Federal Court of Australia

Crowley v Worley Limited [2020] FCA 1522

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| File number: |  |
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| Judgment of: | **GLEESON J** |
|  |  |
| Date of judgment: | 22 October 2020 |
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| Catchwords: | **CORPORATIONS** – representative proceedings – listed securities – continuous disclosure obligations under ASX listing rule 3.1 – misleading or deceptive conduct relating to securities – whether WOR had a reasonable basis for earnings guidance statement – no contraventions found |
|  |  |
| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2,ss 4, 18*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BB, 12DA*Corporations Act 2001* (Cth) ss 111AE, 111AL, 111AP, 674, 675, 676, 677, 1041H *Evidence Act 1995* (Cth) s 140 |
|  |  |
| Cases cited: | *Blatch v Archer* (1774) 98 ER 969*Botany Bay City Council v Jazabas* *Pty Ltd* [2001] NSWCA 94 *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336*Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304*Digi-Tech (Australia) Ltd v Brand* [2004] NSWCA 58*Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199*Fair Work Ombudsman v Hu* [2019] FCAFC 133 *Forrest v Australian Securities Investments Commission* [2012] HCA 39; (2012) 247 CLR 486*G v H* [1994] HCA 48; (1994) 181 CLR 387*GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd* [1998] FCA 1486; (1998) 29 ACSR 584*Global Sportsman Pty Ltd v Mirror Newspapers Ltd* [1984] FCA 180; (1984) 2 FCR 82*In the matter of HIH Insurance Limited (In Liq)* [2016] NSWSC 482; (2016) 335 ALR 320*Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298*Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361*Mathai v Nelson* [2012] FCA 1448; (2012) 208 FCR 165*McGrath; in the matter of Pan Pharmaceuticals Ltd (in liq) v Australian Naturalcare Products Pty Ltd* [2008] FCAFC 2;(2008) 165 FCR 230*Sykes v Reserve Bank of Australia* (1988) 88 FCR 511; [1998] FCA 1405*Ting v Blanche* [1993] FCA 524; (1993) 119 ALR 543*TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* [2019] FCA 1747*Transport Industries Insurance Company Ltd v Longmuir* [1997] 1 VR 125 *Willett v Thomas* [2012] NSWCA 97 |
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| Sub-area: | Corporations and Corporate Insolvency |
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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: | GLEESON J |
| DATE OF ORDER: | 22 October 2020 |

THE COURT ORDERS THAT:

1. The issues common as between the applicant and the group members and to be determined at the initial trial, identified by order made on 22 March 2019 be amended in the terms set out at [678] and following of the accompanying reasons for judgment, to correspond with terms used in the accompanying reasons for judgment.
2. The originating application and the fourth further amended statement of claim be dismissed.
3. Provided that the respondent does not file an application for a different costs order or orders, and subject to any costs order previously made, the applicant pay the respondent’s costs of the proceeding.

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

REASONS FOR JUDGMENT

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GLEESON J:

# Introduction

1. In late November 2013, the price of ordinary shares in the respondent (**WOR shares**) fell approximately 26% on the company’s announcement of revised earnings guidance. That guidance was markedly different from the company’s 14 August 2013 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 (**FY13**).
2. 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.

1. On 9 October 2013, WOR made a further relevant 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 August 2013 earnings guidance statement (**9 October 2013 announcement**).
2. The August 2013 earnings guidance statement was repeated on 10 and 15 October 2013.
3. WOR’s **November 2013** **revised earnings guidance**,published on 20 November 2013, was 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.

1. Looking back, the basis for the August 2013earnings guidance statement is plainly open to question. What could have changed between 14 August 2013 and 20 November 2013 (just over three months) to cause WOR to revise its forecast so significantly? In early December 2013, WOR’s Chief Financial Officer (**CFO**), Simon Holt’s description of WOR’s budgeting/forecasting performance as “poor”, would reasonably strengthen a suspicion that the August 2013 earnings guidance statement might not have been well-founded.
2. The applicant (**Mr Crowley**) contended that the August 2013earnings guidance statementforecast an earnings result that was unreasonably high, having regard to the information available to WOR at the time. Alternatively, Mr Crowley argued, even if the August 2013 earnings guidance statement could be justified when first made, by 21 September 2013, WOR was on notice that the year ending 30 June 2014 (**FY14**) was tracking far worse than expected and, accordingly, on that day (or in the days following) it should have issued revised guidance to the effect of the November 2013 revised earnings guidance.
3. WOR’s earnings guidance was based upon its internal **FY14 budget**, initially approved by WOR’s board of directors (**Board**) in August 2013. The FY14 budget forecast FY14 NPAT of $352 million. WOR contended that the FY14 budget was the result of a comprehensive, robust and detailed process.
4. Mr Crowley submitted that the FY14 budget did not provide a reasonable basis for the August 2013 earnings guidance statement because, in outline:

… although the early part of the budget process – in May 2013 – can be regarded as a “bottom up build”, from the end of May 2013 the inputs from senior management went beyond “challenge” and pushed the Locations to forecast revenues and cost savings that in combination went beyond aggressive, to become plainly unreasonable and improbable of achievement. The budget also lacked a risk analysis that would have identified this serious overreach.

…

The initial bottom-up build from the Locations and Regions became distorted by a series of “challenges” from management, to which the Locations and Regions acquiesced because … the lower-level managers recognised that the targets were being set by senior management and they had to be reflected in the “forecasts”, one way or another. That was the practical reality of the demands expressed as “challenges”.

1. The expression **bottom-up** indicates the role of the individual locations and cost centres in the early construction of the draft budget.
2. Mr Crowley argued that “clinching support” for his case was to be found in the events leading to the November 2013 revised earnings guidance. Specifically, Mr Crowley referred to “two senior executives, working overnight on 18-19 November 2013 and bluntly stripping $97 million in projected earnings from the then-current FY2014 forecast”.
3. Mr Crowley’s case that was, by this activity, WOR removed so-called **management adjustments** (defined at [34]below)that had been made to the draft FY14 budget in late May and June 2013. In final submissions, Mr Crowley characterised the management adjustments as a series of **top-down** adjustments (that is adjustments by or at the behest of senior management) that aimed to increase operational **EBIT** (operational earnings before interest and tax) by $88.6 million. Mr Crowley also contended that “the essential effect was that the revenue line … was held too high, having regard to the expected market conditions and to the reductions being demanded for the costs line”.
4. Although hindsight plainly suggests that the FY14 budget may have been overly optimistic, for the reasons that follow, I am not persuaded by the available evidence that WOR’s FY14 budget lacked reasonable grounds when it was approved by the Board on 14 August 2013. It follows that I am not satisfied that WOR’s August 2013 earnings guidance statement lacked reasonable grounds. As explained below, these factual conclusions lead to the result that Mr Crowley’s primary “budget” case must fail.
5. Nor am I am satisfied that the position changed so that, by 21 September 2013, 9 October 2013, 10 October 2013 or 15 October 2013 (being the dates alleged by Mr Crowley), WOR lacked a reasonable basis for maintaining or failing to correct the August 2013 earnings guidance statement. Again, as explained below, the consequence is that Mr Crowley’s alternative “performance” case must fail.
6. Mr Crowley’s third case, the “consensus” case, was predicated on the existence of a **consensus expectation** of professional analysts covering the Australian Stock Exchange (**ASX**) and WORshares, 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. Assuming in Mr Crowley’s favour the existence of that consensus expectation, his “consensus” case also fails because it required Mr Crowley to demonstrate that, while the so-called consensus expectation existed, WOR knew or ought to have known that its FY14 earnings would fall materially short of a range between $354 and $368 million. I am not satisfied that any relevant officer or officers of WOR, whose state of mind is to be attributed to WOR, had or ought to have had that knowledge or belief at any relevant time.

# Mr Crowley and the group members

1. Mr Crowley is a self-funded retiree and former accountant who manages his own share portfolio. Mr Crowley purchased 423 WOR shares on 4 October 2013 for a total consideration (including brokerage) of $10,046.59. On 30 May 2015, Mr Crowley sold all of his WOR shares for $2,755.70.
2. Mr Crowley brought the proceeding 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 20 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 28 August 2019, that is, the first day of the trial.

# Outline of Mr Crowley’s case

1. Analysed by reference to the alleged facts, Mr Crowley’s case involved the following three aspects:
2. the budget case;
3. the performance case; and
4. the consensus case.
5. Analysed by the pleaded laws, Mr Crowley’s case alleged contraventions of:
6. WOR’s “continuous disclosure obligations” which arose under s 674 of the *Corporations Act* *2001* (Cth) (**Corporations Act**) and r 3.1 of the ASX **Listing Rules**.
7. Proscriptions on misleading or deceptive conduct in s 1041H of the Corporations Act, s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and or s 18 of the **Australian Consumer Law**(being Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).

## Budget case

1. Mr Crowley’s budget case is first predicated on allegations that, by no later than 14 August 2013:
	1. WOR did not have a reasonable basis for making the August 2013 earnings guidance statement (defined in the 4FASOC as **Material Information**); and
	2. 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 (defined in the 4FASOC as **Earnings Expectation Material Information**).
2. Mr Crowley alleged that, in circumstances pleaded in the 4FASOC, by no later than 14 August 2013, WOR became obliged pursuant to Listing Rule 3.1 to tell the ASX the Material Information and or the Earnings Expectation Material Information.
3. There is no dispute that WOR did not tell the ASX either of these matters. Mr Crowley alleges that, by this failure, WOR contravened s 674 of the Corporations Act which, in summary, required disclosure to the market of information that was not generally available and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of WOR shares. In support of the alleged contraventions, Mr Crowley ultimately alleged that the Board of WOR and other “officers” of the company, within the meaning of the Corporations Act, ought reasonably to have recognised that the FY14 budget did not support the August 2013 earnings guidance statement.
4. Next, Mr Crowley made a case based on the allegation that, by making (and then maintaining) the August 2013 earnings guidance statement, WOR represented that:
5. it expected to achieve NPAT in excess of $322 million in FY14; and
6. it had reasonable grounds to expect that it would achieve NPAT in excess of $322 million in FY14,

(individually and together the **FY14 guidance representation**).

1. By its defence, WOR admitted that it made the FY14 guidance representation to the extent that WOR represented that it expected to achieve NPAT in excess of $322 million in FY14 in its August 2013 earnings guidance statement and repeated this statement on 9, 10 and 15 October 2013.
2. WOR also admitted that, by the August 2013 earnings guidance statement and the repetition of that statement, WOR represented that it had a basis for expecting that it would achieve NPAT in excess of $322 million in FY14.
3. In closing submissions, WOR acknowledged that, by conveying an opinion, WOR also conveyed that WOR had a basis that it considered reasonable for the opinion. However, WOR disagreed that it conveyed that it had reasonable grounds for expecting to achieve NPAT in excess of $322 million, relying on the following observation of the Full Court in *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* [1984] FCA 180; (1984) 2 FCR 82 at 88:

An expression of opinion which is identifiable as such conveys no more than that the opinion expressed is held and perhaps that there is basis for the opinion.

