally, a market is considered efficient if it meets the criterion of a semi-strong form efficient market (para 46). One criticism of the EMH asserts that share prices deviate from “fundamental” values and these deviations are caused by, or persist due to, investor irrationality (para 47). While “informational efficiency” refers to public information being quickly “impounded” in the share price, fundamental efficiency is concerned with whether the information is “impounded” correctly or accurately (para 47). In Mr Torchio’s experience, courts have not accepted fundamental efficiency as a necessary condition for securities litigation cases, but have continued to use informational efficiency as the standard (para 48). Thus, Mr Torchio does not regard the concept of fundamental efficiency as relevant to his opinion on efficiency (para 50).

181 The second area of criticism relating to the EMH concerns anomalies in share prices such as findings that low Price/Earnings (**P/E**) stocks earn higher returns than would be predicted by standard asset pricing models, however Mr Torchio says that analysis of such anomalies by noted economists has shown that the anomalies do not contradict the EMH (para 51). Further, traditional models of efficient markets hold that while irrationality among investors may exist, the marginal trader who affects the share price is rational, in that such investors trade in a security based on their own perception of value (para 52). In contrast, the models of behavioural economists indicate that prices may be affected by irrational traders, thus causing “market bubbles” (para 52). However, Mr Torchio points out that large market changes, being the defining characteristic of a bubble, are not inconsistent with the EMH (para 52).

182 The metric used to measure the effect on a company’s share price from an event is called the “return”, which is the percentage change in the market price of a company’s shares over a specific time period such as one trading day (para 54). Once a disclosure has been identified as a potential event related to the wrongdoing, an event study analysis can measure the company-specific component of the return on that event date, that company-specific component being called the “excess return” (para 54). Market models are empirical models that follow the theoretical Capital Asset Pricing Model (**CAPM**), one inference from the CAPM being that the returns for a given stock are correlated with the returns of the general market (para 55). The sensitivity of the returns for a given stock to the general market is referred to as the stock’s “beta” (para 55). Thus a market model describes the normal relation between the return on the company’s security and the return on a broad-based market index (or an industry index of stocks of companies that are similar to the company of interest, or an index of stocks of companies from which the company of interest derives its revenues), the indices used in a market model also being called “independent variables” (para 56).

183 A market model uses linear regression analysis, in which the company’s return is regressed against the returns of the market index and industry index or indices (if applicable) to estimate the historical relation (the “betas”) between the index variables and the company returns (para 57). In essence, the indices in the market model can explain or account for some measurable portion of the company’s total return, so as to isolate share price movements from company-specific factors (para 57).

184 The regression analysis yields a generalised equation (para 59):

Company Return = α + β· Market Return

Plotted on a chart in which the horizontal axis shows the Market Returns in percentage figures and the vertical axis shows the Company Returns in percentage figures, the slope of the regression line is the beta (β), and that β or slope indicates the expected company return caused by a percentage change in the market return (para 60). Theα is the constant term or intercept of the equation, representing the value of the regression line where the market return is zero, and it is called an intercept because it is the value where the regression line crosses or intercepts the Company Returns axis (para 60). For a market model with an industry index, predicted returns are equal to the intercept term from the regression plus: (i) the market beta multiplied by the return on the market; and (ii) the net-of-market industry beta multiplied by the net-of-market return on the industry (para 61). The predicted return represents an estimate of a company’s return based on the return for the market (and industry) index on a given day (para 61). After calculating predicted returns, excess returns are calculated on each day by subtracting the predicted return from the company’s return on each day, thereby representing the company-specific portion of the return on a given day (para 62).

185 Event studies also assess the probability that an excess return was the result of new information disclosed in an event, and not due to random price movements (ie due to chance) (para 63). A statistically-significant excess return at a significance level of 5% means that the excess return could be due to chance only 5% of the time (para 64). Significance level statistics are closely related to confidence intervals, for example, a 5% significance level is equivalent to a 95% confidence interval (para 64). The statistical significance for each daily excess return is measured by the t-statistic, which is calculated as a day’s excess return divided by the standard error of the regression (para 65):

t-statistic = Excess Return ÷ Standard Error of Regression

The standard error is the measure of normal volatility, which is one of the parameters obtained from the regression for a market model (para 66). A t-statistic greater than 1.96 in absolute value (either positive or negative) means that the excess return is significant at the 5% significance level (para 67). Mr Torchio uses the 5% level of significance for his analyses and he considers that excess returns with a t-statistic greater than 1.96 in absolute value are statistically significant, and says this is common in financial economics research (para 67).

186 There are other issues that the researcher must confront in an analysis of the information in an event study for securities litigation, namely (i) economic correspondence; (ii) confounding information; (iii) truth-on-the-market; and (iv) the length of the event window.

187 Economic correspondence refers to an economic link between information in an identified event and the contraventions stated in a statement of claim (para 70). If there is such correspondence, then the identified event is referred to as a corrective event or corrective disclosure (para 70). In securities litigation, it is rare to encounter language in a corrective disclosure that is identical to the language in a statement of claim, and a comparison of the language in a corrective disclosure to that in a statement of claim may suggest that the corrective disclosure “over-corrects” (or sometimes “under-corrects”) the disclosure failures or contraventions in a statement of claim (para 71). Whether the information in a disclosure over-corrects, however, cannot be determined by merely comparing a literal reading of the language from a corrective disclosure with the language describing the disclosure failures or contraventions in a statement of claim (para 72). The answer requires an analysis of how investors, analysts, the media and others translate the language of a disclosure into financial consequences for the company, in that the market processes information from a disclosure and forms a consensus of the consequences from that disclosure (para 72). Expressed more precisely, a disclosure can be an over-correction if the disclosure contains material negative information that is related to the contraventions, but the negative information is both: (i) not stated as a specific contravention in a statement of claim; and (ii) not a foreseeable consequence of the contraventions in a statement of claim (para 73). In an economic context, foreseeable consequences refer to whether the ultimate effects or consequences of the contraventions that occurred because of the corrective event would reasonably have been anticipated or predictable during a relevant period with knowledge of the contravening information (para 73). Thus, to determine economic correspondence, the expert must address the question: would the valuation consequences that resulted from a corrective disclosure have been reasonably foreseeable consequences from the contravening information or from any assumed counterfactual? If the answer is no, then the corrective disclosure over-corrects; if the answer is yes, there is no over-correction (para 74). In his oral evidence, Mr Torchio said that he includes economic “equivalence” under the heading “economic correspondence” and regards it as “all part and parcel of the same thing” (T818.33-45).

188 A common example of foreseeable consequences in securities litigation concerns the loss of management credibility or integrity because of a disclosure failure, and it is not unusual to observe that the market loses some confidence in management following a corrective disclosure that reveals poor financial performance and also reveals weak management practices or judgment (para 75). That loss of confidence or credibility is referred to by economists as a loss of reputational capital, and research has shown that, on average, there is a substantial decline in a company’s share price because of a loss of reputational capital (para 75). New negative information can result in the market reappraising the discounted present value of its expectation of future cash flows to be lower than what would be the direct effect from poor financial performance, and the incremental share price loss is a result of a loss of reputational capital (para 75).

189 Pausing there, Mr Holzwarth also dealt with the concepts of economic correspondence and equivalence in his report and in his oral testimony. In his report of 15 November 2018, Mr Holzwarth was critical of Mr Torchio for not analysing the aspect of his assumed counterfactual disclosure which refers to the underlying reasons in that hypothetical disclosure being “economically equivalent” to the actual disclosure (paras 244, 274; and see T889.1-3). When asked in cross-examination whether economic correspondence is effectively subject-matter relation, and economic equivalence is quantification, Mr Holzwarth replied: “You could think of them as a qualitative analysis and a quantitative analysis” (T886.8-12).

190 I found these descriptions of the concepts of economic correspondence and equivalence too vaguely expressed to be of any real assistance in circumstances where the corrective disclosure is not exactly the same as what would have been required or appropriate to ensure that the respondent’s conduct did not contravene the relevant legal norm. The concepts were more clearly expressed by Senior Counsel for both parties in what emerged as common ground. Mr Craig KC for WOR submitted that economic equivalence and economic correspondence require that the counterfactual and the actual corrective disclosure are sufficiently qualitatively and quantitatively similar so as to have driven in the minds and actions of market participants the same (or substantially the same) conclusion as to the foreseeable cash flow consequences: T326.33-327.20. Mr Sulan SC accepted that economic equivalence or economic correspondence requires that the counterfactual disclosure would have had substantially the same economic impact on the market as the actual corrective disclosures had (T450.9-28) and effectively agreed with what Mr Craig KC had put as to the meaning of those concepts (T450.34-451.2). Mr Sulan SC submitted that the quantitative element, being the figures in the actual and counterfactual disclosures, would have the major impact on the market, referring to “the main thing the market reacts to, of course, is the numbers” (T106.24-26; T441.10-18), but also recognised the importance of the reasons given in the disclosures (T400.32-47), as too did Mr Craig KC (T331.41-332.23). For example, the reasons may indicate whether the corrective disclosure is the result of an isolated one-off event, on the one hand, or a systemic problem for ongoing cashflows, on the other hand.

191 Confounding information refers to circumstances in which the event window that contains disclosure of information related to the contraventions also contains other new and important information that is wholly unrelated to the contraventions (para 76). If confounding information is present, it requires additional analysis to adjust the results of the event study of the corrective disclosure to account for the effect of the confounding information (para 76). There is a number of kinds of analysis that can resolve the problem created by confounding information, including:

(a) as to whether the confounding information is important to investors, there are several approaches to discern whether such information has economic importance including fundamental valuation analyses (eg DCF and multiples), and the researcher can also analyse contemporaneous commentary by analysts and the media to gauge the relative importance of the corrective information to the potentially confounding information; (para 77);

(b) fundamental analyses can also be used to parse out the total excess returns into what is attributable to the corrective information and what is attributable to the confounding information (para 78);

(c) a researcher can examine whether the confounding information was disclosed at a different time of day, and if so intraday price movements may in some circumstances be used to differentiate the price responses to each piece of information (para 79); and

(d) if there is evidence that the confounding information has already been disclosed, then it is presumed that the confounding information cannot have caused the price decline because the total mix of information in the market before the event window already reflected the confounding information (para 80).

192 “Truth-on-the-market” is a term that refers to circumstances in which there is evidence that all of the information that ostensibly corrects the misrepresentations or omissions has already been disclosed and, therefore, is already in the total mix of publicly available information prior to the event window (para 82). If the information in an event that corrects the misrepresentations has already been disclosed, then it may be presumed not to have caused the price decline over the event window, and conversely, if some aspect of the information is new, then it may still be responsible for the price decline over the event window (para 82). The content and source of the information and context in which the information is disclosed are important determinants in assessing these issues (para 83).

193 As to the length of the event window, as an economic matter, corrective disclosures do not have to emanate from respondents alone, in that information correcting allegations can flow from analysts, government sources, media and other sources (para 84). While the market may react immediately to the release of information, the full effect from the release of information, particularly complex information, can require longer event windows, and if information from third parties follows in the hours and days after a corrective disclosure then a price response from that information may also be included in the measure of the full price effect (para 84). An event window refers to the length of time used to measure the price effect from a specific event (para 85). The longer the window, the more likely one will capture the full price effect of the event being studied, but the more likely it is that other events or information may confound the results (para 85). In practice, it is common to use windows of one or two days, depending on the information that is being disclosed, but a window of more than two days can also be appropriate in certain circumstances (para 86). The determination of the appropriate length of an event window is dependent on the circumstances, the complexity of the disclosure, and the degree to which additional information from the company or analysts was disclosed in subsequent hours or days after the initial disclosure (para 87).

194 The results of an event study analysis serve as economic evidence of materiality and as the basis for quantification of the losses caused by the contraventions (para 88). The quantification of losses involves the following steps (para 89):

(a) the return from the event is calculated by using a market model to account for market and industry factors;

(b) the excess return involves computing the t-statistic to determine if it is statistically significant;

(c) the statistically significant excess return is calculated by adjusting the excess return for any determined overcorrection, confounding information and truth-on-the-market circumstances;

(d) the excess return attributed to the contravention(s) involves determining the appropriate event window length and calculating the adjusted returns;

(e) the cumulative excess return attributed to the contravention(s) is then calculated; and

(f) the losses per share caused by the contravention(s) are then calculated.

The quantification of losses also serves as a basis for economic evidence of materiality, in particular by way of the statistical significance of the excess return, and other economic evidence of materiality of the contravention(s) can be marshalled from company disclosures outside of the event study, or various fundamental financial analyses including DCF analysis and valuation ratios (paras 90-91).