1. In *Forrest v Australian Securities Investments Commission* [2012] HCA 39; (2012) 247 CLR 486 at [102], Heydon J stated:

… It is often said that to state an opinion one does not hold misleads the audience about one’s state of mind. That is understandable. It is also often said that to state an opinion which one does hold implies that one has reasonable grounds for holding it. In some circumstances that may be so, but why should it be so in all? Assume that two people are asked: “In your opinion, is that document a contract?”, one answers “Yes”, and the other answers “Yes, and I have reasonable grounds for that view.” The two answers are different. The first answer does not imply the second, unless there are special circumstances indicating that it should.

1. I accept Mr Crowley’s contention that the circumstances in which WOR made and repeated its August 2013 earnings guidance statement, including the fact that it was intended to convey information that would assist the market to understand WOR’s financial situation and that may have been material to an assessment of the value of WOR shares, were such that a reasonable person hearing or reading that statement was likely to understand WOR to convey that the company had reasonable grounds for the statement.
2. Accordingly, I accept that WOR made the FY14 guidance representation as pleaded, on the occasions pleaded.
3. At the core of Mr Crowley’s budget case is the proposition that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement.
4. Mr Crowley alleged that the effect of the August 2013 earnings guidance statement (and the FY14 guidance representation conveyed by that statement) was that the trading price of WOR shares was higher than it otherwise would have been, and that the price was inflated from the time of the announcement until the corrective announcement on 20 November 2013.

### Pleaded case

1. The 4FASOC provides particulars in support of the allegation that the August 2013 earnings guidance statement lacked a reasonable basis. In summary, they concern:
2. The development of the FY14 budget during which it is alleged that WOR senior management:
3. required Locations to reflect WOR’s FY14 “growth strategy” as determined by ExCo and CEOC without any or due regard to the market conditions referred to in (a) to (b) above [sic – there is no (a) to (b) above]
4. added $88.6m of operational EBIT, via the Management Adjustments, to the “bottom up” build of Location budgets;
5. included a $12m acquisition stretch to WOR’s EBIT figure without a proper basis;
6. did not include in the budget any contingency against operational underperformance, except the FX contingency (described in par.22B [of the 4FASOC]) based on short term fluctuations in FX spot rates that were inherently volatile, with the result that the FX contingency was not appropriate or reliable as a contingency for operational risk; and
7. did not include any or adequate adjustments for projected restructuring costs arising from staff cuts made in order to implement the CEOC Commitments (as to reductions in overheads) or, after 15 October 2013, the termination of a further 1200 full time equivalent staff (FTE) as part of a redundancy program called ‘Project X’ and adopted by WOR to attempt to meet market earnings guidance…
8. The absence of any or any adequate critical review of blue sky revenue figures in the FY14 budget prior to its approval, to ensure that those figures were not inflated.
9. The claim that the FY14 budget included unreasonable amounts of blue sky revenue in WOR’s Australia New Zealand (**ANZ**) region and in the Southwest Ops (**SWO**) location of WOR’s USA and Caribbean (**USAC**) region.
10. The conclusion, from (1) to (3), that WOR did not have reasonable grounds for including in the FY14 budget a NPAT forecast materially higher than approximately $284 million; or alternatively for a profit guidance to the market of “growth” on its FY13 result of $322 million.
11. In particular (1)(i) above, **CEOC** is a reference to the CEO’s Committee, which was a committee comprising members of WOR’s senior management that advised WOR’s Chief Executive Officer (**CEO**), Andrew Wood. CEOC is described in more detail at [100] below.

#### Management adjustments case

1. As to particular (1)(ii) above, the “Management Adjustments” are defined in the particulars to para 22B of the 4FASOC as follows:

… [T]he FY14 Budget as approved by the Board … set a budget NPAT approximately $100m higher than the NPAT indicated by Locations’ forecasts (being $252m …) of which $68m was attributable to the adjustments, acquisition stretch and CEOC commitments (together **Management Adjustments**) …

1. Paragraph 22B of the 4FASOC alleges, relevantly, that by 14 August 2013, it was a fact that the FY14 budget would be “challenging to achieve”. Paragraph 22B set out the following particulars about the management adjustments:

7) during the reviews in ‘6’, alternatively on or about 31 May 2013 at the time of compiling the Locations’ detailed budget submissions, Messrs Bradie and Daly **instructed** the Locations to include in their detailed budgets increased operational EBIT of **$34.9m** in total, resulting in the detailed budgets as compiled indicating a budgeted NPAT of $288.6m…;

8) further to the matters in ‘7’:

a) on or about 7 June 2013, Mr Allen added to the budget **$12m** EBIT as a provision for additional operational EBIT generated through acquisitions during FY14 (acquisitions stretch)…; and

b) on or about 12 June 2013, Messrs Bradie and Daly instructed a number of Locations to make further adjustments to their detailed budgets with the effect of increasing operational EBIT by **$20.7m**…;

with the result that budgeted NPAT increased to $295m;

9) then further to the matters in ‘8’:

a) on or about 17 June 2013, Mr Holt provided a draft budget to ExCo reflecting the outcome of the process particularised in ‘1’ to ‘8’ above and indicating an NPAT of $297m…;

b) on or about 25 June 2013, a CEOC meeting resolved to include an additional $43.8m in overhead savings in the FY14 budget (CEOC commitments), of which **$33m** would be recorded in operational EBIT …;

c) on or about 26 June 2013, Messrs Allen, Daly and/or Holt incorporated the FX spot rate as at 14 June as the assumed FX rate for FY14, with the result that $32m was added to the budget NPAT figure…;

(Emphasis added)

1. As to (7) immediately above, Stuart Bradie was WOR’s Group Managing Director (**GMD**) of Operations. Michael Daly’s title was Global Director – Operations and Communications Support. As to (8), John Allen’s title was Global Director – Corporate Finance.
2. The figure of $88.6 million in particular (1)(ii) is the sum of the following three items referred to in the particulars to para 22B of the 4FASOC:
3. $34.9 million;
4. $20.7 million; and
5. $33 million.
6. The $68 million figure ([34] above) comprises the $88.6 million, less the $33 million for “CEOC commitments”, plus the $12 million **acquisition stretch** referred to in (8) of the particulars at [32] above.
7. In contrast with particular (1)(iii), particular (1)(ii) does not allege that the addition of $88.6 million to operational EBIT lacked a proper basis. This is consistent with para 22B of the 4FASOC, to which particular (1)(ii) refers, which only alleges that the FY14 budget would be “challenging to achieve”.

#### Contingency against operational underperformance

1. As to particular (1)(iv) ([32] above), the “FX contingency” was also identified in the particulars to para 22B of the 4FASOC, as follows:

[P]rior to the presentation of the final FY14 Budget to the Board on 13 August 2013, FX spot rate movements since June indicated a positive NPAT effect of up to $48m, which effect was booked to operational EBIT but (at the direction of Wood and Allen) was offset by a $16.1m “contingency” (**FX contingency**) resulting in no change to the $32m FX contribution to NPAT …

#### Blue sky case

1. As explained in more detail below, **blue sky** is estimated revenue from projects not identified at the time of forecasting. As expressed in the 4FASOC, the first of the two allegations concerning blue sky revenue ([32](2) above) focuses on the absence of any or any adequate review of the estimates. It does not make a positive allegation that blue sky revenue forecasts were inflated by any particular amount.
2. Mr Crowley’s case as particularised was that the absence of a review could be inferred from the following two matters:
3. Mr Daly’s 7 November 2013 observation that “some locations added blue sky to increase their figures to maintain budget but increased overhead in line with this proportionately”.
4. Mr Daly’s “very critical” look at WOR’s operational EBIT forecast in November 2013, which led to his recommendation that the budget be changed in the following three respects:
	1. $97 million of operational EBIT relating to blue sky revenue should be removed;
	2. the $12 million acquisition stretch should be removed; and
	3. a $10 million provision for the Arkutun-Dagi project ought to be taken against EBIT.
5. The case that the blue sky revenue forecasts were inflated, as expressed in the second particular ([32](3) above) concerning blue sky revenue, is limited to WOR’s ANZ region and the SWO location of the USAC region.
6. The 4FASOC states that, in these premises:
7. WOR did not have reasonable grounds for including in the FY14 budget an NPAT forecast materially higher than approximately $284 million; further or alternatively
8. WOR did not have reasonable grounds for a profit guidance to the market of “growth” on its FY13 NPAT result of $322 million.
9. The figure of $284 million is said by Mr Crowley to be the approximate sum of the 27 May 2013 forecast NPAT of $252 million plus an allowance for foreign exchange effects accrued between that time and the final budget.

#### Contentions not pursued

1. In the 4FASOC, Mr Crowley removed the following earlier allegations:
2. WOR did not budget for the most reasonable and likely view of the outcome of the Imperial Oil Limited Aurora Tailings Management (**IOL ATM**) project in Canada.
3. WOR did not incorporate an appropriate business risk or integration contingency in respect of “TWP” in the Sub-Saharan Africa (**SSA**) region.
4. WOR did not budget for an appropriate provision of contingency in respect of an anticipated claim in relation to its Arkutun-Dagi project in the SWO location.

### Opening submissions

1. In opening, Mr Crowley contended that, over three rounds of management adjustments, approximately $100 million in operational EBIT was added to the bottom-up build of the FY14 budget. By the following process, WOR’s projected FY14 NPAT was increased from $252 million to $352.1 million:
2. the 27 May 2013 draft budget produced a forecast NPAT of $252 million;
3. 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;
4. Messrs Bradie and Daly then added $20.7 million in operational EBIT with the result that budgeted FY14 NPAT increased to $295 million;
5. 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
6. $32 million was added to the budget NPAT figure using the current foreign exchange spot rate (Mr Crowley makes no complaint about this adjustment).
7. As opened, the case was that the management adjustments were “imposed” by senior management.

### Final submissions

1. In final submissions, Mr Crowley maintained the contentions that WOR did not have reasonable grounds on 14 August 2013:
2. for calculating, in the FY14 budget, an NPAT forecast materially higher than approximately $284 million; and
3. for giving guidance to the market to the effect of “growth” on its FY13 NPAT result of $322 million.
4. Further, Mr Crowley contended that a reasonable budget process would have forecast a FY14 result in the range $260 to $300 million, or in any event materially lower than the post-August 2013 analysts’ consensus promoted by WOR. This contention is similar to the following allegation that was deleted from the particulars to para 46(d) of the 4FASOC:
5. WOR did not have reasonable grounds for a profit guidance to the market materially higher than:

…

B alternatively to A, NPAT of around $296.9m (Jaski Reply Report, 163);

…

D … NPAT of between $260m-$300m, inclusive of redundancy costs, being the amount in “B” less the further adjustment determined during the Board meeting on 20 November 2013 on the grounds that the ExCo recommendation of a forecast of $280-300m was insufficiently conservative.