195 In the context of securities litigation, the excess returns from any event study analyses of corrective disclosures need to be translated into the amount of inflation at earlier points in time relative to the dates of corrective disclosures (para 92). Artificial inflation is generally defined by economists as the difference between the actual share price and the “true value” of the share on the date that a plaintiff purchased the shares during the period between when the misrepresentation was made and when it was corrected (the relevant period), where the “true value” of the security is the value that reflects the valuation effects of information that the respondent failed to disclose to the market in accordance with its duty under securities laws (para 93). Artificial inflation is generally computed by first starting with the declines in a share price from the identified corrective disclosures, which generally occur towards the end of a relevant period, and then working backwards through a relevant period (para 94).

196 As a general matter, there are two basic methods to compute artificial inflation discussed in the literature, being percentage and dollar methods (para 95). Both methods use the excess returns attributed to the contraventions from event studies on corrective disclosure days to estimate artificial inflation (para 95). The percentage method is based on the percentage change (the excess return) in the share price, and the dollar method is based on the dollar change derived from the excess return from a corrective disclosure (para 95). Mr Torchio’s opinion is that the percentage method for calculating damages is fully justified by fundamental economic and financial principles when investors’ expectations about the company’s primary value drivers, such as the company’s earnings, revenues or cash flows, are roughly inflated by a constant percentage (para 100). In general, it is Mr Torchio’s approach to use the percentage method in his securities litigation assignments when the contraventions affect the earnings or cash flows for several future time periods (para 106). That is because, in most instances, the contraventions affect growth in future earnings or cash flows that are expected to be generated by an asset or assets of the company that are the subject of the contraventions, and in most instances the expected growth of cash flows from a given asset of a company bears a direct relationship to the overall expected growth of cash flows for all of a company’s assets, which is reflected in the company’s share price (para 106). Thus, linking artificial inflation to the share price is generally reasonable and appropriate if the company’s overall growth (as reflected in its share price) is related to the expected growth of the asset that is the subject of the contraventions, and when the price path during the relevant period is a consequence of changing market valuations of the asset or assets that are the subject of the contraventions (para 106). Mr Torchio’s view is that the use of dollar inflation in the United States is driven primarily by circumstance and law, as opposed to economics (para 107).

197 Further, there can be circumstances in which it is appropriate and necessary to adjust the artificial inflation that is measured by share losses from the corrective disclosures, particularly when economic conditions are substantially different at the time of the corrective disclosures relative to the economic conditions that existed during a relevant period, or if the financial impact of the wrongdoing became greater over time (para 110). In such circumstances, inflation can be scaled by some reasonable parameter to better reflect the economic reality (para 110).

198 Turning then to the circumstances of the present case, Mr Torchio identified one event that related to information that corrected the alleged contraventions, namely that on 20 November 2013, WOR issued an ASX announcement providing the market with a trading update revising its earnings guidance for FY14, and also held a teleconference call for the trading update that morning (para 114). Mr Torchio then conducted an event study analysis of that event to assess the degree of economic correspondence of the information in this event to the information allegedly misrepresented (para 116).

199 The terms of the ASX announcement of 20 November 2013 (CB10,780-1) are important in assessing a number of the arguments concerning the event study analysis, and I therefore set them out in full:

WorleyParsons Limited (“the Company”) provides a trading update and revised earnings guidance for the year to 30 June 2014.

At the Company’s Annual General Meeting WorleyParsons reiterated guidance for FY2014 of increased earnings compared to FY2013 net profit after tax (NPAT) of $322 million. After considering our current trading results and having experienced a delay in upturn in our markets the company is issuing revised guidance. On current indications the company now expects to report underlying NPAT for FY2014 in the range of $260 million to $300 million with first half underlying NPAT in the range of $90 million to $110 million.

The revised outlook primarily reflects:

* Reduced professional services revenue compared to the prior year. This reduction is particularly evident in the company’s large Australian and Canadian businesses and to a lesser extent in Latin America and the Middle East;
* Implementation of a rigorous cost reduction program across the entire group. The benefit of this program, net of restructuring costs, will begin to be realized in the second half of the financial year;
* Outperformance in a number of other markets, in particular the United States, Southern Africa and Europe, will not be able to offset the decline experienced in the Australian and Canadian businesses as had previously been expected.

The reduced professional services revenue is driven by:

* The decline in the Australian business has been greater than expected, as hydrocarbons projects in Northern Australia move into the final construction and delivery phase and the Minerals & Metals business remains weak;
* The Canadian business continues to be impacted by major project deferrals and additional costs incurred in our construction and fabrication business WorleyParsonsCord;
* The Latin American business has been impacted by the soft global minerals and metals market;
* The business in the Middle East has also experienced a slow start to the year as a result of delays in the ramp up of a number of projects that have been awarded.

Commenting, Chief Executive Officer, Andrew Wood, said: “Notwithstanding the impacts weaker than expected market conditions are having on our performance, the cost reduction program we are implementing together with the momentum from recent contract awards should position us for medium term growth. The diversity of our business in terms of its geography, industry sector and service offering remains a fundamental strength.

200 As to the market model for WOR, Mr Torchio selected the S&P/ASX Accumulation 300 Index (the **Market Index**) as a proxy for the market for WOR shares (para 117). In addition, Mr Torchio formed a peer index using the equal-weighted returns of five ASX-traded peer companies identified by WOR in its “peer comparison group” (the **Peer Index**), being companies with similar business profiles to its own (para 117). As to the time period for model estimation, Mr Torchio followed his usual practice of estimating a market model over a one-year period when possible, and thus he first estimated the market model regression over a one-year period before the start of the Relevant Period, being 14 August 2012 to 13 August 2013 (para 118).

201 Mr Torchio observed that there were several days during the estimation period on which there were disclosures of WOR’s earnings or earnings guidance, and a customary specification of a market model is to use indicator or dummy variables for each earnings or earnings guidance disclosure date (para 121). The use of dummy variables for earnings disclosures is designed to eliminate the effect of potentially high volatility days from the regression parameters that often occur on routine earnings or earnings guidance disclosures (para 121). The use of a dummy variable isolates that day’s return and considers it a separate independent variable, and thus effectively eliminates the return for that specific day from the computation of the regression beta parameters, standard error and other regression statistics, and accordingly the use of dummy variables can provide a potential improvement in the specification of the market model (para 122).

202 Another issue that can arise in event study analysis in securities litigation is that the volatility during an estimation period differs substantially from that during a relevant period (para 124). Mr Torchio conducted various modes of analysis which led him to be satisfied that there was not a change-in-volatility issue (para 124). Mr Torchio also ran several other regression models to assess whether the parameters yielded from his model were robust (para 125).

203 As to the return, excess return and statistical significance for the announcement on 20 November 2013, Mr Torchio observed that WOR’s share price declined by $5.59 per share, or 25.89%, from its last closing price on 19 November 2013 of $21.59 per share to close at $16.00 per share on trading volume of 8.3 million shares (para 132). The excess return is computed by subtracting the predicted return from the actual return (para 133). Subtracting the predicted return of -1.61% from the actual return for WOR of -25.89% yields an excess return of -24.28% for 20 November 2013 (para 133). In other words, 1.61% (1.61 percentage points) of the entire 25.89% price decline was attributable to movements in the Market Index and the Peer Index (para 134). The statistical significance of the excess return is measured by the t-statistic, which is computed as the excess return divided by the standard error of the market model regression (para 135). Based on the excess return of -24.28%, and a standard error of 1.47%, the t-statistic is -16.54 (para 135). That t-statistic implies with over 99.99% confidence that the excess return for WOR on 20 November 2013 was not because of chance but rather because of information disclosed on that day (para 135). Accordingly, the market attached a high degree of importance to the information disclosed that day (para 135). Over the next several days, volume remained substantial, but there were no other statistically significant returns between 20 November 2013 and 5 December 2013 (para 137).

204 Dealing with the question of an efficient market, the reliability of event study results for a given stock depends on how efficient the trading in the market for that stock is, market efficiency being a matter of degree (para 138). Mr Torchio said that the preponderance of the evidence of his analyses of market efficiency strongly supported his opinion that the degree of market efficiency for WOR shares was more than sufficient to use his market model reliably to assess the statistical significance of excess returns and to measure quantitatively the price reaction to new information, and in particular to measure the price reaction to information disclosed on 20 November 2013 (para 138 and Appendix A).

205 Mr Torchio reviewed the information disclosed by WOR on 20 November 2013, together with media commentary and analyst commentary in relation to that announcement (paras 143-144). Mr Torchio said that, although WOR did not provide a specific range of the FY14 underlying NPAT guidance on 14 August 2013, after the disclosure on 14 August 2013 the analyst consensus for FY14 underlying NPAT was $368 million (para 148). WOR’s disclosure on 20 November 2013 provided revised guidance for FY14 underlying NPAT of between $260 million and $300 million, yielding a midpoint estimate of $280 million, and the analysts’ consensus for FY14 underlying NPAT following the 20 November 2013 disclosure was $274 million (para 149). Immediately before the 20 November 2013 disclosure, the analysts’ consensus FY14 underlying NPAT was $354 million, which was 3.8% below the $368 million consensus after the 14 August 2013 disclosure, a decline which Mr Torchio attributed to WOR’s 9 October 2013 disclosure that, while affirming its previous full year guidance, WOR expected that its earnings in the first half of FY14 would be below the corresponding period in FY13, but that the second half was expected to increase (para 150). I note at this point that Mr Torchio later amended his assessment of the pre-20 November 2013 analysts’ consensus to $351.8 million (T821.17-22), accepting a point made by Mr Holzwarth (at paras 234 and 278 of his report) that certain “stale” analysts’ reports should be excluded.

206 Accordingly, relative to the analysts’ consensus of $354 million (now $351.8 million) underlying NPAT, the 20 November 2013 disclosure caused an $80 million reduction (being $354 million less $274 million) in the market’s expectation of FY14 underlying NPAT, which translated to a dramatic -23% change from prior analysts’ expectations (para 151). That dramatic revision of FY14 guidance was the principal factor discussed by analysts for their changes in earnings expectations for FY14, FY15 and FY16, rating changes, and changes in their price targets for WOR (para 152). Mr Torchio said that that commentary supported his conclusion that the predominant cause for the share price decline from the announcement on 20 November 2013 was the reduced future profit expectations conveyed to the market from WOR’s revised guidance for FY14, and expressed the opinion that the market interpreted the lower FY14 guidance to be a harbinger of reduced growth expectations for WOR’s future revenue, earnings and cashflows (para 152).

207 Mr Torchio then summarised the contraventions and the associated counterfactuals that he was instructed to assume as to the contraventions. Mr Torchio was instructed to assume that the matters set out in Mr Crowley’s pleading were correct, and in particular Mr Torchio assumed the correctness of the following alleged contraventions:

(a) at the time WOR gave the earnings guidance on 14 August 2013, it did not have reasonable grounds to give that guidance, nor did it have reasonable grounds to repeat the guidance on 9 and 10 October 2013, and accordingly those representations were misleading or deceptive; and

(b) WOR breached its continuous disclosure obligations by failing to inform the market of the true position until 20 November 2013 in circumstances where the company was aware of the factors leading to the downgrade which was announced that day at or around the time of the 14 August 2013 earnings guidance.

208 As to the counterfactuals, Mr Torchio was instructed to assume:

that had [WOR] issued a reasonably based FY2014 NPAT guidance to the market during the Relevant Period:

(i) that guidance (Reasonable Guidance) would have been in a range of $260 million to $300 million; and

(ii) [WOR] would have announced that the underlying reasons for the Reasonable Guidance were the same or economically equivalent to the underlying reasons for the revised FY2014 guidance provided by [WOR] on 20 November 2013.

It is important to note that those counterfactuals were no more than assumptions which were given to Mr Torchio. Mr Torchio agreed in cross-examination that he did not have to analyse, and express an opinion on, whether the counterfactual disclosure was economically equivalent to the actual disclosure on 20 November 2013 because the assumption was that the amount of the guidance and the reasons for it matched (T856.11-31).

209 I also note at this point that, for the purposes of his third report, Mr Torchio was given a different set of assumptions as to what WOR would have announced as the reasons underlying the so-called Reasonable Guidance of $260 to $300 million, instead of what was stated on 20 November 2013. The letter of instructions to Mr Torchio dated 1 February 2019 expresses those alternative guidance reasons in four propositions, although during his oral evidence, Mr Torchio was asked by Senior Counsel for Mr Crowley to ignore the third and fourth of those items (T806.34-37), which had apparently been formulated by reference to an affidavit which was not read. The first and second of the alternative guidance reasons were stated as follows:

(i) [WOR] had overestimated its FY2014 NPAT from the ANZ Region based on the economic outlook for the sectors it provided professional services to and its business performance at the time it provided the FY2014 NPAT guidance;

(ii) [WOR] had overestimated its FY2014 NPAT from the USAC Region based on the economic outlook for the sectors it provided professional services to at the time it provided the FY2014 NPAT guidance.