1. The “Jaski Reply Report” was an expert report that was ultimately not relied on by Mr Crowley.
2. Mr Crowley identified eight core factual matters in support of his contention that the FY14 budget did not in fact provide reasonable grounds for the earnings guidance (and that the Board and other officers of WOR ought reasonably to have recognised as much). The eight core factual propositions are as follows:
3. WOR had a consistent record of underperforming against its internal budget since FY09, with the sole exception of FY12, and had not materially changed its FY14 budget-setting process from previous years.
4. WOR had been required to downgrade its earnings guidance on two occasions in FY13 because of underperformance against its internal budget.
5. In early 2013, as the FY14 budget-setting process began, WOR’s major markets were either not growing, or were deteriorating, and the expectation was for continued uncertainty in its markets during FY14.
6. Between March and May 2013 the locations, together with the regional managing directors (**RMDs**) and managing directors of the customer service groups (**CSGs**), engaged in a thorough bottom-up budget process, with conscientious regard to “growth” and overhead reduction directives issued by senior management. The result was that the “detailed budget” compiled in very late May 2013 already incorporated stretch targets in respect of both revenue, and costs savings. Those targets were already optimistic, given market conditions.
7. In June and July 2013, when it became apparent that the actual bottom-up budget would not support WOR’s **Vision 2017** objective of year-on-year growth in every year from FY13 to FY17 (set out in full at [121] below), senior management, by the so-called management adjustments, demanded a series of top-down adjustments that aimed to increase operational EBIT by $88.6 million. The locations duly stretched again to reflect the majority of those adjustments in their local budgets (however improbable they were and proved to be).
8. The FY14 budget included the $12 million acquisition stretch addition to EBIT that lacked a proper basis.
9. The FY14 budget was not a true **P50** budget (explained at [114] below), but rather included no adequate allowance for the risks associated with continued slow markets and operational underperformance.
10. WOR’s budget process lacked a risk-adjusted review of its internal budget, particularly in relation to unsecured work, for the purpose of ensuring that any consequential guidance to the market properly reflected the risk associated with its stretch budget targets.

## Performance case

1. The performance case was put in the alternative to the budget case, against the possibility that the Court was not satisfied that the August 2013 earnings guidance statement lacked reasonable grounds. On this aspect of the case, Mr Crowley alleged that WOR’s actual performance in the early months of FY14 dissolved whatever hopes that had underpinned the FY14 budget. More specifically, Mr Crowley alleged that by late September 2013, WOR’s senior management was aware that the assumptions in the FY14 budget were failing but did not revisit those assumptions.
2. The performance case was that from 14 August 2013 and, specifically, on 9 October 2013, 10 October 2013 or 15 October 2013, WOR lacked a reasonable basis for maintaining the FY14 guidance representation and by failing to correct the August 2013 earning guidance statement (or the 9 October 2013 announcement), WOR engaged in conduct that was misleading or deceptive or likely to mislead or deceive.

## Consensus case

1. The consensus case, as described in this judgment, comprises the claims premised upon a proposition that WOR was aware of a consensus expectation of market analysts that it would deliver between approximately $354 and $368 million in NPAT for FY14. Mr Crowley put a case that WOR had this state of knowledge from 14 August 2013 and that WOR ought to have known that its earnings were likely to fall materially short of the consensus expectation from 14 August 2013. In the alternatively, Mr Crowley contended that by specific dates, being 21 September 2013, 9 October 2013, 10 October 2013 or 15 October 2013, WOR was or ought reasonably to have been aware that its FY14 earnings were likely to fall materially short of $354 million. By failing to disclose that information, Mr Crowley alleges, WOR contravened s 674 of the Corporations Act.
2. Mr Crowley explained that the key difference between the performance case and the consensus case is that even if a reasonable forecast for FY14 was, for example, an NPAT of $323 million, so as to constitute minimal “growth” over the FY13 result and therefore be “notionally compliant” with the August 2013 earnings guidance statement, nonetheless that result was still sufficiently below the consensus expectation that it was material information that was required to be disclosed to the market.

# Issues for determination

1. By order made on 3 December 2018, the trial was a hearing of Mr Crowley’s claim and of issues common to the claims of group members as agreed by the parties or determined by the Court. On 22 March 2019, subject to further order, the Court made an order identifying the list of issues common as between Mr Crowley and the group members and to be determined at the initial trial. The common issues are addressed at the end of these reasons for judgment, amended to incorporate terms used in the judgment.

# Legal principles concerning fact finding

1. Mr Crowley accepted that, in order to succeed, he must prove his case on the balance of probabilities in accordance with s 140 of the *Evidence Act 1995* (Cth). By s 140(2), without limiting the matters that the Court may take into account in deciding whether it is satisfied that the case has been proved on the balance of probabilities, it is to take into account:
	1. the nature of the cause of action or defence; and
	2. the nature of the subject-matter of the proceeding; and
	3. the gravity of the matters alleged.
2. The allegation that a publicly listed company did not have reasonable grounds for its earnings guidance is a relatively serious one. In *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, Dixon J (as his Honour then was) explained at 361-362:

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

1. Mr Crowley observed that inferences, whether drawn from documents or from the absence of contradictory evidence, are part of the process by which the Court determines whether it has been persuaded of a fact in issue to the requisite standard. In *Transport Industries Insurance Company Ltd v Longmuir* [1997] 1 VR 125 at 141, where the issue was whether the respondent was responsible for causing a fire, Tadgell JA (Winneke P and Phillips JA agreeing) explained:

As will be seen, I respectfully differ from the learned [primary] judge upon several of the individual conclusions of fact which he drew from the evidence and which he considered to preclude a finding that the respondent was responsible for the fire. That aside, it should be said that, to assess the evidence in a case like this by reference to various individually-pleaded particulars, as though running through items on a check list, is apt to mislead. The evidence is to be evaluated as a whole in order fairly to consider whether the party bearing the onus of proof has established what is ultimately sought to be proved. The object of the exercise of evaluation is to discover whether the evidence paints a picture reflecting real life, rather than to place a tick or a cross against paragraph after paragraph of torpid pleading. A true picture is to be derived from an accumulation of detail. The overall effect of the detailed picture can sometimes be best appreciated by standing back and viewing it from a distance, making an informed, considered, qualitative appreciation of the whole. The overall effect of the detail is not necessarily the same as the sum total of the individual details …

(Citations excluded)

1. This analysis was adopted by Tracey J in *Mathai v Nelson* [2012] FCA 1448; (2012) 208 FCR 165 at [46] and following, in deciding the question whether Mr Mathai had used certain funds to purchase properties.
2. Whether an inference should be drawn is decided by reference to the particular circumstances of the case. In *G v H* [1994] HCA 48; (1994) 181 CLR 387 at 390, Brennan and McHugh JJ explained:

It is one thing to say that the Court may draw an inference; it is another to say what inference should be drawn. An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law …

1. In that regard, the principle in *Blatch v Archer* (1774) 98 ER 969 at 970 may be relevant, namely, 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”.
2. Mr Crowley noted that, relatedly, in *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 at 321, Windeyer J stated that, 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”.
3. The failure to call a witness may also permit the Court to draw with greater confidence any inference that is unfavourable to the party that failed to call the witness, if that inference is open on the evidence and the uncalled witness appears to be in a position to cast light on whether the inference should be drawn: *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361, 384-385 at [63].
4. Mr Crowley observed that, by virtue of his position as a former shareholder of WOR, he has primarily sought to make his case at the initial trial from discovered documents while WOR is in possession of all available information concerning its FY14 budget and its performance against that budget. Mr Crowley did not make any complaint about the adequacy of discovery provided but observed that it was necessarily limited, including because of the passage of time, and because all information may not be recorded or recorded in documents that are now retrievable.
5. Mr Crowley acknowledged that neither *Blatch v Archer* nor *Jones v Dunkel* can be relied upon to “convert conjecture and suspicion into inference”: *Fair Work Ombudsman v Hu* [2019] FCAFC 133 at [56], but argued that, in the absence of clear evidence from WOR contradicting any inference available from the material relied upon by Mr Crowley for any particular fact in dispute, the Court may more readily draw the inference proposed by Mr Crowley.
6. Mr Crowley submitted that the documentary record in this case, taken as a whole, presents a picture which is not ambiguous but that WOR’s three lay witnesses had sought to “recharacterise” that record. Those witnesses were three senior executives: Mr Wood; Robert Ashton, the RMD of the Middle East, North Africa, India (**MENAI**) region from March 2013 to November 2016 and Denis Lucey, RMD of the Asia and China (**ASCH**) region from 2011 to 2014.
7. I do not accept either element of this submission, which is not supported by my detailed findings below. In summary, my impression was that the documentary record of the development of the FY14 budget is generally consistent with the evidence of WOR’s witnesses. The evidence that supports Mr Crowley’s case is mostly hindsight and is not supported by detail that might have contradicted the evidence of WOR’s witnesses in substantial respects.
8. Mr Crowley drew attention to WOR’s failure to call witnesses in the following three categories:
9. Persons who were “key” to the 2013 budget process but who are no longer employed by WOR, particularly Mr Bradie, Mr Holt and Ian Wilkinson, RMD of the ANZ region at the relevant times.
10. Persons whose current employment is not known, particularly Mr Daly.
11. WOR employees and members of the Board, whose affidavits were served but who were not ultimately called. This included John Grill, the Board Chairman and Mr Allen.
12. Mr Crowley referred to *In the matter of HIH Insurance Limited (In Liq)* [2016] NSWSC 482; (2016) 335 ALR 320 at [33], in which Brereton J rejected a submission that the former CFO of HIH, Mr Fodera, was not in the defendants’ camp. His Honour inferred that Mr Fodera knew that the treatment of certain arrangements was incorrect according to proper accounting practice and standards and would create a misleading appearance of profitability. His Honour noted that, as a former officer, Mr Fodera was obliged to assist the liquidators and “he would much more naturally be called by the defendants to deny that he had guilty knowledge than by the plaintiffs to confess that he did”.
13. At a general level, I accept that WOR’s failure to call the witnesses identified by Mr Crowley may provide support for one or more adverse inferences. However, it is necessary to address the issue by reference to particular inferences and the available evidence for and against any proposed inference.
14. Mr Crowley identified as a significant proposed inference:

… that the descriptions of the budget-setting process recorded in the interview notes collated for the purposes of Mr Holt’s memorandum prepared for the Audit and Risk Committee of the Board (and comprising Board members) (**A&RC**) on 5 December 2013 (what became known at trial as the **Holt Memorandum**) were an accurate description of the process actually followed.