That assumption as to alternative guidance reasons was not intended to reflect any abandonment of the original counterfactual assumption based on the whole of the reasons expressed in the 20 November 2013 announcement, but ran in parallel with that original set of assumptions as an alternative set of assumptions. As matters transpired at the hearing before me, Senior Counsel for Mr Crowley abandoned the case based on the alternative assumptions given to Mr Torchio for his third report (as later modified during the oral evidence given by Mr Torchio) during his oral address in reply: T438.37-439.15.

210 Mr Torchio then turned to an analysis of the economic consequences of the information disclosed on 20 November 2013 in relation to the contraventions and the counterfactuals which he had been instructed to assume. As to the disclosure on 20 November 2013 of WOR’s revised underlying NPAT for FY14 being in the range of $260 million to $300 million, Mr Torchio noted that his assumptions as to the contraventions included the lack of a reasonable basis for WOR’s NPAT guidance on 14 August 2013, namely that FY14 NPAT would increase above the $322 million NPAT in FY13, and the assumption as to the counterfactual that WOR should have guided the market that its FY14 NPAT would likely be in the range of $260 million to $300 million as at 14 August 2013 and maintained that guidance throughout the Relevant Period (paras 156 and 159). Mr Torchio noted that the assumed counterfactuals were the same as the revised guidance disclosed by WOR on 20 November 2013, and concluded that there was substantial economic correspondence between the 20 November 2013 disclosure and the assumed counterfactuals (para 159). I note at this point that, while that was an obvious conclusion to draw from the assumptions given to Mr Torchio, the reasoning effectively does no more than restate the assumptions which he was given. As to the disclosure on 20 November 2013 that WOR’s underlying NPAT for the first half of FY14 would be in the range of $90 million to $110 million, Mr Torchio expressed the opinion that that information was subsumed in the lower NPAT guidance for the full year of FY14, and consequently that information about the first half of FY14 guidance was not independent of the full year guidance, which itself had direct correspondence to the assumed counterfactuals (para 162). As to the disclosure on 20 November 2013 of the underlying reasons for the revised guidance, Mr Torchio noted that he had been instructed to assume that the causes of the FY14 underlying NPAT counterfactuals were the same causes that WOR attributed to the revision of the FY14 underlying NPAT guidance, and therefore concluded that that information had economic correspondence to the assumed contraventions and assumed counterfactuals (para 164). As to the information disclosed on 20 November 2013 as to restructuring costs, Mr Torchio noted that the restructuring associated with the cost reduction program had a negative effect on the expected NPAT for FY14, but he did not consider the restructuring costs to be confounding information for three reasons: (a) the cost reduction program was prompted by WOR’s expectations for reduced profit for FY14, which were directly related to the assumed contraventions; (b) Mr Torchio considered the restructuring to be a one-time event that was not a factor in the lower expected profit beyond FY14 projected by analysts following the 20 November 2013 disclosure; and (c) on balance the cost reduction was portrayed by WOR and perceived by analysts to be a positive long-term strategy given the lower profit guidance (paras 165-168).

211 Mr Torchio concluded that the alleged wrongdoing had strong economic correspondence to the corrective information disclosed on 20 November 2013, and expressed the opinion that the information disclosed on 20 November 2013 corrected the assumed contraventions and was the same as the counterfactuals that he had been instructed to assume (para 170). I note again that Mr Torchio’s reasoning on this point was effectively no more than a restatement of the assumptions he had been instructed to make. Mr Torchio also expressed the opinion that whatever portion of the excess return was due to a loss of reputational capital would have been a foreseeable consequence of the assumed counterfactuals (para 170). In addition, Mr Torchio said that he did not find any disclosure after 20 November 2013 that provided additional and important information correcting the assumed contraventions that was associated with a statistically significant excess return (para 171).

212 As to confounding information, Mr Torchio concluded that the pieces of important information disclosed on 20 November 2013 were not independent of, or unrelated to, the assumed contraventions and counterfactuals, and he did not find any other important information that was independent of or unrelated to the assumed contraventions or counterfactuals that he considered confounding (para 172).

213 As to truth-on-the-market, Mr Torchio said that before 20 November 2013, the market had some information about risks that were ultimately identified by WOR as the underlying reasons for its revised guidance, such as a decline in the Australian business and project deferrals in the Canadian business, but despite the awareness by analysts of issues in WOR’s underlying markets, their forecasts for FY14 NPAT were all above WOR’s FY13 NPAT of $322 million, which was consistent with WOR’s guidance before 20 November 2013 (paras 175-176). After reviewing a number of analysts’ reports, Mr Torchio concluded that the revised guidance on 20 November 2013 was new information to the market, and he found no evidence that the market was aware of the lower guidance disclosed on 20 November 2013, and indeed analysts generally expressed surprise that WOR lowered its guidance so soon after it reaffirmed its higher guidance on 15 October 2013 (para 183).

214 As to the event window which a researcher needs to determine to measure the full price effect of the corrective disclosure, Mr Torchio selected an event window of one day, namely 20 November 2013 (para 188).

215 Mr Torchio then turned to the topic of artificial inflation, noting that an important aspect of forensic economics in securities litigation is to translate the excess returns that are observed from corrective disclosures into artificial inflation for each day of a claim period (para 190). Artificial inflation is generally defined as the difference between the actual share price and the “true value” of the share on each day in a relevant period, where the “true value” of the security is the value that reflects the failure of the respondent to disclose information important to the market in accordance with its duty under securities laws (para 191). Mr Torchio expressed the opinion that the percentage method was a more appropriate method for modelling inflation for the assumed contraventions in this case, referring to academic support for that method and to his view that the use of the percentage method is most appropriate when the company’s expected growth rate has been affected by the assumed contraventions (paras 192-194). Mr Torchio expressed the opinion that the percentage method was appropriate in this matter because the assumed contraventions that were corrected involved expected profit for FY14, which affected the market’s perception of WOR’s future sales and profits beyond that in the immediate period of FY14, and thus resulted in a change in the expected growth rate for WOR as a whole (para 194). Mr Torchio then supported that opinion by reference to analyst consensus estimates and reduction in P/E ratios (paras 195-203).

216 In terms of the computation of artificial inflation, Mr Torchio said that the percentage method begins with the excess returns attributed to the assumed contraventions as determined from the loss causation opinion derived from the event study method, and repeated his opinion that the -24.28% excess return was attributed to the correction of the assumed contraventions on 20 November 2013 (para 204). Mr Torchio expressed the view that the constant percentage inflation of 24.28% measured at the end of the Relevant Period likely underestimated the inflation percentage at the beginning of the Relevant Period (para 205). Mr Torchio said that because the market’s consensus FY14 underlying NPAT at the start of the Relevant Period was $368 million (greater than the consensus immediately before 20 November 2013), the same revised guidance provided at the start of the Relevant Period would have caused a larger decline in the market’s consensus, namely $94 million (being $368 million minus $274 million) or 26% ($94 million divided by $368 million), which would have likely resulted in a negative excess return of more than 24.28% (para 205). However, to be conservative, Mr Torchio limited the inflation percentage to be constant at 24.28% and applied it to the entire Relevant Period (para 206). The negative 24.28% excess return was then multiplied by the daily price to yield artificial inflation from 14 August 2013 to 19 November 2013 (para 206 and Exhibit G).

217 Mr Torchio then turned to the topic of fundamental analysis of the assumed contraventions, noting that there were two general methods of performing valuation analysis, DCF analysis and multiples valuation analysis (para 208). For a multiples analysis, the long-term profit growth rate was determined from the market price and the chosen accounting metric, whereas for a DCF analysis, the profit growth rate is generally determined by the analyst (para 208). For his valuation analysis, Mr Torchio relied on the valuation multiple of WOR’s P/E ratio, using the share price of WOR shares as the numerator and the consensus earnings from analysts covering WOR as the denominator (para 210). For the consensus earnings, Mr Torchio downloaded the analyst consensus expectations for FY14, FY15 and FY16 earnings from Capital IQ (para 212). Because the corrective disclosure on 20 November 2013 was the same as the counterfactuals which Mr Torchio was instructed to assume, Mr Torchio concluded that the assumed counterfactuals would have resulted in market expectations for FY14, FY15 and FY16 earnings to be the same expectations that obtained after 20 November 2013 (para 216). In addition, because the actual P/E ratios during the Relevant Period were approximately the same or greater than the P/E ratio the day before 20 November 2013, Mr Torchio concluded the changes in the P/E ratios would have resulted from the assumed counterfactuals to be the same changes in the P/E ratios that were observed after 20 November 2013 (para 216). Mr Torchio then calculated WOR’s “true value” for each day during the Relevant Period, and compared that with the artificial inflation from his event study analysis, and observed that the artificial inflation from his multiples analysis was consistent with (albeit somewhat greater than) the artificial inflation from his event study analysis, which he said supported the more conservative measure of artificial inflation for WOR computed from applying the percentage method to his event study results (para 219). Mr Torchio expressed the view that the results of his valuation multiples analysis provided a reasonableness check with the results of his event study analysis (para 220).

218 In his second report dated 18 October 2018, Mr Torchio dealt with the question of how the portion of the excess return attributable to different counterfactual assumptions as to the NPAT guidance provided by WOR during the Relevant Period should be calculated. In light of evidentiary rulings on that report, the matter was addressed further in oral evidence, and was explained by Mr Torchio by reference to a hypothetical example of WOR having given reasonable guidance as at 14 August 2013 that NPAT for FY14 would be $290 million. Mr Torchio explained (at T827.32-39), that if the prior analysts’ consensus was $352 million, one would subtract from that the counterfactual guidance of $290 million, being $62 million; next one would look at the total shortfall that occurred in analysts’ expectations by taking the prior consensus of $352 million and subtracting from that the analysts’ consensus after the 20 November 2013 disclosure, which was $274 million, being a difference of $78 million; and one then divides $62 million by $78 million, being 79%. Accordingly, 79% of the total decline on the event (ie 24.28%) would be attributable to the alleged contraventions. Mr Torchio calculated the appropriate figures for apportioned excess returns attributable to a range of reasonable guidance from $260 million to $340 million, saying that reasonable guidance in excess of $340 million may not yield an economically material return because such apportioned excess return may not be considered significant based on his measure of WOR’s normal volatility of excess returns (second report para 44).

219 A graph at para 45 of Mr Torchio’s second report (reproduced below), with the vertical axis being apportioned excess return in percentage figures and the horizontal axis being reasonable guidance in millions of dollars, showed a straight line (or constant relationship) between reasonable guidance of about $275 million and $340 million. At reasonable guidance of $260 million to about $275 million, the apportioned excess return remained at about 24.28%. Mr Torchio explained the flat line at the range of $260 million to $275 million (in the context of the analysts’ consensus after the corrective disclosure of 20 November 2013 being $274 million) on the basis that, while a hypothetical disclosure of revised guidance of $275 million or below would have had a larger valuation effect than revised guidance of $280 million (that is, caused by a larger above-price decline), this would imply that artificial inflation remained in WOR’s share price after the corrective disclosure on 20 November 2013; because there were no additional corrective disclosures to remove the remaining artificial inflation, the apportionment of excess return in excess of the actual excess return on 20 November 2013 would imply that investors would be entitled to recovery of losses in excess of what they actually suffered (third report dated 31 January 2019, para 217). However, the paragraphs of Mr Torchio’s second report dealing with the basis for the linear relationship shown in the graph were not read by Mr Crowley’s counsel, although I note that Mr Holzwarth did not take issue with this concept. I will return to that point at [261]-[262] below, in dealing with Mr Crowley’s application to reopen his case and adduce further evidence. Importantly, Senior Counsel for both parties accepted that the apportionment exercise, represented by the linear relationship between the figure for reasonable guidance and the apportioned excess return, applies only within the parameters of economic equivalence, and only when that economic equivalence has been established: Mr Craig KC at T357.19-358.21; Mr Sulan SC at T442.16-37, 444.9-15. That common ground is consistent with the opinion expressed by Mr Holzwarth in his oral evidence (at T832.36-45), which I accept. Mr Torchio accepted that the analysis in his second report concerning a range of reasonable guidance of $260 million to $352 million and the commensurate level of artificial share price inflation was based on the assumption of economic equivalence in the underlying reasons in the counterfactual disclosure and the actual disclosure on 20 November 2013 (T859.21-38). That common ground also seems to me to be intuitively correct. At the higher end of the range for reasonable counterfactual guidance of (say) $330-340 million, market participants would seem unlikely to form any adverse view at all of the competence or integrity of WOR’s management, but at the range of the actual corrective disclosure of $260-300 million, that loss of “reputational capital” (see [188] and [211] above) would likely be very substantial as a driver downwards of the WOR share price (a point reflected in some of the analysts’ reports issued shortly after 20 November 2013, as referred to in Mr Torchio’s first report at para 144). There would thus be no economic equivalence (in the sense referred to at [190] above) between those two scenarios. Accordingly, it is only where there is economic equivalence between the actual corrective disclosure and the selected range of counterfactual guidance that a linear relationship with excess returns would make sense.



### Mr Crowley’s Proposed Counterfactuals

220 Mr Crowley advanced three alternative counterfactuals as to the reasonable guidance that WOR should have provided to the market on 14 August 2013 and thereafter during the Relevant Period. Mr Crowley accepts that he bears the onus of demonstrating the appropriate counterfactual on the balance of probabilities (T430.1-21). I note at this point that, at least at the theoretical level, one possible counterfactual would have been that WOR would have given no earnings guidance at all, but neither party has run a case based on that hypothesis and I thus disregard it. The primary counterfactual advanced by Mr Crowley is that reasonably based NPAT FY14 guidance would have reflected the announcement made on 20 November 2013, namely NPAT guidance of between $260 million and $300 million together with substantially the same explanation for the downgrade, as I have indicated above, and that corresponds to the counterfactual assumption which Mr Torchio was instructed to make. Mr Crowley also advances two alternative counterfactuals, namely that counterfactual reasonable guidance would have been approximately $284 million (being WOR’s 27 May 2013 Draft Budget plus allowance for the foreign exchange movements that occurred before the FY14 Budget was adopted) or a figure of $289 million (being materially less than the FY13 NPAT of $322 million applying a 10% materiality threshold). Mr Crowley accepts that reasonable guidance required WOR to satisfy the parameters of a P50 Budget: T120.10-12.

221 WOR submits that the only counterfactual available to Mr Crowley is $284 million, on the basis that the other two counterfactuals were unpleaded, undeveloped and not run as part of Mr Crowley’s case. WOR submits that the 4FASOC alleged that a reasonably-based NPAT forecast was $284 million, referring to the particulars to paras 46 and 46A of the 4FASOC and the striking out of various other counterfactuals in those paragraphs, including “between $260-$300m”. WOR submits that the reference in the particulars to NPAT “materially less than $322 million” is fundamentally lacking definitional content and cannot retrospectively be assigned a value, particularly in circumstances where Mr Crowley deleted a range of quantified values from the pleading. WOR further submits that the closing written submissions by Mr Crowley fixed on $284 million, with varying degrees of precision or imprecision, and in oral closing submissions, Mr Crowley’s Senior Counsel did not depart from $284 million (see T998.40). WOR submits that the primary counterfactual of NPAT between $260 and $300 million was deleted in the 4FASOC, was not seriously opened or closed on, and was substantively abandoned in the way the case was put. WOR further submits that the alternative counterfactual of $289 million was not mentioned in the case as opened, and only trace elements appeared in Mr Crowley’s closing submissions, after evidence had been finalised, and the estimate of $289 million does not expressly appear in the 4FASOC.

222 In response, Mr Crowley says that certain counterfactuals were struck through in the 4FASOC because a proposed expert witness on the liability case, Mr Jaski, was not called, but Mr Crowley did not abandon the primary counterfactual which always formed part of his loss and damage case, and WOR was on notice of that fact, referring to his written opening at [169] (which relied on the evidence of Mr Torchio) and his oral opening at T407.33-37 (which stated that Mr Torchio’s first report made the assumption that the reasonable guidance would have been in the range of $260 to $300 million). The particulars as to the allegation of loss in para 74 of the 4FASOC refer expressly to the expert report of Mr Torchio. Mr Crowley submits that Mr Torchio’s first report addressed the range $260 to $300 million, and his second report addressed a broader range of $260 to $340 million, both of which were admitted into evidence. Mr Crowley also refers to a passage in the transcript of the concurrent evidence given by Mr Torchio and Mr Holzwarth in which WOR sought to confine Mr Crowley’s case to the initial counterfactual guidance assumption which was the subject of Mr Torchio’s first report of $260 to $300 million (T835.1-5). Mr Crowley’s closing written submissions referred to the principal case being a counterfactual disclosure in the range $260 to $300 million: [607]. The primary judge referred to Mr Crowley’s contention in final submissions being that a reasonable budget process would have forecast a FY14 NPAT in the range $260 to $300 million, or in any event materially lower than the post-August 2013 analysts’ consensus promoted by WOR: PJ[50]. The primary judge pointed out that that contention was similar to an allegation that had been deleted from the particulars to para 46(d) of the 4FASOC, but did not say that such a contention was not open to Mr Crowley.

223 In my view, the submissions by Mr Crowley as to whether it is open to him to advance all three counterfactuals should be accepted. While the counterfactual of $260 to $300 million was not pleaded in the allegations concerning WOR not having a reasonable basis for making the FY14 Earnings Guidance Statement at para 46 of the 4FASOC, or elsewhere in the allegations of liability, it was clear from the particulars of loss under para 74 (which referred expressly to the expert report of Mr Torchio) and the case was squarely put on the basis of that counterfactual. Accordingly, the case was run on the basis that Mr Crowley’s primary counterfactual was hypothetical reasonable guidance of FY14 NPAT in the range $260 to $300 million. It is therefore open to Mr Crowley to maintain that position in this remitted hearing. As to the alternative counterfactual of FY14 NPAT of $289 million, Mr Crowley’s closing written submissions made repeated reference to the alternative case that a reasonable budget would have been materially less than $322 million: at [507], [531] and [731]. The trial was conducted, and the primary judge delivered judgment, well before the Full Court’s decision in *Masters v Lombe (in his capacity as liquidator of Babcock & Brown Limited) (in liq)* [2021] FCAFC 161; (2021) 392 ALR 326. While the figure of $289 million was not advanced by Mr Crowley at the initial hearing, I accept that it is open to Mr Crowley to advance that figure now, on the basis that it corresponds to the 10% materiality threshold referred to in *Masters v Lombe.*

224 That takes me then to the critical question as to whether Mr Crowley has discharged his onus of proof of establishing that reasonable NPAT guidance by WOR on 14 August 2013 and thereafter during the Relevant Period would correspond to one of those counterfactuals. There is no expert evidence on that matter and accordingly the question of what reasonable guidance would have been given must be assessed on the basis of the whole of the documentary evidence and witness testimony which is before me. Further, this is a question which neither the Full Court nor the primary judge addressed directly. Moreover, the present issue does require me to assess what the FY14 Budget and its various components would have stated by way of NPAT if it had been based on reasonable grounds (although that may not be required to be done on a strictly line-by-line basis), whereas that was found by the Full Court to have been an erroneous approach by the primary judge to issues of liability.

225 Dealing first with Mr Crowley’s submissions in support of the primary counterfactual of NPAT guidance of between $260 million and $300 million, Mr Crowley submits that the adoption of that counterfactual is supported by the following matters:

(a) the guidance given on 20 November 2013 was the result of the risk-based review that, as the A&RC accepted, ought to have formed part of the FY14 Budget process (see PJ[608]), and that review resulted from a “much more critical assessment” of Blue Sky and phasing (see PJ[550] and [553]), which Mr Crowley submits were the source of significant but unaddressed concerns during the FY14 Budget process;

(b) the guidance given on 20 November 2013 was not the result of any unexpected deterioration in market conditions, in that WOR knew during its budget setting process that its markets were flat or falling and there is no reference in the Holt Memorandum or the Holt Memo Interview Notes to a reason for WOR failing to meet its budget over the last six years (including FY14) being an unexpected deterioration in market conditions, and Mr Crowley submits that the documents reveal that the FY14 Budget was formulated in spite of market conditions;

(c) the proposition that the revised forecast on 20 November 2013 did not result from a change in market conditions is evidenced by the revision to the forecast for MENAI following the November 2013 review; WOR did not have a problem with market conditions in MENAI (PJ[574]), but the November 2013 review resulted in a $10 million EBIT reduction from MENAI (PJ[570(2)]), and the primary judge’s recognition that this evidence “casts doubt about whether WOR’s problem … concerned its markets or its performance” (PJ[574]) involves significant understatement;

(d) WOR failed to call the persons who were directly involved in the FY14 Budget process, including senior managers who were involved in the November 2013 review, being Mr Bradie, Mr Holt and Mr Daly (noting that Mr Ashton, who was called by WOR, was not even consulted on the November 2013 review: T678.45-680.8, especially T680.4-8); and

(e) WOR’s actual performance for FY14 (being NPAT of $263.4 million) was just above the bottom of the range provided, which Mr Crowley submits he is entitled to rely upon not in hindsight but as confirmatory evidence as to the correct counterfactual on the evidence for his damages case.

226 In amplification of those submissions, Mr Crowley put a submission at the hearing before me that there was nothing that arose in the period from 14 August to mid-November 2013 that was the subject of the 20 November 2013 announcement that was not already known to the company as at August 2013 (T92.1-3). In seeking to make good that proposition, Mr Crowley sought to distill the reasons provided in the 20 November 2013 corrective disclosure into four essential propositions, and compared those propositions to the evidence indicating WOR’s knowledge of those matters existing before 14 August 2013. That analysis is as follows.

227 First, Mr Crowley identifies as one of the reasons provided in the 20 November 2013 corrective disclosure that there was reduced revenue in the Australian region, as Hydrocarbon projects in Northern Australia moved into the final construction and delivery phase and the MM&C business remained weak (first, third and fourth dot points in the 20 November 2013 announcement extracted at [199] above). Mr Crowley draws attention to the following evidence as to knowledge of that reason existing before 14 August 2013:

(a) Mr Wood said at para 145 of his affidavit of 23 November 2018 that:

Australia North was projecting [on 26-27 June 2013] a 44% decrease in BEBIT for FY14 as compared to FY13 Q3 forecast. I considered this to be reasonable, due to phase 1 of the QCLNG project being expected to complete in the first half of FY14 and phase 2 being delayed until the second half of FY14;

(b) Mr Wood said at para 233(b) of that affidavit:

We have experienced ongoing requests for cost reductions (volume and rates) across multiple contracts particularly in Australia South but also in Australia North;

(c) Mr Wood said in his CEO summary of 20 March 2013 in relation to MM&C (CB2,121.3):

Market outlook for Greenfield development in ANZ continues to remain soft resulting in the retrenchment of some underutilised process resources;

(d) in a memorandum from Mr Wood to the Board in relation to his CEO Summary of 13 May 2013 (CB3,430), Mr Wood said:

The Australian market continues to soften with the cancellation of Browse in its current form a blow to Perth in particular. Workshare from offshore is helping a number of locations. There is a major focus on right sizing the business – we expect staff numbers to continue to decrease;

(e) Mr Wood said in his CEO’s Report of 14 May 2013 in relation to ANZ (CB3,475):

Markets remain soft across the region especially in the minerals, metals and chemical sector. The month has seen a number of disappointments with losses and cancellations of projects;

(f) Mr Wood said in his CEO’s Report of 14 May 2013 in relation to ANZ (CB3,475):

All businesses across the region continue to work to right-size for what is to be expected to be a significantly contracted market;

(g) Mr Wood said in his CEO’s Report of 14 May 2013 (CB3,497) and his CEO’s Report of 17 June 2013 (CB4,567):

SOPs & NOPs: Market conditions in Australia have led to deferral and scale-back of many projects and significantly increased competitive pressures. This has been exacerbated by a number of Hydrocarbons clients demanding reduced rates;

(h) Mr Wood said in his CEO’s Report of 14 May 2013 (CB3,502):

Our major markets experience a significant unexpected downturn in activity, particularly in marginal cost of production area such as the Hydrocarbons sector (e.g. oilsands and deepwater);

(i) in an email on 16 May 2013, by Mr Ross to Mr Wood and Mr Bradie (CB3,710), Mr Ross said in relation to MM&C:

Given the expected contraction in ANZ and its significant current contribution to the WorleyParsons M&M business the outlook for M&M can at best be described as flat on the basis that a contraction will be partially offset by continuing to grow our market share in LAM and Africa and into the mining sector;

however, it should be noted that the same email says in relation to Hydrocarbons:

We have reasonable confidence (at this early point in the calendar year) that we can secure between 9% and 10% YOY EBIT growth;

(j) in the FY14 Budget Reporting Pack AEP North of 27 May 2013 (CB4,041), it was stated that:

Cost pressures continue to impact coal-seam gas projects and mining projects – we continue to see project deferrals and operation closures. … QCLNG EP is now substantially complete and Phase 2 is deferred until H2FYI4. … The overhead structure needs to be re-sized to reflect the reduced size of the business …;

(k) the FY14 Budget Reporting Pack AEP North of 27 May 2013 (CB4,042) stated as follows:

Overall, the FY14 budget is impacted by the challenging trading environment experienced at the end of FY13 continuing into FY14 meaning that as projects complete, they are not replaced in the same volume, or at the same margin. FY14 sees a decline over H1 which steadies over H2 before beginning to pick up as identified prospects ramp up. Consequently, the proportion of blue sky in FY14 is higher than in recent years. …BEBIT – down $41M or 47% on Q3 Forecast driven mainly by the completion of QCLNG Upstream Engineering and Procurement and reduction in other major FY13 projects including MAK (phasing to construction in country), Arrow (completion of pre feed work), WICET (lower volume continues) and Ma’aden (completed);

(l) the same document (CB4,047) stated as follows:

BEBIT % half on half in line with Q3 Forecast at 56%: 44%. BEBIT weighted towards H1 FY14 due to QCLNG Upstream Phase 1 and MAK TS ramp down’s during this Half; and

(m) Mr Wood’s CEO’s Report of 17 June 2013 (CB4,548) stated:

The Australian market continues to be soft in the mining sector.