1. The interview notes (**Holt Memo interview notes**), which accompany the **Holt Memorandum** addressed by Mr Holt to the A&RC and dated 5 December 2013, are just that: 14 pages of bullet pointed observations, some of which are attributed to particular individuals but others of which are unattributed. There is no reason to doubt that they are an accurate record of the interviews that they record; or that they reflect opinions genuinely held (although Mr Lucey did not remember the discussion recorded in the notes and Mr Ashton had only a limited recollection). However, the meaning of the notes is very often unclear, as is the basis upon which interviewees expressed their opinions. For example, the notes include the following:

**Strategy**

* Location managers can only do so much
* Probably react by cutting costs
* If the market is declining there is not much to manage and there is not much that the location manager can do
* You need to Grow market share but that is a medium to long term strategy
* How do you grow by 10% in a flat market?
* Reality is that strategy change will only benefit in the new few years
* Where is the revenue going to come from

**Financial Realities**

* Over the last couple of years we have been bled down
* Underlying performance vs release of provisioning (headline performance)
* In the current cycle we are struggling to turn

**Mal practice**

* Little evidence of deliberate mal practice
1. By way of a further example, the following notes appear under the heading “Process”:
* Recognition of BlueSky
* Sum of the Locations does not equal Actual
* Multiple passes at forecast and reforecasts trying to get to a more palatable outcome
* Desire to get rid of the sandbagging
* Cultural pressure for Reforecasts to hold the line on budgets
* Culture of fear if they tell the truth with consequence of staff cuts
* Underlying performance vs Headline performance
* People put in number which look right rather than are right
* Exco will make the decision anyhow, and they WILL be asking for more
* There are too many people budgeting!!
* We budget too often
* Lack of transparency, if it is bad we have to know it is going bad!!!
* Push to Grow regardless of actual trading conditions and cycle
* Every budget has a perceived target which requires bluesky with great deal of uncertainty
* Higher and higher BlueSky with lower and lower probabilities leads to falling behind on actuals
* Nervous about the degree of BlueSky in the budget
* General recognition of P50 trending now to P25
* Some budgetary risk not provisions in final budget outcomes
* We do not have very good location controls and location level transparency to challenge and provide commercial oversight
1. And under the heading “How can we improve the process”

…

* With hindsight we would have attacked the overheads at the locations earlier
* Unrealistically high BlueSky number with little proper risk assessment
* What is the minimum we can spend globally since the cost base is too high
* The actual budget process is good we just need to risk assess it better
* We get a good first cut and then talk it up
* We are setting hurdles which are way too high
* …
* We have to stop kidding ourselves on revenue and take out costs quickly before the lag of 3, 4 or sometimes 6 months

…

1. These notes certainly indicate possible significant defects in the FY14 budget setting process and, ultimately, the FY14 budget. However, ultimately, it is necessary to look at all the available evidence concerning the process to determine whether WOR’s failure to call one or more witnesses supports an adverse inference based on documentary evidence (including the interview notes) or the oral evidence of Messrs Wood, Ashton and Lucey, each of whom was cross-examined by counsel for Mr Crowley.

# Assessment of witnesses

1. As explained below, I concluded that Mr Crowley was a truthful witness.
2. I formed favourable views of the credibility of each of Messrs Wood, Ashton and Lucey. Each of these witnesses gave evidence that was forthright and generally responsive to the questions asked of them in cross-examination. Each appeared to be experienced and knowledgeable about WOR’s business and the budget setting process within their respective areas of responsibility. I was satisfied that they were truthful and candid witnesses and I generally accepted the evidence given by each of them.

# Consensus expectation about WOR’s FY14 NPAT

1. Paragraph 22D of the 4FASOC alleges:

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**).

1. As noted below, both WOR and professional analysts commenting on WOR made reference to “consensus” forecasts of WOR’s NPAT. The ASX also referred to “consensus estimate” in the following passage of its ASX Listing Rules **Guidance Note 8**:

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.

1. The evidence did not refer to any consensus expectation of NPAT expressed as a range. Rather, the evidence identified consensus NPAT figures as follows:
2. “Average analyst consensus” of $374.6 million and “Bloomberg NPAT consensus at 17th June 2013” as $359.4 million in WOR’s FY14 Draft Group Budget pack dated 26 June 2013 (see [263], [264] and [306]);
3. On 15 August 2013, Macquarie Equities Research stated, in relation to its forecast of WOR’s FY14 NPAT, “Consensus is similar at $368m” (see [320]);
4. 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” (see [469]);
5. 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 (see [504]).
6. 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.

## Falling “materially short” of consensus expectation

1. Mr Crowley’s case included an allegation that, by no later than 14 August 2013 or (alternatively) 21 September 2013, 9 October 2013 or 15 October 2013, WOR’s FY14 earnings were likely to fall materially short of the FY14 WOR Earnings Expectation pleaded in para 22D of the 4FASOC, set out at [80] above.
2. In final submissions, Mr Crowley submitted that “materiality” is likely to connote a change between 5% and 10%. For the purpose of its case, WOR noted that throughout the relevant period, WOR’s internal forecasts were estimating its full year earnings to be within 5% of the pleaded “consensus estimates”.
3. In *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* [2019] FCA 1747 (***Myer***) at [1166], Beach J found that information that the forecast NPAT in that case would be “materially lower” meant at least 5% lower, and rejected Myer’s contention that it was closer to 15% lower. His Honour referred to Guidance Note 8 which, during the relevant period stated relevantly:

ASX would therefore recommend that an entity consider updating its published earnings guidance for the current reporting period if and when it expects its earnings for the period to differ materially from that guidance. For these purposes, ASX would suggest that entities apply the guidance on materiality in Australian Accounting and International Financial Reporting Standards, that is:

* treat an expected variation in earnings compared to its published guidance equal to or greater than 10% as material and presume that its guidance needs updating; and
* treat an expected variation in earnings compared to its published guidance equal to or less than 5% as not being material and presume that its guidance therefore does not need updating,

unless, in either case, there is evidence or convincing argument to the contrary. Where the expected variation in earnings compared to its published earnings guidance is between 5% and 10%, the entity needs to form a judgment as to whether or not it is material. Smaller listed entities or those that have relatively variable earnings may consider that a materiality threshold of 10% or close to it is appropriate. Very large listed entities or those that normally have very stable or predictable earnings may consider that a materiality threshold that is closer to 5% than to 10% is appropriate.

This recommendation is purely a suggestion to assist listed entities in determining if and when they should be updating their published earnings guidance. The mere fact that an entity may expect its earnings to differ from its published guidance by more (or less) than a particular percentage will not necessarily mean that its guidance is (or is not) misleading.

(Footnotes omitted)

1. For the purposes of considering this aspect of Mr Crowley’s case, I have adopted Beach J’s approach in *Myer.* 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:
2. by no later than 14 August 2013, $368 million (that is, below $349.6 million);
3. by no later than 21 September 2013, $364.6 million (that is, below $346.37 million);
4. by no later than 9 October 2013, $364.6 million (that is, below $346.37 million);
5. by no later than 15 October 2013, $364.6 million (that is, below $346.37 million).

# Background to WOR FY14 budget

## WOR’s business

1. WOR is a professional services provider to customers in the resources, energy and infrastructure sectors. Its customers include multinational oil and gas, resources and chemicals companies, as well as more regionally and locally focussed companies, national oil companies and government owned utilities.
2. At all relevant times, WOR was listed on the ASX. As at 30 June 2013, it had 246.5 million ordinary shares on issue. WOR admitted that it was:
3. a corporation included in the official list of the financial market operated by ASX and whose securities are enhanced disclosure (**ED**) securities for the purposes of s 111AE of the Corporations Act;
4. subject to and bound by the ASX Listing Rules;
5. a listed disclosing entity within the meaning of s 111AL(1) of the Corporations Act;
6. a trading corporation within the meaning of the ASIC Act; and
7. a corporation within the meaning of the *Competition and Consumer Act 2010* (Cth).
8. During FY13, WOR operated out of 165 offices in 43 countries and employed approximately 39,800 people. During FY14, WOR operated out of 157 offices in 46 countries and employed approximately 35,600 people.
9. At the relevant times, WOR’s business was organised into the following eight regions, each headed by a RMD:
10. ANZ (as previously noted Mr Wilkinson was RMD of ANZ);
11. Canada (**CAN**);
12. ASCH(as previously noted Mr Lucey was RMD of ASCH);
13. USAC;
14. Latin America (**LAM**);
15. MENAI (as previously noted Mr Ashton was RMD of MENAI);
16. Europe (**EUR**); and
17. SSA.
18. Each **region** was divided into **locations**, of which there were 43 in total. For example, the ASCH region comprised eight locations, while MENAI comprised seven locations.
19. For FY14, WOR allocated customers to three CSGs:
20. **Hydrocarbons**:being customers involved in extracting and processing oiland gas;
21. “Minerals, Metals & Chemicals” (**MM&C**): customers involved in extracting and processing mineral resources and manufacturing chemicals; and
22. **Infrastructure**:a consolidation of two sectors **Infrastructure & Environment** (customers involved in projects relating to water, the environment, transport, ports and site remediation and decommissioning) and **Power** (customers involved in power generation, transmission and distribution).
23. There was a CSG managing director for each of the CSGs.
24. According to WOR’s 2013 annual report, the Hydrocarbons sector contributed 70% of WOR’s aggregated FY13 revenue. Considered by region, ANZ, CAN and USAC together generated 67% of aggregated FY13 revenue. Mr Crowley described the Hydrocarbons sector and the ANZ, CAN and USAC regions as the “primary financial engines” of WOR. ANZ comprised four locations, CAN comprised six locations and USAC comprised five locations.