228 Second, Mr Crowley identifies as another reason provided in the 20 November 2013 corrective disclosure that there was reduced revenue in the Canada region, as business continued to be impacted by major project deferrals and additional costs incurred in Cord (first, third and fifth dot points in the announcement extracted at [199] above). The evidence of that reason existing before 14 August 2013 is said to be as follows:

(a) Mr Wood said in his affidavit of 23 November 2018 at paras 104-107 as follows:

Cord is a construction group of WorleyParsons in Canada. In June 2013, two of Cord’s major EPC projects known as “Husky Sunrise Energy Project” (**Husky**) and “Imperial Oil Aurora Tailings Management” (**IOL ATM**) were in the final stages of mechanical completion. Mechanical completion is the interface between construction and commissioning (which verifies that each of the component installations is in place). …

In about late June, there were a number of issues which came to light late in the projects, including as a result of matters outside of WorleyParsons’ control (such as unfavourable weather conditions and scope changes by the customers). This affected the timing for mechanical completion, which were reflected in the budget submissions for Cord.

For Husky, there was a scope dispute between WorleyParsons and the customer, the end result of which was that we had to undertake “loop checking” at significant cost. There were a number of engineering and design problems that were discovered as we completed construction, for example some of cables were undersized and had to be replaced on all the well pads. This pushed out the timing for mechanical completion and delayed revenue recognition and reduced the incentives that could be earnt.

For IOL ATM, there were significant weather events at the time of completion, where the site was shut down and delayed the barge launch (we submitted a force majeure impact for 3 weeks). Helicopters were brought in to take people off the sites. There were also some engineering issues discovered as part of the completing construction, for example a major high voltage cable did not work as envisaged and was subject to testing and eventually replaced;

(b) the minutes of the WOR Board meeting on 20 March 2013 (CB2,285) record the following:

Simon Holt provided a finance update based upon preliminary financial results for February 2013. He advised that operational EBIT for February was down by $30 million largely due to Cord;

(c) the CEO’s Report of 14 May 2013 (CB3,487) stated the following:

Lack of “Blue Sky” prospects is significantly impacting financial expectations of Cord. Additionally, market uncertainty and delayed projects are causing a slowdown in Calgary with some layoffs becoming necessary in the very near term;

(d) in an email from Mr Bradie to Mr Hall and copied to Mr Wood and another in relation to “ATM Challenges” on 6 June 2013 (CB4,315), Mr Bradie stated:

Please see the note below and the attached. I note there was a sponsor’s meeting last week. I am very concerned about Cord and a potential downgrade of 20mn a few weeks after the last forecast and budget confirms I am right to be concerned. I get the impression they don’t really know where they are;

(e) Mr Wood stated in his CEO’s Report of 17 June 2013 (CB4,548):

schedule challenges on the ATM project in Cord are straining our ability to make the targets;

(f) the FY14 Draft Budget – Group Analysis of 21 June 2013 (CB4,656) stated:

Aggregated revenue decline is driven by the reduction of construction revenue within our Cord business (completion of Husky, ATM, and Nexen projects);

(g) a Macquarie CEOC presentation to WOR on 24 June 2013 (CB4,936) stated:

Concern around slowdown in Canadian oil sands and impact on WOR – in particular Cord business;

(h) Mr Wood gave evidence in his affidavit of 23 November 2018 at para 146 concerning the presentation for Canada at the joint Board, ExCo and CEOC meeting on 26-27 June 2013 (CB5,072) as follows:

The RMD for the Canada region, Mr Faulkner, presented the budgets for Calgary, Edmonton and Cord locations. … Cord projected a revenue decline of 27% in the FY14 budget as compared to FY13 Q3 due to the wrap up of the Husky and IOL ATM project. Some key assumptions included that Husky Sunrise and IOL ATM projects would complete in early FY14 and expected to deliver combined revenue of $50m; and the potential LD exposure on the IOL ATM project if the projected schedule is not achieved (of approximately $10m) was noted but not reflected in the FY14 budget. I considered this to be reasonable;

(i) Mr Wood said in his CEO’s Report of 19 July 2013 (CB6,286): “slowdown and project delays in the Quebec market”; “slowdown and project delays in I/E has put I/E FY2013 performance at risk”; “Cost overruns on ATM project”; “Increased international competition entering the Alberta market”; “Project deferrals/losses resulting in under achieving of FY13 BEBIT budget and HVE targets”;

(j) Mr Holt said in an email to Mr Wood, Mr Ross and Mr Allen dated 24 July 2013 (CB6,379):

Suggestions for [themes for the CEO report] this year include: … 1. Weakness in Australia West, South Africa and Cord.

229 Third, Mr Crowley identifies as a further reason provided in the 20 November 2013 corrective disclosure that there was reduced revenue in the Latin America region as it was impacted by the soft global minerals and metals market (first and sixth dot points in the extract at [199] above). The evidence in support of the proposition that that reason existed before 14 August 20134 was said to be as follows:

(a) Mr Wood said in his affidavit of 23 November 2018 at para 142(a) that one of the matters of note to him at the time of the 26-27 June 2013 joint meeting was:

projected reduction, or softening, in estimated global capital expenditure of metals and mining companies for 2013 and 2014 calendar years based on data from Deutsche Bank, Factset and company data dated about 8 May 2013;

(b) Mr Wood said at para 143 of that affidavit:

projected FY14 BEBIT for MM&C (as against FY13 Q3 forecast) indicated a very slight projected drop in BEBIT for MM&C. In view of the market factors identified in paragraph 142 above, I considered this to be reasonable to reflect that the chemicals business was, in my view, likely to offset any declines in the metals and minerals business. The bridge analysis also indicated a projected drop in BEBIT for the ANZ and LAM regions;

(c) Mr Wood said in a memorandum to the Board on 1 April 2013 in relation to his CEO Summary (CB2,555);

MM&C – we continue to see major minerals and metals projects deferred and delayed;

(d) Mr Wood said in his CEO’s Report of 14 May 2013 (CB3,476):

The suspension of the MMX project is of major concern for the Brazilian business. This is due to the client being unable to secure environmental permits which have caused funding constraints. This will have an impact both in this year and next. The market in Chile remains flat at best and right sizing is ongoing;

(e) Mr Wood said in his CEO’s Report of 17 June 2013 (CB4,549):

In Brazil the suspension of the MMX project has had a significant impact albeit chargeability is being aggressively maintained. Considerable attention will be required to close out our involvement from a commercial perspective. The hydrocarbons hubs in Rio and Bogota have not been successful. Bogota has achieved progress in customer relationship and engagement with Ecuador but largely due to the overall market weakness.

The growth within Colombia has not occurred. In Rio work has been won with all the IOCs but due to timing no significant in country presence has been developed. Rio will be a core focus of the FY14 strategy process.

In Spanish speaking LAM the markets for mining projects and their associated infrastructure has deteriorated much faster than expected. This is putting pressure on the business and some reduction in staff numbers is occurring.

230 Fourth, Mr Crowley identifies as a further reason provided in the 20 November 2013 corrective disclosure that there was reduced revenue in the Middle East region, as a result of delays in the ramp of a number of projects that had been awarded (first and seventh dot points in the extract at [199] above). Mr Crowley submits that the following evidence supports the existence of that reason before 14 August 2013:

(a) Mr Wood said in his affidavit of 23 November 2018 at paragraph 147:

The RMD for the MENAI region, Mr Ashton, presented the budget for Saudi Arabia location [referring to the joint meeting on 26-27 June 2013]… It was projected to have almost nil BEBIT for the first half of FY14, due to anticipated delays in meeting the requirements to receive work under the GES+ contract with Saudi Aramco. I considered this to be reasonable;

(b) Mr Wood said in his CEO’s Report of 14 May 2013 (CB3,476):

In Saudi the SEC master services agreement was replaced by an EPCM contract for power plants 13 and 14 signed with the Saudi Electricity Company on 17th April. The SEC/WorleyParsons joint venture continues to progress as the SEC preferred way forward. The GES+ contract with Saudi Aramco and partners is progressing but at a slower pace than expected. The deadline to have this completed is 13 August 2013 including transfer of staff into the new entity;

(c) Mr Wood said in his CEO’s Report of 14 May 2013 (CB3,499):

JV agreement with the new GES+ partners is not finalized. All documents have been initiated and discussed. Few issues remain to be agreed. Approval was received from Aramco on JV set up on 9 April. A specialized office to expedite the set-up of the new entity process has been located and final agreement reached. Proposal activity for some Saudi Aramco and Saudi Aramco affiliates projects under EPC contracts continues;

(d) in an email from Ms Connell (the Vice President CFO for MENAI: see PJ[238(2)]) to Mr Ahmed on 12 June 2013 in relation to proposed budget amendments to MENAI of $4.25 million (CB4,440), Ms Connell said:

I expect these changes will be difficult to make in MENAI.

I note, however, that Mr Crowley did not refer to the contrary evidence given by Mr Ashton on this matter in his affidavit of 23 October 2018 at paras 88-92, which was the subject of a favourable finding by the primary judge at PJ[334];

(e) Mr Ashton’s MENAI presentation on 26-27 June 2013 at the joint Board, ExCo and CEOC meeting (CB5,078) stated:

Key assumptions: … Expectation and target of receiving more work from Saudi Aramco through signing the GES Plus contract;

(f) Mr Ashton also stated in that presentation (CB5,078):

FY14 H1 has almost nil BEBIT as GES plus set up cost for employee transfer cost ($2m) in the first few months of FY14. Also, Blue Sky and Prospects are projected to start contributing from the second half of the year.

231 It should be noted in relation to those four aspects of the argument (that is, that there was nothing that arose in the August to November period that was the subject of the 20 November 2013 announcement that was not already known to the company as at 14 August 2013), that the material relied upon for that submission is expressed in qualitative terms by reference to the particular subject matters where problems had been identified. There was no identification in quantitative terms by reference to dollar figures as to the monetary impact of those matters on the forecast NPAT for FY14. Nor was there any suggestion in that evidence that the monetary impact on NPAT of those various matters had not actually been taken into account to an extent that was reasonably based as at 14 August 2013 in the FY14 Budget.

232 Before dealing with these submissions, I should set out in some detail the internal communications within WOR in the few days preceding 20 November 2013. This is of particular importance in light of Mr Crowley’s argument that what caused WOR to revisit the NPAT forecast for FY14 in November 2013 was the realisation that WOR had been too optimistic in its Blue Sky forecast, and that it can be deduced from that (together with the Locations’ budget of $252 million with the foreign exchange benefit of an additional $32m, and the material known to the company as at August 2013), that what was ultimately announced to the market on 20 November 2013 was something that could reasonably have been announced to the market, and should have been announced, in August 2013: T92.12-27. Further, Mr Crowley submits that the stripping out of Blue Sky from the NPAT forecast for FY14 which occurred on 18-19 November 2013 was “precisely what could have occurred back in August if they had taken a more critical look at blue sky. And if that’s what had happened back in August, then they would have ended up with the range of 260 to 300, which would have been appropriate” (T95.33-37).

233 On Friday 15 November 2013, Mr Holt sent an email to various members of WOR’s senior management, including Mr Bradie and Mr Wood, attaching the then draft 3+9 NPAT tracker saying the following (CB10,404):

Please find attached the October numbers. The results are not good. At an NPAT line they are down $10.5m against budget and $8m against 2+10 forecast, and are slightly up on the first cut 3+9 forecast. The greatest concern I have is the forecast. While I believe we are working hard on overheads I just don’t believe that we will achieve a full year NPAT of greater than last year which is what the 3+9 currently estimates. I am extremely concerned on the revenue line in relation to the blue sky in the back half of the second half. Further understanding of this is an imperative and I have asked Chiam and Michael to look at. The results are poor in three key areas volume (revenue) is down, chargeability is down and gross margin % is down. To achieve full year numbers we need to be doing $37-40m NPAT per month for the next 8 months. Based on this assessment I just cannot see how we are going to get there and I certainly feel extremely uncomfortable that we are likely to achieve growth on last year. I don’t see the business ramping up to support the current growth we are expecting in the second half. This will lead into a creditability issue with the market with regard to full year numbers if we go to the market early.

234 On Monday 18 November 2013 (in the United Kingdom), Mr Daly sent an email to Mr Holt and Mr Bradie referring to their earlier conversations and then stating (CB10,613):

I have reviewed the operational EBIT forecast in the light of the H1/H2 phasing and the amount of blue sky in some locations and I attach a high level assessment of where the numbers may fall if we take a very critical look at the figures.

In summary, the revised operational EBIT reduces from the current “3+9” (including $30m of overhead savings) by approx $120m giving operational EBIT of approx $903m, very similar to FY13. The potential reductions are due to a much more critical assessment of the phasing and blue sky in the current “3+9” and also assume a provision of $10m is needed for A-D [a reference to Arkutun-Dagi, a project in SWO: see CB11,130.45] and no additional EBIT comes through acquisitions.

A very high level assessment of this reduction on the revenue figures is also included, using “professional services revenue” as the base. This shows a potential reduction of approximately $580m on professional services revenue. Cord revenue would also be reduced and this would need to be added to the figures. I have estimated the impact on Cord’s aggregated revenue as a reduction of approx $10m but this is extremely high level (as is the Cord EBIT reduction estimate of $25m).

235 On 19 November 2013, an ExCo meeting took place by telephone, including Mr Wood, Mr Bradie, Mr Holt and others. Under the heading “Finance update”, the minutes record Mr Holt as having led ExCo through the summary of the October 2013 results, which the ExCo discussed (CB10,615). Under the heading “3+9 Forecast” within the “Finance update”, the minutes record the following:

Simon [Holt] noted that the FY 14 3+9 forecast had produced a full year NPAT forecast of $369m which was greater than the FY14 budget of $352m. However, the 3+9 first half forecast was $96m which was well below the budget of $145m and had deteriorated from the 2+10 forecast of $118m. The 3+9 forecast second half was therefore $272m which was far greater than the largest second half ever achieved by WorleyParsons of $192m.

The company’s performance year-to-date indicated we were having difficulties achieving budgeted volume and margin. In addition, since the AGM there had been further softening in our markets in particular in Canada and Latin America. ExCo agreed that, even with the forecast overhead savings of $64m, based on these details, it was very difficult to support the second half 3+9 forecast and therefore, the full year forecast.

ExCo discussed the things that had changed since the AGM when we had confirmed guidance for the full year. Since then we have received September and October results which were both below budget and there has been a general weakening in our markets.

ExCo discussed the level of “blue sky” (EBIT not supported by prospects and proposals) in the forecast and noted it was higher than it would usually be as there was less coming through in proposals. Simon [Holt] advised that in the last 24 hours he and Stuart [Bradie] had reviewed each location’s assessment of the blue sky in their forecast. Based upon prior performance, known issues in each location and current market conditions, Simon [Holt] and Stuart [Bradie] had concerns over approximately $100-120m of EBIT in the forecast. In particular, concerns were held with regard to forecast by China, Calgary, UK, Cord, Saudi and South West Ops.

Simon advised that the review resulted in a recommended removal of $100m of EBIT in the second half which would then require $200m NPAT in the second half and $290m NPAT for the year. This forecast result would make more sense, particularly as we are in a tough market which appears to be deteriorating.

Simon [Holt] provided details of the reduction in blue sky suggested for each location. The M&A stretch would also be removed. ExCo discussed the adjustments recommended. …

Given the amended full year forecast of $290m, ExCo agreed that a recommendation be made to the Board that the company announces a revised forecast for FY 14 of $280-300m …

236 On 20 November 2013 at 8 am, a meeting was held of the Board by telephone. The minutes record the following (CB10,764):

In summary, Andrew [Wood] noted that the company had experienced a very slow start to the year. In the current soft market, it was the opinion of ExCo that the company cannot recover sufficiently over the rest of the financial year to achieve its current market guidance. Therefore, he recommended to the Board that the company’s outlook be changed as proposed in the draft trading update. …

Simon Holt advised that the FY 14 3+9 forecast had produced a full year forecast NPAT of $369m, which included overhead savings of $60m. The forecast for the first half was now $96m which had deteriorated from the 2+10 forecast of $118m. The 3+9 forecast second half was therefore $272m which was far greater than the largest second half ever achieved by WorleyParsons of $192m.

Given the company’s performance year-to-date and the state of the markets in which the company operates, ExCo had agreed that the “blue sky” in the forecast was too high and could not be achieved. ExCo had assessed a reduction in “blue sky” of $110m was appropriate. This adjustment will be held at corporate. …

Directors discussed with management whether the proposed downgrade was conservative enough given the slowdown in the market and the need to pay redundancy costs. Following discussion, it was agreed that the outlook range for the full year should be extended to $260-300m.

237 In my view, there are four fundamental flaws in Mr Crowley’s primary submission that WOR should have made an announcement on or about 14 August 2013 to substantially the same effect as the corrective disclosure which was actually made on 20 November 2013. The first flaw is the hindsight error in contending that there was a reasonable basis to conclude that WOR should have been aware of what it knew on 20 November 2013 some three months earlier. The task of forecasting NPAT undertaken close to the beginning of that financial year was very different from the task of making that forecast some four and a half months into the financial year when much of the company’s actual performance was known. The point is even starker in relation to forecasting NPAT for the first half of that financial year: 20 November 2013 was only about six weeks short of the end of the first half of FY14, whereas 14 August 2013 was only about six weeks into that period. The minutes of the ExCo meeting on 19 November 2013 indicate the importance to senior management of the then forecast for the H1 NPAT as derived from the 3+9 forecast, being $96 million, thereby requiring an H2 NPAT of $272 million, being far greater than the largest second half ever achieved by WOR, namely $192 million. By contrast, the 2+10 forecast which was distributed in a Board pack on 4 October 2013 contained a forecast for NPAT in the first half of FY14 of $120.2 million: PJ[476(1)].

238 The contemporaneous documents in mid-November 2013 are replete with references to information concerning the actual results available at that time as being the basis for the re-forecast announced on 20 November 2013. Mr Holt’s email of 15 November 2013 is expressly based on the results shown in the then draft of the 3+9 NPAT tracker, and contrasts those actual results against the information available in the 2+10 forecast (CB10,404). Mr Daly’s email of 18 November 2013 similarly takes the then current 3+9 forecast as the starting point for re-assessing the forecast for FY14 (CB10,613). The same starting point was adopted in the discussion on the topic conducted by the ExCo on 19 November 2013 (CB10,615). The minutes of that meeting expressly refer to the “company’s performance year-to-date” and “since the AGM [on 9 October 2013] there had been further softening in our markets in particular in Canada and Latin America”. The minutes record the ExCo discussing “the things that had changed since the AGM when we had confirmed guidance for the full year”, noting that since then the ExCo had received the September and October results which were both below budget and there had been a general weakening in WOR’s markets (CB10,615). The minutes also record the level of Blue Sky and express concern in that regard having regard to “known issues in each location and current market conditions” (CB10,615). The minutes refer to WOR being in a “tough market which appears to be deteriorating” (CB10,615). The Board minutes of 20 November 2013 record Mr Wood noting that “the company had experienced a very slow start to the year” and referring also to “the current soft market” (CB10,764). Reference was made also to “the slowdown in the market” (CB10,765).

239 The announcement on 20 November 2013 itself expressly refers to the circumstances as they appeared in mid-November 2013. The revised earnings guidance is stated as being made “After considering our current trading results and having experienced a delay in upturn in our markets”, and refers expressly to “current indications” (CB10,780). The explanation for the revised outlook given in the seven bullet points in the announcement (extracted at [199] above) is tied explicitly to the then circumstances, including “The decline in the Australian business has been greater than expected”, “The Canadian business continues to be impacted by major project deferrals and additional costs”, “The Latin American business has been impacted by the soft global minerals and metals market” and “The business in the Middle East has also experienced a slow start to the year” (CB10,780). The announcement attributes to Mr Wood a reference to the impacts which “weaker than expected market conditions are having on our performance” (CB10,781).

240 Mr Crowley’s *aide-mémoire* (MFI 1) indicates that the subject-matter of the various bullet points in the 20 November 2013 announcement corresponded to matters which were known to pose problems for WOR before 14 August 2013. However, as I have noted at [231] above, that analysis does not identify in quantitative terms the monetary impact of those problems on the forecast NPAT for FY14 as it was (or should have been) known before 14 August 2013, compared to the monetary impact which was discerned by senior management and the Board in mid-November 2013. Without such quantification, it is not possible to say that the revised earnings guidance of a range of $260-$300 million for FY14 NPAT should have been disclosed to the market as at 14 August 2013. The evidence in the contemporaneous documents strongly indicates that there had been a worsening of the company’s position during that three-month period, such that the revised guidance of $260-$300 million reflected the circumstances as they existed in mid-November 2013, but not the circumstances as had prevailed three months earlier. As Mr Holzwarth expressed the point in a way that was not the subject of challenge (at para 230 of his report):

the 20 November 2013 Disclosure describes aspects of actual results for the first four months of FY2014. These results would not have been available to report about at the start of the Relevant Period and thus do not describe risks related to earnings guidance but rather actual results during the fiscal year. While the fiscal year was not complete, this disclosure describes the realisation of risks rather than the disclosure of risks about future events.

241 Mr Crowley submits that, even if the counterfactual guidance of $260-$300 million was not appropriate as at 14 August 2013, it was appropriate at subsequent points in the Relevant Period, such as on 9, 10 and 15 October 2013 when WOR repeated its earnings guidance of 14 August 2013. While it is true to say that the closer one gets to 20 November 2013, the less is the degree of hindsight which is called for, there is nevertheless a significant hindsight error in that alternative submission. As I have indicated at [238] above, the minutes of the ExCo meeting of 19 November 2013 refer expressly to adverse changes which had occurred since the AGM on 9 October 2013. Moreover, the emails and minutes of meetings from 15 to 20 November are replete with references to the October results which had been adopted in the then draft of the 3+9 forecast, as the first sentence of Mr Holt’s email on that date (extracted at [233] above) indicates, and those October results had only just come to hand as at 15 November 2013. 15 November 2013 was a Friday, and there was evidently a great deal of activity which occurred, particularly on 18 and 19 November 2013, before the Board meeting at 8 am on Wednesday 20 November 2013. It is those actual results which led to the revised guidance of $260-$300 million, and there is nothing in the contemporaneous documents to indicate that material available to WOR’s senior management before then would have reasonably led to a downgrade of the same magnitude. For example, the Board pack for the 2+10 forecast on 4 October 2013 showed NPAT for the first half of FY14 as $120.2 million (PJ[476(1)]), which was substantially higher than the first half forecast announced on 20 November 2013 of a range of $90-$110 million (CB10,780). Accordingly, I reject the submission that, acting reasonably, WOR would have announced revised earnings guidance of $260-$300 million for FY14 NPAT at any time before it actually did so on 20 November 2013.

242 The second fundamental flaw in Mr Crowley’s primary counterfactual relates to the heavy emphasis in the documents from 15 to 20 November 2013 on the stripping out of approximately $100-$120 million of Blue Sky from the FY14 Budget. When Mr Holt addressed the Board on 20 November 2013, he picked the mid-point of that range, being $110 million. That was evidently the main integer in producing the revised earnings guidance of $260-$300 million.

243 I have referred at [99] above, in that part of my reasons relating to Question 2 which is concerned with WOR maintaining the 19% Blue Sky revenue, to the concession made by Mr Crowley, both to the initial primary judge and at the hearing before me, as to the reasonableness of the 27 May 2013 Draft Budget, comprising the budgetary submissions made by the Locations. As I concluded at [100] above, Mr Crowley’s concession at the hearing before me included a concession as to the reasonableness of what the Locations had submitted for that draft budget in relation to Blue Sky. That followed as a matter of logic from the concession as to the reasonableness of the overall NPAT figure of $252 million, in that Mr Crowley made no attempt to demonstrate how the forecast FY14 NPAT in the 27 May 2013 Draft Budget of $252 million could have been arrived at without including the 19% Blue Sky revenue component. It also followed from the express concession made at the hearing before me as to the reasonableness of what was submitted by the Locations for that draft budget (see T93.13-19), which plainly included their submissions concerning Blue Sky. It would be inconsistent with those concessions for me to find that, as at 14 August 2013, $100-$120 million should have been stripped out of the Blue Sky forecasts made in the 27 May 2013 Draft Budget. The analysis undertaken by Mr Crowley, to which I referred at [98] and [101] above, demonstrated that $7.831 million appears to have been added to Blue Sky after 27 May 2013 and incorporated in the FY14 Budget of 14 August 2013, and I have found at [101] above that $6.294 million of that amount of Blue Sky lacked reasonable grounds. However, that amount falls a very long way short of the reduction to Blue Sky made in mid-November 2013, and I do not see any basis for hypothesising that the amount stripped out of the FY14 forecast in mid-November 2013 relating to Blue Sky should have been stripped out of the FY14 Budget in August 2013.