## WOR’s senior management structure

1. From 23 October 2012 and throughout the relevant period, Mr Wood was CEO and WOR’s only executive director. The other members of the Board were Mr Grill (Chairman), Ron McNeilly (Deputy Chairman), Christopher Haynes OBE, Erich Fraunschiel, Catherine Livingstone AO, Xiao Bin Wang, JB McNeil, Larry Benke and John Green.
2. During the relevant period, the following executives reported directly to Mr Wood:
3. CFO, Mr Holt;
4. GMD Operations, Mr Bradie;
5. GMD Development, Iain Ross;
6. GMD New Ventures, David Steele;
7. GMD Improve, Randy Karren; and
8. GMD People, Barry Bloch.
9. The eight RMDs reported to Mr Bradie.
10. The CSG managing directors reported to Mr Ross. They were Brian Evans (Hydrocarbons), Andy Cole (Infrastructure) and Mark Southey (MM&C).
11. There were three management committees of relevance to this proceeding:
12. The Board, which operated on a consensus basis and for which Mr Wood prepared a monthly CEO report or a CEO summary providing information on the prior month. There were two key sections of the CEO Report and CEO Summary: (i) a report of market conditions, which the CSG managing directors assisted in preparing; and (ii) a report on operational performance, which Mr Bradie had input into, assisted by the RMDs.
13. The Executive Committee (**ExCo**), which comprised Mr Wood and his six direct reports from September 2013. Prior to that time, it comprised those individuals except Mr Holt. The ExCo met at least monthly.
14. The CEOC, which comprised ExCo, the CFO (when not formally in ExCo), the eight RMDs and the three CSG managing directors. As Mr Wood explained it, the CEOC was an advisory group that provided him with advice and support. Many of the key business leaders at WOR were on the CEOC. The CEOC was not a decision-making body.
15. Mr Crowley referred to the following two other executives in particular:
16. Mr Daly, who was “effectively the financial lead for Mr Bradie”. As previously noted, Mr Daly’s title was Global Director – Operations and Communications Support. Mr Daly reported to Mr Holt but Mr Wood had direct formal and informal discussions with him.
17. Mr Allen, also reported to Mr Holt but, again, Mr Wood had direct formal and informal discussions with him. As previously noted, Mr Allen’s title was Global Director – Corporate Finance.
18. WOR monitored its financial performance through, among other things, monthly financial reports that detailed actual monthly financial performance and were typically finalised approximately two to three weeks after the end of each month. These monthly financial reports were provided both to the Board and ExCo.

## WOR’s officers within the meaning of the continuous disclosure provisions

1. The definition of “officer” in s 9 of the Corporations Act (which applies to the ASX Listing Rules pursuant to r 19.3) is 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 instructions or wishes the directors of the corporation are accustomed to act …

1. There is no dispute that each of the members of the Board, including Mr Wood, was an “officer” of WOR at the relevant times.
2. WOR also admitted that Mr Bradie was an officer of WOR, and that Mr Holt was an officer of WOR from September 2013, when he became a member of ExCo.
3. Mr Wood’s affidavit identified Mr Holt as CFO during the period 1 February to 19 November 2013. The Board minutes identify Mr Holt as CFO on 12 February 2013. On this evidence, and having regard to Mr Holt’s leading role in the development and finalisation of the FY14 budget, I find that Mr Holt was an officer of WOR from at least 1 February 2013.
4. Mr Crowley also contended that Messrs Allen and Daly were officers of WOR at the relevant times.
5. As Mr Crowley has failed in his case that WOR lacked a reasonable basis for its August 2013 earnings guidance statement to the market prior to the corrective disclosure on 20 November 2013, the issue (identified by Mr Crowley) of whether any WOR officer ought reasonably to have recognised the lack of such a basis does not arise.
6. Accordingly, it is unnecessary to decide whether either Mr Allen or Mr Daly was an officer of WOR within the meaning of the Corporations Act at any relevant time.

## Overview of WOR’s budget process and market guidance

1. WOR admitted that, at all material times, it reported:
2. on a consolidated basis for itself and its controlled entities;
3. earnings as EBIT and profit as NPAT; and
4. revenue as “aggregated revenue” which it defined as “statutory revenue and other income plus share of revenue from associates less procurement services revenue at nil margin, interest income and net gain on revaluation of investments previously accounted for as equity accounted associates”.
5. Mr Wood’s evidence was that WOR’s earnings guidance from time to time was based on its expected NPAT, calculated by reference to the company’s internal budgets and forecasts and business strategy for the financial year. The Board approved all earnings guidance given to the market. It was the practice of the Board, when forming its opinion regarding earnings guidance, that it also approved the internal budget on which the guidance was based. Mr Wood’s evidence was that “we work very hard in framing our guidance such that it gives a clear indication of our expectations of the business’s performance and where we sit in the market”. He agreed with Mr Holt’s December 2013 statement that “we have done a good job at year end of guiding the analysts to a consensus that is approaching our budgeted figure”.
6. As outlined in Mr Wood’s affidavit, WOR’s annual budget setting process broadly followed the following steps:
7. In around March, a strategy session that involved identifying what was happening in the markets in which WOR operated, where the opportunities were and where the company should direct its efforts. The business presented a picture of expectations around sector or location market changes. The strategic plan was typically set in March and communicated to the Board in April. The strategic plan provided a framework for the budget process.
8. A bottom-up build of the draft budget, involving each location considering and assessing anticipated revenues and costs or each project of contract. The bottom-up build was based on WOR’s portfolio of work in hand (referred to as “secured work”) and estimates for “unsecured work” which consisted of “proposals”, “prospects” and blue sky.
9. Between March and June, the location draft budgets were reviewed by the RMDs, the Regional Finance Directors (**RFDs**), the CSG managing directors and ExCo. Thus, the bottom-up build was subject to top-down review and CSG “side-check”.
10. In June, the draft budget was presented to the Board, with ExCo members, RMDs, CSG managing directors and other budget owners who stated their budget expectations for their own regions or sectors. The strategic plan was also presented to the Board for discussion.
11. In August, the budget (typically closely aligned with the draft budget presented in June) was approved by the Board. The Board would also typically (and in August 2013 did) approve a separate directional guidance to be released to the ASX, indicating WOR’s expectation as to its earnings for the coming year.
12. This broad outline does not identify how WOR’s non-operational overheads are incorporated into the annual budget. WOR’s business structure included **Global Functions**, which were non-revenue generating cost centres. WOR’s Global Management Reporting FY14 Budget Global Instructions (**FY14 budget instructions**) indicate that Global Functions budgets were prepared separately from the location draft budgets. Global Functions costs totalled $437.4 million in the FY14 budget.
13. WOR professed to adopt the P50 parameter to produce its budgets. Mr Wood explained that P50 is the probabilistic Monte Carlo analysis of the statistical confidence level for an estimate. As Mr Wood put it, P50 means that 50% of estimates exceed the P50 estimate and, by definition, 50% of estimates are less than the P50 estimate. In other words, there is an equal chance of exceeding or going below the estimate.
14. In relation to “unsecured work”, WOR defined the different categories as follows.
15. “Proposal” related to tenders for which WOR had bid, or had received a request for tender information. Usually, there was a proposed start date for the project within the forthcoming year. An assessment of “Go” and “Get” likelihood was made for proposals 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. “Get” was a percentage figure representing the likelihood that WOR would be engaged for the work in the event that the project went ahead.
16. “Prospect” related to tender processes for which WOR had not yet submitted a bid, or known projects where the tender process had not started. Budgeted revenue from “Prospects” was also discounted for “Go” and “Get” risks.
17. Blue sky was described by Mr Wood as expected projects based on discussions with customers and projects that are likely to materialise based on history and past experience, such as under a framework agreement. Mr Lucey described blue sky as an estimate of the value of projects which WOR expected to be engaged to undertake during the course of the financial year (other than secured work, proposals and prospects), based on a subjective assessment of the particular location’s historical performance and current market conditions and also taking into account WOR’s strategy for the coming year. Mr Ashton described blue sky as projects that were not known but were anticipated based on a combination of the operational history of the location, information obtained from customers or industry analysts and or anticipated market conditions.
18. Blue sky was estimated at a numerical value and accounted for that value in the budget without any discount.
19. The following financial terms were used in WOR’s budgeting documents:
20. **Revenue** is WOR’s direct income from professional services.
21. Costs of sales are deducted from the revenue figure to arrive at the **gross margin** (or **GM**).
22. From the gross margin, each location deducted location-specific overheads to arrive at a “business earnings before interest and taxes” (**BEBIT**) figure.
23. The total of BEBIT figures was **operational EBIT**. Operational EBIT is a metric that reflects the underlying performance of WOR’s business exclusive of head office expenses.
24. WOR’s **total group EBIT** is calculated by deducting its global head office or Global Function costs from operational EBIT.
25. NPAT is determined primarily by deducting corporate tax from group EBIT (at an effective tax rate of approximately 30%).

# Context for FY14 budget setting process

## Vision 2017

1. In its 2012 annual report, released in August 2012, WOR recorded its Vision 2017strategy as follows:

OUR VISION

It is 2017 ……..

* We consistently deliver high quality engineering, consulting, project and *Improve* services and as a result have become a world leader
* We have a recognized and valued position with our customers
* We are an admired employer
* We have a facilitating organizational structure

As a consequence of these attributes, we have enjoyed good growth, year-on-year for the last five years.

1. WOR’s *Improve* business provided asset maintenance services.

## WOR’s FY13 earnings guidance

1. Also in the 2012 annual report, WOR reported an underlying NPAT excluding fair value gain on acquisitions for 2012 of $345.6 million, “an increase of 15.8% on the $298.5 million net profit reported in 2011”. The annual report made the following statements about growth:
2. “we have enjoyed good growth, year-on-year for the last five years”;
3. Under the heading “10 years of growth”:

Looking to the future, WorleyParsons will endeavour to continue to deliver to our shareholders through our vision of being the preferred global provider of technical, project and operational support services to our customers and using the distinctive WorleyParsons culture to create value for them and prosperity for our people and stakeholders.

1. In the “Chairman’s Review”:

Our growth during the year was underpinned by strong capital spending by major global customers and strengthening of our global relationships with these customers. The ever growing demand for energy is driving the unconventional oil and gas sector, where we have seen strong growth in oil sands, shale gas and coal seam methane, in Canada, the USA and Australia.

Developing markets were also a significant driver of growth as large global clients continue to invest in projects in countries where the bulk of the world’s undeveloped resources lie.

1. On 29 August 2012, WOR made an announcement to the ASX which included the following statement:

Subject to the markets for our services remaining strong, we expect to achieve good growth in FY2013 compared to FY2012 underlying earnings.

We have a clear growth strategy in place focused on improving margins and developing our skill set and geographic footprint across our four customer sectors. This will be achieved through organic growth as well as by taking advantage of acquisition opportunities that provide value for shareholders.

We are confident that our medium and long term prospects remain positive based on our competitive position, our diversified operations and strong financial capacity.

1. On 13 February 2013, WOR made an announcement to the ASX which included the following statement:

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

1. Mr Crowley described this statement as a qualitative downgrade from “good growth” to “growth”.
2. On 17 May 2013, WOR issued a trading update to the ASX, stating:

WorleyParsons Limited (“the Company”) provides a trading update and updated earnings guidance for the year to 30 June 2013.

At the Company’s half year results announcement on 13 February 2013 WorleyParsons provided guidance for FY2013 of growth compared to FY2012 underlying earnings. The company now expects to report a net profit after tax in the range of $320 million to $340 million compared to FY2012 underlying earnings of $345.6 million.

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.

Commenting, Chief Executive Officer, Andrew Wood, said: “Despite weaker than anticipated market conditions impacting the second half result we continue to have confidence in the medium and long term growth prospects of our business.

“The diversity of our business in terms of its geography, industry sector and service offering is a fundamental driver of this confidence. While Western Australia and WorleyParsonsCord have underperformed, a number of regions are performing strongly, particularly the United States, Canada and China. As existing assets age, new assets come online and regulatory requirements increase, we continue to see increased demand for our *Improve* services”.

1. On 14 August 2013, WOR announced NPAT of $322 million for FY13, down 7% on the previous year.

## WOR’s markets in the second half of FY13

1. Mr Wood said that, coming out of the Global Financial Crisis (**GFC**), WOR experienced a period of growth in both the resources and hydrocarbons markets “on the back of very high resource prices and high levels of activity”. His evidence referred to an “incredibly turbulent period” in which it was very difficult to budget and forecast. I understood FY13 and FY14 to be part of the period of turbulence. Concerning FY13, Mr Wood said:

What we saw in FY13 was, even though – we saw a rapid falloff in key-resource prices and, basically, the minerals-and-metals market pretty much calling a halt to further development, and that impacted our business. But at the same time, we saw significant activity in the hydrocarbons market and that, with high oil prices, and an outlook, continued outlook from most of the major forecasters and our customers that they expected that to continue. So it’s a – was an incredibly turbulent period, and then we found what we then led into was the biggest crash in activity levels and prices for a couple of generations, in the following year. That’s the period we were trying to fore-cast in. It’s [an] exceptionally difficult time.

1. Concerning WOR’s various markets by early 2013, Mr Wood’s undisputed evidence was that:
2. Hydrocarbons was broadly stable;
3. 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;
4. the chemicals part of MM&C was fine, especially in the USA and China;
5. the infrastructure and environment sector was continuing to struggle in some places; and
6. the power business was “okay”.
7. Mr Wood said that power, infrastructure, and minerals and metals were each overall small contributors to EBIT, while “Hydrocarbons was the big one”. This evidence is consistent with Mr Crowley’s view that the Hydrocarbons sector was one of the “primary financial engines” of WOR.
8. Mr Crowley submitted that, having regard to the state of WOR’s markets, “it is clear that estimates for blue sky revenue could not reasonably have been expected to match the estimates that had been adopted for the FY2013 year (and as we have seen, were not achieved). At the very least, blue sky projections that were of similar magnitude to prior years should have been seen as already ‘aggressive’ targets”.
9. This submission was not made out by the available evidence. In particular, the proposition that blue sky revenue targets for FY13 were not achieved was not the subject of supporting analysis on behalf of Mr Crowley. Further, it is far from clear that the FY14 blue sky revenue targets for the Hydrocarbons CSG (which contributed approximately 70% of revenue in 2013), could not reasonably have been expected to match FY13 estimates, where that business was “broadly stable”.
10. At this point, Mr Crowley also noted the general proposition that WOR’s capacity to win and complete blue sky work was affected by its spend on staff and overheads. Mr Crowley contended that “[i]f costs are cut then the ability to earn the blue sky is impaired”. No doubt, WOR could have cut costs in a way that would impair its ability to earn blue sky revenue. However, I do not accept that cost cutting impaired WOR’s ability to earn blue sky revenue without some analysis of the precise impact of cuts on WOR’s revenue earning capacity.

# February to May 2013: High level budget process

1. In the light of Mr Crowley’s case, it is not necessary to make detailed findings about the high level budget (**HLB**) process. Mr Crowley noted that it was a new process at WOR.
2. Mr Wood characterised the HLB process as a “strategic process, where we would look at our markets and establish what, we believe, was happening in our markets”. The HLB process and the subsequent process of building a budget were “somewhat separate, and one informed the other”.
3. Mr Crowley referred to the following evidence about the HLB process up to 15 April 2013:
4. It was hoped to provide senior management with a “heads up” or indication of the locations’ expectations for FY14, and to “allow the opportunity to review expectations with the locations and ensure that they are in line with the strategy prior to development of a full detailed budget”. Projections for FY13 based on the FY13 Q3 budget (that is, the FY13 budget with 9 months of actual results) were the proxy comparator for the FY14 HLB.
5. The following email, sent on 27 March 2013 from the president of INTECSEA, a division of WOR involved in deep-water engineering, anticipated an expectation of an insistence on growth, asking:

… Before we spend time building budgets are there any expectations set by WorleyParsons for global EBIT improvement for FY14. Last year it was 20%; so if it is 20% again I would like to know since that will be the number demanded by the RMDs, regardless of what we develop.

1. The instructions for the HLB exercise from Mr Daly to the RMDs and the operational finance team, sent on 16 April 2013, were to “overlay the following initial high level expectations with regard to the budget”. Those expectations included an “underlying assumption that there is year on year EBIT growth at each location”, with the level of growth to be reviewed based on location and relevant markets. The balance of the expectations indicated that various metrics (overheads as a percentage of professional services, revenue, overhead growth, EBIT percentage and chargeability percentage) were to be improved relative to the comparators from FY13.
2. An early indicator that the HLB process involved rigorous consideration is an email sent by Mr Evans on 18 April 2013. In that email, Mr Evans referred to the need to achieve $27 million in overhead savings for Hydrocarbons, saying:

… Slash and burn. We need all to understand the implications of pushing us that deep – no incoming costs accepted from ANYONE. No people moves in (unless net net zero). Transfer out or make redundant people…we are asked to move folks to billable roles – where can we do that?

1. Mr Crowley did not seek a finding that Mr Daly’s instructions for the HLB exercise warranted criticism.

## “Review calls” and “adjusted” HLB process (22 to 26 April 2013)

1. In the ASCH region, Mr Lucey reacted to Mr Daly’s 16 April 2013 instructions by sending emails to all of his eight locations (except Brunei) to the effect of this example, sent to Thailand on 1 May 2013:

I’ve now had a chance to collect my thoughts following an, at times, heated discussion with Stuart [Bradie] on the first pass high level budgets for FY14….What’s clear is the ASCH is seen globally as a growing region and as such, expectations are high!! Also, compliance with the guidelines below is pretty well mandatory (unless there’s a very good reason for not complying).

As such, as you prepare your detailed FY14 budget, please keep this in mind and ensure all of the metrics stack up. Also, see what you can do to get your BEBIT to AUD5M (using the FY14 budget forex rates). Note that I haven’t forgotten about your “special contribution” in March and advised Stuart accordingly. Whilst he genuinely appreciates this, he (and I) would still like you to see what you can do to reach the AUD5M target.

1. Mr Wood acknowledged that the aspiration to achieve results of the kind referred to in this email was “very strong”.
2. Although aware of the HLB process, Mr Wood was not closely involved in it and did not have an immediate recall of reports about the results of the HLB submissions. Mr Crowley noted an internal email sent on 30 April 2013 by Kirsty Wallace, WOR’s Group Financial Controller, to Roisin McIernon (who appears to have been assisting Ms Wallace), in the course of preparing the HLB. Ms Wallace anticipated that the figures would not be acceptable in the following terms:

Would like to get this to Simon [Holt] tomorrow … so that him and Andrew [Wood] can hit the roof about the proposed NPAT and then start some conversations around the actual budget.

1. There was evidently a process of conversations about the HLB in the last two weeks of April 2013, called the “HLB review calls”. Mr Crowley submitted that the effect of the April 2013 HLB review calls was “frankly surprising”, given that the locations had been on notice since the Ojai conference that senior management expected their budget submissions to show revenue growth and tight control on overheads. The submission did not explain the element of surprise, whether by reference to apparent lack of revenue growth or apparent lack of control on overheads or otherwise.
2. On 1 May 2013, a spreadsheet referred to as a “draft FY14 HLB vs FY13 NPAT Tracker” was sent to Messrs Holt and Allen for review. The spreadsheet records:
3. the locations’ HLB “submissions” produced a total FY14 operational EBIT of $884.406 million and NPAT of $272.944 million; and
4. a proposed “adjusted” HLB produced a total FY14 operational EBIT of $980.923 million and NPAT of $342.766 million.
5. The covering email noted, among other things, the following:

NB: The location adjustments of $96.5m have not been agreed with the RMDs and have not been committed to. They are estimates at this stage and “aspirational” adjustments. We’re showing the growth against those numbers so it could be less should the locations not achieve these targets.

1. On this basis, Mr Crowley submitted that Mr Bradie’s input had resulted in an additional $96 million EBIT (980.923 – 884.406 = 96.517) and $70.8 million of NPAT (342.766 – 272.944 = 69.822) being added to the aggregated location budgets, which was an immediate 26% increase in the forecast group NPAT and itself enough to make the difference between “growth on FY2013”, and negative growth on that prior year.
2. The covering email does not indicate the origin of the “adjusted” HLB, but notes that its figures had not been agreed with the relevant RMDs. Based on Mr Lucey’s 1 May 2013 email, it is possible that the “adjusted” HLB is comprised of figures that constitute “Mr Bradie’s input”. However, it is not clear whether those figures were subsequently incorporated into the FY14 budget. Nor do I accept that any of the figures were “accepted by Locations more in acquiescence than endorsement”, as Mr Crowley next submitted, without evidence of that acceptance in any particular case.
3. To take Thailand as an example, its “as submitted” FY14 HLB figure was $4.311 million; the “adjusted” HLB figure is $4.896 million. Subsequently, the 27 May 2013 budget spreadsheet (discussed from [165] below), showed a figure for “FY14 Budget – Draft 2 Post Op Reviews” of $4.707 million and a figure for “FY14 Budget Final” of $4.707 million. On this basis, I do not accept that the “adjusted” HLB figure was added to the Thailand location budget, contrary to Mr Crowley’s submission.
4. Having made the submission that Mr Bradie effectively unilaterally added $70.8 million of NPAT to the FY14 budget, Mr Crowley appeared to retreat from it immediately, saying that he did not contend “of course, that the ‘expectations’ set for the HLB process or the adjustments pressed by Bradie were slavishly applied. Some Locations continued not to show growth forecasts”.
5. Even so, Mr Wood did accept that HLB submissions supplemented by the additional $96 million proposed adjustments became, in effect, the benchmark by which the locations’ detailed budget submissions were measured. He also agreed that senior management expected that there was another $96 million that the locations collectively should be able to achieve, and that expectation was communicated to the locations.
6. Mr Wood also accepted that WOR’s budget process involved “very, very searching” scrutiny of the locations’ draft budgets by more senior management; the locations would be required to justify lower forecasts in a “pretty demanding process”, in which they would be stretched.
7. Mr Crowley submitted that the detailed budget process that started in early May 2013 can therefore be regarded, by the Court, as one that was taken most seriously by the locations, with a conscientious attention to accuracy, from the outset. I did not understand WOR to submit otherwise, except to acknowledge that there was a suspicion within senior management of a tendency to “sandbag”, at least in some locations. The suspected practice of sandbagging involved efforts to lower the expectations of senior management by submitting draft budgets that underestimated a location’s capacity to contribute to NPAT, by either unduly conservative revenue forecasts or excessive costs. Mr Wood described “sandbagging” simply as “putting in a lower budget so they could then exceed it quite readily”.