244 The third of the fundamental flaws in Mr Crowley’s primary counterfactual also relates to the concession as to the reasonableness of counterfactual guidance of $284 million as at 14 August 2013, being the sum of $252 million in the 27 May 2013 Draft Budget and the further $32 million in foreign exchange benefits. Having accepted that forecast NPAT of $284 million would have been reasonably based as at 14 August 2013, the primary counterfactual disclosure of $260-$300 million would not have been consistent with that concession. While there is not necessarily an inconsistency between saying that $284 million was reasonably based and also that a range which adopts $284 million as the mid-point would also have been reasonably based, the mid-point of the range of $260-$300 million is $280 million, not $284 million. Moreover, there is no basis on which I could infer that an appropriate range as at 14 August 2013 and subsequently during the Relevant Period would have had a width of $40 million. Whether a range which has $284 million as its mid-point, or which may have been narrower than a range of $40 million, would still have satisfied the concept of economic equivalence has not been explored at all in the evidence. For present purposes, it is sufficient to say that any such range would have differed from that which is advanced by Mr Crowley as his primary counterfactual.

245 Fourth, in relation to the primary counterfactual, Mr Crowley’s reliance on WOR’s actual performance for FY14 (being NPAT of $263.4 million as announced on 27 August 2014: CB11,570 and 11,574) involves hindsight error of an even more egregious kind than reliance on the revised earnings guidance which was formulated and announced about 9 months earlier on 20 November 2013.

246 Turning then to the alternative counterfactuals, the alternative counterfactual of $289 million in NPAT for FY14 is said by Mr Crowley to correspond to guidance which was materially less than the FY13 result of $322 million, adopting a 10% materiality threshold (which, on my calculation, yields $289.8 million). Mr Crowley relies in that regard on the reasoning of the Full Court in *Masters v Lombe* at [62] in which Middleton, Beach and Colvin JJ said that, generally speaking, information concerning a company’s future cashflows, earnings and NPAT or relevant forecasts on such matters may be said to be material to the extent that it involves a change over prior forecasts, where that change is 10% or more, although in some contexts it may be lower, as in *Myer* (where it was held to be 5%: see *Myer* at [1283]). The counterfactual of $289 million corresponds closely to Mr Holt’s recommendation made at the ExCo meeting on 19 November 2013 for a forecast NPAT for FY14 of $290 million (CB10,614 at 10,615).

247 I do not regard it as appropriate to reason from the proposition that appropriate reasonably-based earnings guidance on 14 August 2013 and thereafter during the Relevant Period must have been materially less than $322 million, to the conclusion that the Court should adopt a figure which is 10% less than $322 million. There must be an evidentiary basis for the counterfactual disclosure, rather than an *a priori* presumption based on a 10% materiality threshold. In any event, the earnings guidance given on 14 August 2013 was not that FY14 NPAT would be $322 million, but would be a figure which exceeded $322 million. If that is construed as conveying that FY14 NPAT would be materially more than $322 million, and if “materially” meant 10%, then an amount which is 10% less than that figure (being $354 million) would take one back to $319 million, not $289 million. Further, Mr Crowley’s reliance on the figure of $290 million for FY14 NPAT recommended by Mr Holt at the ExCo meeting on 19 November 2013 suffers from the same hindsight error which is inherent in the primary counterfactual, which similarly relies on the documents created in the period 15-20 November 2013 as the basis for postulating the guidance which ought to have been given on 14 August 2013 and at other dates throughout the Relevant Period. Accordingly, I reject that alternative counterfactual.

248 As to the alternative counterfactual of reasonable guidance having been approximately $284 million in NPAT, Mr Crowley submits that that figure:

(a) accords with the detailed bottom-up budget prepared by the Locations before it was talked up and the additional “$100 million” in NPAT was added to the 27 May 2013 Draft Budget, which was ultimately stripped from WOR’s budget when WOR undertook the November 2013 review; $284 million is the result of adding the foreign exchange benefit of $32 million to the 27 May 2013 Draft Budget NPAT figure of $252 million;

(b) is roughly the mid-point of the range that WOR eventually adopted when it undertook the review of Blue Sky forecasts and applied a risk-based analysis in November 2013;

(c) was the likely estimate of FY14 earnings by late September or October 2013 if WOR’s planned HOH phasing of earnings held true, on the lower results to date against the FY14 Budget; and

(d) is more generous than WOR’s actual performance for FY14, being $263.4 million NPAT.

249 The counterfactual of $284 million is consistent with Mr Crowley’s concessions at the initial hearing and at the hearing before me to the effect that such guidance would have been reasonably based as at 14 August 2013 and during the Relevant Period. Those concessions are to the effect that the 27 May 2013 Draft Budget, comprising the budgetary submissions of the Locations, was reasonably based at a figure for FY14 NPAT of $252 million, plus the uncontroversial foreign exchange adjustment of $32 million (see [99] and [100] above). However, the figure of $284 million presupposes that the Management Adjustments (other than the $32 million for foreign exchange movements) which were made in or about June 2013 were not reasonably based. Accordingly, it is necessary to analyse those Management Adjustments in some detail in order to ascertain whether there are amounts in those Management Adjustments which were reasonably based, and accordingly should be added to the figure of $284 million.

250 The largest of the Management Adjustments made in June 2013 was the reduction of $33 million in overheads. The FY14 Budget as presented to the Board shows that the CEOC overhead reduction commitment of $33 million was reflected in operational EBIT (in the amount of $22.6 million) and global overheads (in the amount of $10.4 million): CB6,719. The primary judge made detailed findings concerning the reduction in overheads at PJ[248]-[257], [279]-[281], [297] and [336]-[340]. Her Honour stated at PJ[336] that Mr Crowley did not submit that there was no reasonable basis for the inclusion of the $33 million in the FY14 Budget, or any of the integers that made up that amount, and added at PJ[340] that if that was suggested, then her Honour was not persuaded that there was no reasonable basis for the inclusion of the $33 million CEOC overhead reduction commitment in the FY14 Budget or that WOR lacked a reasonable basis for adding $22.6 million in operational EBIT on account of the CEOC overhead reduction commitment. At the hearing before me, Mr Crowley accepted (correctly, in my view) that I am bound by the primary judge’s finding as to the reasonableness of the overhead reduction figure of $33 million: T109.39-44, 110.31-33, T128.12-17, T415.31-416.2, and T451.34-35.

251 Mr Crowley submits, however, that if one adds integers such as the $33 million in overhead reductions to the $284 million NPAT figure, then “the build-up might lead you to a non-P50” budget, but acknowledged that that was not a matter that he was in a position to prove because of problems in proving what the outcome on a P50 basis would be: T452.36-42. Quite apart from that acknowledgement, which is itself fatal to the argument, I do not accept that the overhead reduction of $33 million would not have satisfied the parameters of a P50 Budget. There is nothing in the detailed findings of the primary judge which would tend to indicate that WOR was not as likely to achieve that reduction as it was to fall short of it. Indeed, the Holt Memo Interview Notes are replete with references to the savings which could and should have been made by reducing overheads, for example:

Not enough discipline on O/Hs, you can take your eyes off this when the time [sic] are good and you are riding the wave (CB11,097).

Blue Sky, allowed meeting of expectations which covered (masked) certain OHs with insufficient discipline on costs and O/Hs when we should have been focusing in these, insufficient advance warning on certain … costs vs speculative revenue (CB11,097).

Increased O/H resulted in additional costs at locations and allocated to the locations resulting in uncompetitive and fat costs and uncompetitive tenders (CB11,097).

Failing to curb costs has made us uncompetitive (CB11,098).

We have not handled the OH at the location level (CB11,098).

Budget tension and discussion revolves around the bottom line EBIT based on expectations rather than quality of earnings (revenue) nor influence on Overheads which we should have intervened, as long as EBIT was delivered we bought our own story (CB11,098).

You have to have some BlueSky but it should not be used to defend sticky Overheads or bring a further lag on necessary cost cutting (CB11,099).

With hindsight we would have attacked the overheads at the locations earlier (CB11,099).

Now we are addressing the OH issue we just engaged this late, failure since we have to go there anyway (CB11,102).

Post GFC the revenue is falling but Overheads not cut hard enough (CB11,104).

We are not particularly good at making the hard calls with regard to overhead reduction (CB11,105).

The Holt Memorandum itself refers to WOR having “allowed additional overhead to creep into the organisation” (CB11,120).

252 Accordingly, I am bound by the primary judge’s finding that the $33 million overhead reduction made as part of the Management Adjustments in June 2013 was not shown to lack reasonable grounds, and I also find that a reduction in overheads of that amount satisfied the parameters for a P50 budget. The figure of $33 million was a pre-tax figure, and the budgeted FY14 effective tax rate was 29% (CB6,719). Accordingly, the after-tax benefit of reducing overheads by $33 million in the FY14 Budget was $23.4 million. I regard it as appropriate to add that figure to the counterfactual NPAT of $284 million.

253 As I have indicated at [76] above, in relation to the Management Adjustments which increased earnings from the Locations by $31.046 million and $14.093 million respectively, the first of those figures included $6.6 million relating to ASCH and MENAI, and the second included $6.7 million relating to those two Regions. The primary judge referred to Mr Ashton and Mr Lucey each giving evidence that they considered their respective regional budgets for FY14 to be reasonable, setting out the steps that led to the adjustments, and it was not suggested to either of them in cross-examination that there was no reasonable basis for the adjustments incorporated in their respective draft FY14 budgets in relation to their Regions: PJ[332] and [334]. The primary judge was satisfied as to the truthfulness and credibility of the evidence given by Mr Ashton and Mr Lucey: PJ[79]. Mr Crowley accepts that I am bound by the primary judge’s reasoning to conclude that the amounts of $6.6 million and $6.7 million made by way of those adjustments were reasonably based: T127.13-35, T451.34-35. While Mr Crowley does not accept that those adjustments are necessarily consistent with the parameters of a P50 Budget, Mr Ashton expressly stated that he regarded the final MENAI FY14 Budget as being a P50 Budget (para 149 of his affidavit of 23 October 2018), and Mr Lucey’s evidence was generally consistent with the parameters of a P50 Budget for the ASCH Region (see paras 140-160 of his affidavit of 13 December 2018). Neither was challenged in cross-examination on that issue. I am satisfied that there was a reasonable basis to conclude that it was at least as likely that WOR would achieve those adjusted earnings figures in MENAI and ASCH as it was that WOR would fail to do so. Accordingly, I regard it as appropriate to include those adjustments in the counterfactual earnings guidance. The total of $13.3 million is a pre-tax figure, and taking 71% of that figure as the after-tax benefit, those adjustments yield an additional $9.4 million to the FY14 NPAT forecast. As I have indicated in my reasons in relation to Question 2 at [76] above, I do not regard the balance of the Management Adjustments of $31.046 million and $14.093 million respectively as reasonably based.

254 As to the Management Adjustments relating to “acquisitions stretch” of $12 million, that adjustment was in fact included in the 27 May 2013 Draft Budget “pending review” as a step towards the total forecast NPAT in that draft of $252 million (CB4,286 fn3, and 4,287). Mr Crowley accepts that the 27 May 2013 Draft Budget was reasonably based. Accordingly, whether the Management Adjustment of $12 million by way of acquisitions stretch was reasonably based is a non-issue: see T125.41-42, 189.7-28.

255 The upshot of that analysis is that there should be added to the counterfactual NPAT of $284 million the amounts of $23.4 million and $9.4 million, producing a rounded figure for counterfactual NPAT for FY14 of $317 million. In my view, Mr Crowley has not established that counterfactual earnings guidance in the amount of $317 million NPAT would not have been reasonably based, or would not have satisfied the parameters of a P50 Budget.