# March 2013: Ojai conference and the “growth assumption”

1. In March 2013, WOR senior executives participated in “strategy sessions” at Ojai, California (**Ojai conference**). Mr Holt gave a presentation entitled “FY2014 Budget Expectations and Key Next Steps”. The purpose of the presentation was “to gain alignment in relation to the expectations for the preparation and content of the FY2014 Budget”. The slide pack for the presentation included the following statement:

An underlying assumption of the Budget is to grow aggregated revenue while increasing gross margin % and ensuring overhead growth is below EBIT growth.

1. Mr Wood conveyed a similar expectation to CEOC, and directed that it be conveyed back to the business and be reflected through the budget process. He expected that this would have occurred.
2. Also at the CEOC meeting at Ojai, Mr Bradie provided an “operational effectiveness presentation”. The minutes of the meeting included the following:

‘Match Fit’ Location Overhead Benchmarks **WILL BE APPLIED IN FY14 BUDGETS**

* ~16% of professional services revenue in Delivery Locations
* ~21% of professional services revenue in Consulting Locations

(Emphasis in original)

1. Mr Crowley did not adduce evidence that these benchmarks were inappropriate or unjustifiable.
2. Mr Wood’s evidence was that “an expectation or an aspiration to grow” was in WOR’s DNA. The overall group growth “assumption” was to be a “foundation for the thinking underlying” the FY14 budget and for testing any disconnect between that assumption and what locations reported about their expectations on the ground.
3. The “growth assumption” was consistent with WOR’s Vision 2017 strategy, set out above.
4. That said, the Vision 2017 strategy did not remain unquestioned. The meeting record for the ExCo meeting at Ojai records, under the subject “Strategy”:

Questions for ExCo to decide:

…

3. Is Vision 2017 still appropriate? What guidance do we want to give the organisation? ExCo agreed that we don’t want to change our risk profile to chase unrealistic growth expectations. Vision 2017 will be difficult to achieve, but not impossible, and now is not time to change it.

1. One of the slides for the Global Strategy Session presented to the Board at Ojai was titled “Achieving Vision 2017”. The slide showed three year projections based on low, mid and high cases for group EBIT. The “Vision Curve” was between the mid and high case curves. Mr Crowley did not suggest that these projections were unjustified or warranted criticism by reference to what was known to WOR’s officers in March 2013.
2. Further, on 27 June 2013, the Board expressed a “[n]eed to understand the link between our current reality (FY13 forecast and FY 14 budget) and Vision 2017. Would like to see how the budgeting process fits into the strategy planning process and receive updates on how the company is tracking against its strategy and how it is going to achieve Vision 2017”.
3. Mr Crowley noted that the Holt Memo interview notes, discussed later from [400] below and apparently prepared after the November 2013 revised earnings guidance, include opinions to the effect that the investments markets had unrealistic growth expectations for WOR, which had influenced the budget setting process. In particular, Mr Holt’s interview notes for Mr Bradie were as follows:
* Company has changed significantly
* 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
* Less iterative
* Manage to the forecast rather than the budget
1. Mr Crowley did not contend that it was necessarily wrong that the “growth assumption” was conveyed to WOR’s senior executives. Ultimately, the submission was that “blithe forecasts for growth” in any part of FY14 ought reasonably to have required “particularly strong supporting evidence”, having regard to reported market conditions. Further, Mr Crowley submitted that:

Simple assumptions that blue sky would be in line with FY2013 blue sky forecasts could not be justified, given the FY2013 results (20% below internal budget) and the awareness of difficult market conditions likely to endure into FY2014.

1. Self-evidently, these submissions depend for their force on demonstrating that WOR made “blithe forecasts for growth” and “simple assumptions” about blue sky revenue in the FY14 budget. I am not persuaded that WOR’s FY14 budget contained blithe growth forecasts or reflected simple assumptions about blue sky revenue.

# March to May 2013: Bottom-up build and management reviews

1. Mr Crowley described this part of WOR’s FY14 budget process in the following terms:

[B]etween March and May 2013 the Locations, together with the RMDs and CSGs, engaged in a thorough “bottom up” budget process, with conscientious regard to “growth” and overhead reduction directives issued by senior management. The result was that the “detailed budget” compiled in very late May 2013 already incorporated “stretch” targets in respect of both revenue, and costs savings. Those targets were already optimistic, given market conditions.

…

In the Applicant’s submission, the revenue, EBIT and NPAT forecasts reflected in the 27 May 2013 compilation of the budget were the “bottom-up” build and were the reasonable NPAT projection available to WorleyParsons for FY2014 (albeit to be supplemented with an adjustment for forex movements).

1. The **27 May 2013 draft budget** produced a forecast total revenue of $890 million, group EBIT of approximately $438 million and NPAT of approximately $252 million.
2. Mr Crowley submitted that the evidence supported the following findings concerning the 27 May 2013 draft budget:
3. The locations, with the benefit of reviews from the regions, and the side-checks from the CSG line, essentially got the FY14 forecast right by 27 May 2013.
4. The revenue projections, including unsecured revenue and especially its blue sky component, reflected targets that were “optimistic – aggressive, if (maybe) achievable”;
5. The revenue, EBIT and NPAT forecasts “were the ‘bottom-up’ build and were the reasonable NPAT projection” for FY14, albeit that the NPAT figure required supplementation with an adjustment for foreign exchange movements.
6. This draft budget was the best evidence available to WOR’s senior management of the company’s anticipated performance.
7. The draft budget was prepared bottom-up by the location, region and CSG representatives who were in a position to know. Such stretching as was responsibly available was already incorporated, and had been tested via the review pressures applied by the region and CSG staff.
8. The forecasts as to gross margin and location overheads ought to have been accepted on the basis of the work done in May 2013.
9. Thus, as expressed in this submission, Mr Crowley’s case does not contend that the 27 May 2013 draft budget was deficient, or that any integer of that draft budget was not justified or otherwise deserved criticism.

## Detailed budget compilation (3 to 27 May 2013)

1. Instructions for the detailed budget process were circulated on 3 May 2013. They required that the “detailed budgets should be in line with the High Level Budget presented, incorporating any changes to the High Level Budget as discussed and agreed during the location reviews during the week beginning 22nd April”. The instructions also directed that:

In line with the Group Strategy the FY14 budget should be prepared considering the following key factors:

* Gross Margin and EBIT Growth Rates vs. FY13 Q3 Forecast
* Delivery and Growth by Customer Sector Group
* Delivery and Growth by Business Lines (Consult/Deliver/Improve/Advisory)
* Global Customers
* Overhead cost control
1. Mr Crowley submitted that the changes “agreed during the locations reviews” were the “adjusted” HLB figures in the 1 May 2013 spreadsheet. However, this submission is seemingly contradicted by the 1 May 2013 covering email which asserts that the adjustments had not been agreed.
2. Mr Crowley’s submissions suggested that WOR’s detailed budget process involved a special degree of rigour. For example, it was suggested that the FY14 budget instructions showed that “the Ojai conference’s emphasis on earnings growth and ‘overhead costs control’ had not relented”, that the RMDs and locations were “acutely conscious” of the expectations on them, that the detailed budget compilation was an “exacting” process and that the combined HLB and detailed budget compilation processes were “gruelling”.
3. On 17 May 2013, Andrew Ryan, the RFD for the ASCH and ANZ regions, who reported to Mr Lucey and two others, sent an email titled “ASCH Budget review themes” to the ASCH location directors in which he stated:

Key points to note and analyse as part of the budget pack include:

1. The detailed budget should be in line with the High Level Budget presented, incorporating any changes to the High Level Budget as discussed and agreed during the location reviews.

2. Phasing. The HOH split should show an accurate trend of the business comparing H1 and H2 with previous years H1 and H2 phasing. Monthly phasing, including overheads, should take into account the impact of 4-5 week periods and local statutory holidays.

3. Growth or reductions in revenue, hours/FTEs, GM and overheads need to be proportionately aligned. If a business is either growing or contracting then overheads need to be adjusted accordingly.

1. “Phasing” refers to timing. **HOH** signifies “Half on half” and refers to comparisons of results between the first half of the financial year, 1 July to 31 December (**H1**) and the second half, 1 January to 30 June (**H2**). Relevantly, an HOH analysis produced a ratio of NPAT earned in H1 and H2. Mr Wood’s unchallenged evidence was that the split varied from year to year, and could vary dramatically, although WOR had a bias towards H2. As Mr Wood explained it, the HOH analysis provided a “sense check”: it might indicate that a budget is unrealistic. In cross-examination, Mr Wood agreed that the phasing in the FY14 budget reflected a very careful consideration of the likely timing of revenue, operating costs and overheads.
2. Mr Wood gave the following evidence in cross-examination about the detailed budget compilation:
3. The locations were expected to stretch even in their first-round detailed budget submissions.
4. The location director would either know (for smaller locations) or consult with the local team (for larger locations) as to their on-ground expectations for the coming year.
5. The whole process is undertaken with consciousness of the expectations from senior management. It is an iterative process “that requires an amount of scrutiny and challenge at every level in the business”.
6. The first-pass budget is formulated by the location director and then reviewed by the relevant RMD and RFD. Senior counsel for Mr Crowley, Mr Armstrong QC, asked Mr Wood whether the RMD and RFD would “likewise be pushing the location director (and location finance director) to revisit the first-pass and stretch the targets a bit more”. Mr Wood’s answer was “[t]hey would look to understand it, yes”.
7. The regional people required the location level people to justify any numbers about which the regional people were not satisfied and the effect of this might be to increase a given number or to reduce a given number.
8. Senior management was “well aware that some people were quite competent at sandbagging”. There were also people who were too optimistic in their expectations.
9. The May 2013 process also involved side checks from the business development leads within the CSGs. Mr Wood said that the HLB process had produced location-based estimates significantly different from the “common view” of the RMDs and CSG managing directors (probably reached at Ojai) as to what level of growth could be achieved. The CSG role in the detailed budget process was therefore to look at the revenue generating expectations of locations where they did not match with the CSG’s expectations and what their customers were telling them “to see where the gaps are”.
10. The CSG reviews were again expected to be “pretty exacting”, albeit from a different perspective.
11. The locations were “getting it pretty right” in terms of their revenue expectations. Mr Wood commented that “[t]he revenue picture” hardly changed from the start to the end of the budget process. Mr Wood also gave the following evidence:

Mr Armstrong QC: And the locations, having got it right with the revenue projections, so we can put that whole question of customer expectations of capex and opex to one side, because the locations have taken that into account in their numbers?

Mr Wood: Yes, and blue sky – all those things, are all mashed together to come up with a pretty reasonable estimate of revenue, we believed, at the time.