### Has Mr Crowley established causation and quantification of loss?

256 The question then arises whether counterfactual earnings guidance for FY14 of NPAT of $317 million as at 14 August 2013 and subsequently during the Relevant Period would have had an adverse effect on the market price of WOR shares. NPAT of $317 million is only slightly less than the actual earnings of $322 million in FY13. Neither Mr Torchio nor Mr Holzwarth has considered a counterfactual of $317 million, and the expert evidence which was adduced does not consider any counterfactual above the range $260-$300 million. The average of analysts’ forecasts for FY14 NPAT appears to have varied within the range of about $352 million to about $368 million throughout the Relevant Period (see [205] above), which may provide a basis for saying that an announcement by WOR in that period of expected NPAT of $317 million might have caused a decline in the share price. However, the material available to me does not enable me to conclude that an adverse effect on the market price of WOR shares would actually have occurred on the balance of probabilities. That is a matter which would require expert evidence, whether given by an economist or a quantitative analyst or some other expert. Counterfactual earnings guidance of $317 million would have been within 15% of the average of analysts’ forecasts during the Relevant Period, which ranged from about $352 million to $368 million. There is no expert evidence as to whether the market price for WOR shares was sufficiently sensitive to earnings guidance which departed from the average of analysts’ forecasts for that to have caused a fall in the market price of WOR shares. It is conceivable that it might have done so, but the evidence does not satisfy me that, on the balance of probabilities, it would have done so. In the absence of expert evidence, I conclude that the prospect of a counterfactual disclosure of NPAT of $317 million adversely affecting the share price of WOR shares was no more than a real possibility. Mr Crowley’s case as to causation of loss is based on the proposition that the counterfactual disclosure would have caused an adverse effect on the market price of WOR shares, treating market price as a proxy for the true value of WOR shares. Accordingly, I find that Mr Crowley’s case fails on the basis that he has not discharged his onus of establishing on the balance of probabilities that the various contraventions have caused loss to himself and Group Members. Even if I had concluded that a counterfactual disclosure of $317 million would, on the balance of probabilities, have caused the market price of WOR shares to be adversely affected, there would remain the problem of insufficient evidence to quantify the loss, which I consider below in relation to a counterfactual NPAT of $284 million. The problem is even greater at a counterfactual NPAT of $317 million, given that that figure lies well above the range of $260-$300 million which was announced in the corrective disclosure of 20 November 2013.

257 If, contrary to my reasoning at [249]-[255] above, I had accepted Mr Crowley’s counterfactual disclosure of $284 million for FY14 NPAT as appropriate, then I would have inferred, even in the absence of expert evidence, that such a disclosure would have been more likely than not to have had an adverse effect on the WOR share price. That inference is based on the substantial fall in the WOR share price which occurred when WOR announced revised NPAT guidance for FY14 on 20 November 2013 of a range of $260-$300 million, given that $284 million falls comfortably within that revised range. Mr Crowley would thus have surmounted the obstacle of establishing causation of loss. I would also have been prepared to find that, although market price and true value are not necessarily the same, market price in an informationally efficient market would have provided a good enough proxy for true value for the purpose of quantifying loss in the present case: see *Myer* at [753].

258 However, that would then have led to the question whether there was sufficient evidence to make findings quantifying the loss thereby caused. I accept that, in general, where there is some evidence of loss or damage, the Court must do the best it can in assessing damages: *HTW Valuers* at [47]. Nevertheless, the onus remains on Mr Crowley to establish the existence and amount of loss suffered by reason of WOR’s wrongful conduct. In *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10; (2003) 196 ALR 257 at [38], Hayne J (with whom Gleeson CJ and McHugh and Kirby JJ agreed) said the following:

It may be that, in at least some cases, it is necessary or desirable to distinguish between a case where a plaintiff *cannot* adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff *has not* adduced such evidence. In the former kind of case it may be that estimation, if not guesswork, may be necessary in assessing the damages to be allowed. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can may find their most apt application in cases of the former rather than the latter kind. This case did not invite attention to such questions. Placer sought to calculate its damages precisely.

Similarly, Devlin J said that “where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can”: *Biggin & Co Ltd v Permanite Ltd* [1951] 1KB 422 at 438, cited with approval and emphasis in *Enzed Holdings Ltd v Wynthea Pty Ltd* [1984] FCA 373; (1984) 57 ALR 167 at 183 (Sheppard, Morling and Wilcox JJ), which in turn was cited with approval in *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd* [2007] FCA 40; (2007) 157 FCR 564 at [35] (Black CJ, Jacobson and Rares JJ).

259 In the present case, Mr Crowley has sought to calculate damages with great precision. Mr Crowley’s schedule showing counterfactual FY14 NPAT guidance ranges and proportional calculations of share price inflation (MFI 2) calculates percentage inflation per WOR share to two decimal places, and dollar inflation per WOR share to the nearest cent. However, that schedule, which reflects the reasoning behind Mr Torchio’s Figure 3 in para 45 of his second report, which I have set out at [219] above, operates only in circumstances where it has been demonstrated that the counterfactual disclosure has economic equivalence with the actual corrective disclosure made on 20 November 2013. As I have indicated at [219] above, that was common ground between Senior Counsel for the parties at the hearing before me: Mr Craig KC at T357.19-358.21; Mr Sulan SC at T442.16-37, 444.9-15. It is also common ground between the parties that economic equivalence and economic correspondence require that the counterfactual and the actual corrective disclosure are sufficiently qualitatively and quantitatively similar so as to have driven in the minds and actions of market participants the same (or substantially the same) conclusion as to the foreseeable cash flow consequences: Mr Craig KC at T326.33-327.20; Mr Sulan SC at T450.9-451.2. There is no expert evidence before me which would enable me to draw the necessary conclusion as to the existence of economic equivalence, so as to enable me to rely on the figures for share price inflation set out in MFI 2 at counterfactual guidance of $284 million (being percentage inflation of -21.16% and dollar inflation of $4.57). There is no basis on which I could infer economic equivalence in the absence of any expert evidence, given the significant difference in the figures pertaining to the two disclosures (being $284 million for the counterfactual disclosure and $260-$300 million for the actual corrective disclosure). (As I indicated at [256] above, the problem is even greater at a counterfactual NPAT of $317 million, given that that figure lies well above the range of $260-$300 million announced on 20 November 2013.) Further, I am unable to conclude on the balance of probabilities that the explanation and reasons which would have been given for a counterfactual disclosure of $284 million (or $317 million) would have been the same or substantially the same as those set out in the 20 November 2013 announcement, particularly having regard to the fact that the 20 November 2013 announcement was based on detailed matters as to actual results to October which had formed part of WOR’s corporate knowledge only since about 15 November 2013. Accordingly, even if I had accepted Mr Crowley’s submission that counterfactual guidance of $284 million would have been appropriate, I would have concluded that Mr Crowley had failed to discharge his onus of proving the quantification of loss and damage.

260 I do not accept that this is a case where Mr Crowley was unable to adduce precise evidence of what had been lost, in the sense referred to by Hayne J in *Placer*. There may well have been techniques available for using event study analysis despite the lack of evidence of economic equivalence between a counterfactual disclosure of $284 million (or $317 million) and the actual corrective disclosure of $260-$300 million. For example, Mr Torchio referred to methodologies and metrics to deal with “parsing out” situations where the counterfactual disclosure is not as adverse as the actual corrective disclosure (T855.12-17, 872.30-38), but no such exercise has been undertaken by Mr Torchio (or any other expert witness) in the present case. Further, there was no impediment to the applicant conducting an event study analysis on different assumptions from the primary counterfactual (which was effectively the same as the actual corrective disclosure of 20 November 2013) together with a genuine attempt to prove those assumptions and the consequences for the event study analysis. Moreover, an event study analysis is not the only available approach to the issue of finding the true value of shares. As Mr Samuel said in his report of 16 November 2018, Mr Torchio did not conduct a fundamental analysis or valuation of shares in WOR, which would have required consideration and analysis of the future cashflows of the business and the risks associated in achieving those cashflows (para 53). Mr Samuel expressed the opinion that Mr Torchio did not apply any recognised valuation methodology, the two potentially relevant methodologies in this circumstance being:

(a) a DCF methodology, which requires detailed cashflow forecasts and consideration of an appropriate discount rate; and

(b) a capitalisation of maintainable earnings methodology, which requires consideration of a maintainable level of earnings and an appropriate multiple (para 58).

Mr Torchio accepted that he had not sought to undertake an intrinsic valuation of the kind referred to by Mr Samuel in relation to WOR shares: T955.40-42, 950.1. However, there does not appear to me to be any reason why Mr Crowley could not have engaged an expert witness to have undertaken that exercise. While such an exercise may well have required that WOR disclose various internal documents which were not in the public domain, the process of discovery is available to ensure equality of arms between the parties in that regard.

261 Finally, during the course of his oral address, Senior Counsel for Mr Crowley made an application to reopen his evidence in order to read paras 17-20 of Mr Torchio’s second report (T149.35-37). Those paragraphs had sought to provide reasons underlying the claimed linear relationship between the counterfactual reasonable guidance and the apportioned excess return as shown in para 45 and Figure 3 of that report (which I refer to at [218]-[219] above). That claimed linear relationship also provides the basis for the schedule of proportional calculations of share price inflation at different counterfactual FY14 NPAT guidance which is set out in MFI 2. Mr Crowley relies on the schedule of expert evidence objections, which shows that paras 17-20 of Mr Torchio’s second report were not read by the then Senior Counsel for Mr Crowley. Mr Crowley submits that the reason for those paragraphs not having been read was related to the relevance objection which had been taken in respect of the issue arising from an expert report of Mr Jaski not having been relied upon. WOR opposes the application to reopen.

262 In my view, leave to reopen should be refused. The decision not to read those paragraphs of Mr Torchio’s second report was voluntarily taken by Senior Counsel. No attempt to reopen was made when this very point arose during the hearing, in circumstances where Mr Holzwarth expressed confusion as to what he was dealing with in relation to Figure 3 in Mr Torchio’s second report because that chart could not exist without the paragraphs commencing with para 17 (T832.36-45). It appears that those paragraphs may have affected the evidence of both Mr Torchio and Mr Holzwarth. More fundamentally, the issue as to whether there is a linear relationship as shown in Figure 3 and as reflected in MFI 2 arises only if economic equivalence is demonstrated between counterfactual guidance of $284 million (or $317 million) in NPAT and the actual corrective disclosure of 20 November 2013 of a range of $260-$300 million. No attempt was made by way of expert evidence to demonstrate such economic equivalence, and as I have said at [259] above, there is no basis on which I could infer economic equivalence in the absence of expert evidence. Further, the concept of economic equivalence would also have to extend to the reasons and explanation for the counterfactual earnings guidance. In the absence of any basis for the requisite economic equivalence, the conceptual issue as to the claimed linear relationship is entirely academic.

263 Accordingly, Question 13 should be answered as follows: No, in relation to both question 13.1 and 13.2. The question as to how much does not arise, but if it had arisen then the evidence would not have enabled me to provide an answer to that question.

## Question 14: In the decision to acquire an interest in WOR Securities did the Applicant rely directly on the FY2014 Guidance Representation or the FY2014 Earnings Guidance Statement and its repetition on 9, 10 and 15 October 2013?

264 The parties agree that, as found by the primary judge at PJ[698], Mr Crowley relied on the August 2013 Earnings Guidance Statement made on our about 14 August 2013 in making his decision to acquire WOR shares on 1 October 2013. Otherwise, however, the parties agree that the question should be answered “no”. Accordingly, I answer Question 14 as follows: Yes, in relation to the FY2014 Guidance Representation and the FY2014 Earnings Guidance Statement, but not in relation to its repetition on 9, 10 and 15 October 2013.

## Question 15: Has the Applicant suffered loss and damage in relation to his interest in WOR Securities by and resulting from his reliance on the Contraventions, and if so by how much?

265 It follows from my reasons in answering Question 13 that Mr Crowley has failed to establish both causation of loss and the quantification of any loss. Accordingly, this question should be answered “no”.

## Conclusion

266 It follows that, although Mr Crowley has established contraventions of the various statutory provisions on which he relies, he has failed to prove the causation and quantification of any loss. The claims which he makes for damages on behalf of himself and Group Members have therefore failed. There remain questions of the costs of the proceedings (including the costs of the initial hearing at first instance), and final orders will have to be made disposing of the proceedings. In the orders which I have made today, I have set a timetable for the parties to provide written submissions and any affidavit or affidavits in support in relation to those remaining issues. I anticipate that I will decide the remaining questions on the papers.

## Apology for the Delays of the Court

267 These proceedings were commenced by way of originating application on 27 October 2015. On 9 March 2016, a judge of this Court heard an application by WOR that the then amended statement of claim be struck out. Judgment was not given until 6 January 2017, some ten months later. The matter was fixed for hearing commencing on 6 March 2019, but shortly before that trial, the hearing was vacated unilaterally by the Court. The trial then took place over 19 days, commencing on 28 August 2019 and ending on 12 December 2019. The primary judge then reserved judgment until 22 October 2020, a period of over ten months. The appeal was not heard by the Full Court until 16 and 17 August 2021, and judgment was not given until 11 March 2022, some seven months later (although I note that a further joint submission of four pages was sent by the parties to the Full Court on 22 October 2021). The Full Court ordered that the matter be remitted to a single judge. The High Court refused an application for special leave to appeal on 21 October 2022. The remitted hearing took place before me about 13 months later on 27 November to 1 December 2023.

268 I do not accept any personal responsibility for the delays incurred by the Court in this matter. However, I offer the parties, and others who may have suffered as a result of the delays, an apology for what has transpired.

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| I certify that the preceding two hundred and sixty-eight (268) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman. |

Associate:

Dated: 19 December 2023