1. After the locations’ submissions had been through the regional review and the CSG review and been entered into the company’s financial reporting software (**Hyperion**) and collated by WOR’s Global Management Reporting Team, the company then commenced to produce the first cuts of the spreadsheets called **FY14 Budget NPAT trackers**.
2. What then followed, from the end of May and into early June 2013, was a process of calls between Mr Bradie and the different location managers.
3. Illustrating the role of the CSGs, on 20 May 2013 Mr Evans wrote to the Hydrocarbons business development leads, critical of the locations’ early forecasts for Hydrocarbons revenue, gross margin and EBIT for FY14. Relevantly, he said:

It is not yet at an acceptable level (i.e. it shows a ***shrinkage*** in a still-growing HC market …)

Please immediately engage with your respective Location Managers, and work closely with EACH OF THEM to achieve alignment on what aggressive, yet still achievable HC budgets should be put forth in each of our Locations.

Notice the HUGE impact that 3 of the Locations has on forecast EBIT in FY14. Please prioritize your engagement, hunting first where the most ducks are to be found…..

There is much hard work still left to be done on this. Low-balling is not allowed. This is a very serious activity.

I am available to assist, and motivate as-needed. I plan to work with the RMDs as they also review this information across CSGs and across their Locations.

(Emphasis in original)

1. Mr Crowley described Mr Evans stated availability to “motivate” as ominous, and suggestive of sanctions for noncompliance. However, Mr Wood’s evidence was that the recipients of this email did not set budgets.
2. On 22 May 2013, Mr Evans forwarded his 20 May 2013 email to his superior, Mr Ross, and added the following comment:

We are attacking this issue. It is not at a feasible or defensible forecast, based on our HC market view. There is some sand-bagging going on, potentially driven by motivation as I mentioned to you yesterday. Who knows.

1. Minutes of an ExCo meeting the previous day, 21 May 2013, record the following concerning the budget process:

7.0 Operational effectiveness update

Stuart advised that progress with implementation of the operational effectiveness measures is continuing. ExCo discussed:

…

* We need to have greater transparency in the numbers so we can understand why gross margin has increased while EBIT has decreased. We are telling the market that margins will recover, but we would like to see something which says we can achieve this.

…

8.0 Budget process

Simon advised that the budget process was on track. ExCo discussed early indications from first reviews of locations.

The message for functional groups is that the overall business is not growing so functional group budgets should be flat if not less. Furthermore, we are looking for opportunities to simplify the business and should remove overhead where possible. Our global groups are larger than they need to be.

All ExCo members have the responsibility to create 2014 budgets for their current areas of responsibility.

1. Mr Crowley submitted that, in the light of the earlier HLB process and the rigour of the detailed budget compilation process, any suggestion from WOR that there was still “sandbagging” reflected in the draft budget numbers, or “fat” in the overheads, is simply improbable. Mr Crowley submitted that:

The budget estimates by the end of May 2013 can and should be regarded as the best estimates available, prepared conscientiously by the people – both at location and CSG level – who “are there on the ground, dealing most directly with the customers and the projects that are the ultimate source of the revenue for the organisation”.

1. I do not accept this submission. As noted above, Mr Wood agreed that the revenue projections were “pretty right”. However, WOR senior management evidently did not accept the projected costs. Mr Crowley did not propose a standard or facts by which the Court could assess the reasonableness of the estimates that had been submitted to this point, or even a sample of significant figures. In particular, Mr Crowley’s submission seems to overlook Global Functions costs. Further, as set out below, the budget estimates as at the end of May 2013 apparently indicated flat or declining revenue and rising overheads. Mr Crowley did not explain why WOR was required to budget in FY14 for rising overheads while projecting flat or declining revenue, if that was his position. Without more evidence, I am not satisfied on the balance of probabilities that the projected FY14 costs as at end May 2013 were the “best estimates available”, even assuming that they were prepared conscientiously.
2. Mr Crowley submitted that there was a “blinkered insistence that Locations must be setting soft targets” which seemed to “underpin the constant pushing from senior management for better numbers (whether as gross margin or as operational EBIT) even after the numerous reviews that precede delivery of the first-round detailed budget compilations towards the end of May 2013”. Mr Crowley submitted that the Court can infer there was a high degree of confidence from locations, and regions, in the budget submissions making up the 27 May 2013 compilation because they had held those numbers “despite the pressure to date from senior management”.
3. These submissions are overblown. I am not persuaded that I should draw conclusions about the quality of the estimates prepared by the locations without more evidence and more analysis. I do not accept that the available evidence warrants adverse findings that one or more of WOR’s senior management was affected by blinkered insistence or constant pushiness, or that senior management imposed inappropriate pressure on the locations or regions in any particular instance or generally.
4. By 27 May 2013, WOR had compiled the 27 May 2013 draft budget, in its first FY14 Budget NPAT Tracker spreadsheet.The aggregate operational EBIT forecast of $887.733 million was only marginally higher than the late April HLB estimate of $884.156 million. A version of the FY14 Budget NPAT Tracker dated 31 May 2013 shows, as noted above, that the 27 May 2013 draft budget produced a forecast NPAT of $251.988 million.
5. Thus, as Mr Crowley observed, the detailed budget compilation process produced an EBIT (and implied NPAT) estimate very close to the pre-adjustment HLB figures.

## 27 May 2013 draft budget

1. Mr Crowley contended that the 27 May 2013 draft budget was “ambitious and tested”. He also submitted that the evidence favours a conclusion that the 27 May 2013 location budgets “had taken up all reasonable ‘stretch’ in their earnings targets (covering revenue and operating costs)”.
2. On the subject of blue sky budget revenue, Mr Wood agreed that the location level people and the regional level people were best placed to anticipate blue sky for individual markets. However, when asked whether they were best placed to determine their overheads, Mr Wood gave the following evidence:

Mr Armstrong QC: And likewise they are the best informed to identify what their operating costs are likely to be and therefore gross margin and the overheads that they need in order to do the work?

Mr Wood: They – they are but I would temper that with they would look to continue to invest in the business, which is the short-term investment in overheads for particular activities. There is – should – should we decide that the overall business was not in a position to support that level of overhead, they are also aware of where they can take overhead out of their business for the short-term. And that’s the challenge that will be placed to them. So as much as they know what is the base level of overhead they need, that’s absolutely – that’s quite clear. But there is – the opportunity always to challenge and see what can they do to help reduce the overall overhead burden of the company by either deferring or not carrying out, or not exploring some areas of expense, which is what you do in pretty much every business in every home.

1. Mr Wood did not accept that the locations were optimistic about the levels of blue sky they expected to achieve in 2014, saying:

I don’t accept that because, as I said, each individual location will look to what is achievable in their location. And overall, when we look at the percentage of blue sky in the overall scheme, it is no different to what we’ve seen in previous years.

1. Mr Crowley sought to contrast this evidence with the evidence of Mr Ashton that “blue sky reflects the opportunity to generate revenues, which is a function of market buoyancy”.
2. Mr Wood conceded that that the blue sky percentage gross margin figures for the Australia South and Australia North locations for the FY14 budget were optimistic. For Australia South, the 27 May 2013 draft budget included a 12% increase of blue sky revenue as a percentage of gross margin over the FY13 budget. For Australia North, the 27 May 2013 draft budget included a 10% increase of blue sky revenue as a percentage of gross margin over the FY13 budget.
3. In the FY14 budget reporting pack for Australia North dated 27 May 2013, the Executive Summary notes that the FY14 budget gross margin “is 53% from secured work, 18% from prospects and proposals and 29% from Blue sky”. It includes as a risk:
* The high % of unsecured work coming from blue sky is a risk in the current trading environment
1. Mr Crowley also noted that, in the Australia West and the United Kingdom locations, blue sky revenue increased significantly during the budget compilation process. In the case of Australia West, it increased from 16% to 26% of gross margin (having been 25% of gross margin in the FY13 budget). In the United Kingdom, blue sky budgeted revenue increased from 26% to 28% of gross margin (having been 22% of gross margin in the FY13 budget).
2. Mr Wood agreed that these two examples showed that the locations were doing exactly what was asked of them, that is, stretching to identify aggressive yet achievable budget targets.
3. In the FY14 budget reporting pack for the SWO location of the USAC region dated 16 May 2013, the Executive Summary notes as a risk:
* Blue Sky accounts for ~29% of unsecured Gross Margin total ($17.9M of $62.4M)
1. Mr Wood agreed that he would have expected the RMDs to be looking at overhead estimates through a wider lens than the individual locations during the detailed budget compilation but insisted that there was another step in the budget process yet to be done, implicitly, to reduce budgeted costs. According to Mr Wood, following quite substantial growth in 2011 and 2012, WOR had set up a strategy with an expectation of further growth which required moderation in the FY14 budget. As he put it:

We expected to grow from the 40,000 people we were up to nearly 60,000 people. And so to some degree, we had been pre investing at a corporate level and at an individual location level to achieve that end. What we were then faced with was rather than growing, we were faced with a situation where our markets, some of our markets were falling and our primary market was flat. So that expectation of growth and the building up of overhead associated with that growth needed to be redressed. So within the location budgets, following that trajectory, they diligently had continued the path of what the overall strategy had said. When we saw in the revenue side of it and the gross margin side of it that that was no longer supported, we then had to go and address the overhead question. So it’s not a question of the locations got it wrong. Or they got it right. It was a change in circumstance. We needed to address it and the way we addressed it, as you see in later documents is that we brought them back together and said no, the picture is not looking the same as what we first thought, what can you do? What can you do to reduce the level of overheads? Remembering we have got – at this point, we have $1.5 billion worth of overhead in our business. In location overhead and corporate overhead, $1.5 billion worth of overhead. And we were looking to make a relatively small adjustment to that 1.5 billion to reflect the current market conditions, which meant we might have to put some things on hold for a year or two while the market went through what we thought was a flattening, as we found out later was not, it was actually a plummet which we had to deal with.

1. Mr Wood’s references to an estimated total overhead of about $1.5 billion correspond with figures in the 14 June 2013 FY14 Budget Tracker referred to below. In that document, the $1.5 billion comprised about $405 million of Global Functions costs and $1.1 billion of location overhead.
2. Mr Armstrong QC suggested to Mr Wood that all of those considerations had been drawn to the attention both of the regions and the locations at the time of the Ojai conference. Mr Wood disagreed, saying:

Mr Wood: No, no, sorry, that’s not correct. Because no one knew until this point as to what that number was. Now, as you know, as we said before, the expectations that, and the guidelines that were given were that we were going to see growth because we had had our strategy session, we thought we could achieve growth. So the instructions had been given to the locations to say here we go, we are following on from our strategy, the locations will grow, other margins will grow and in that process hopefully we will get some leverage by not growing your overheads as fast as your margins. The information that came back and consolidated properly for the first time, for the first time at the beginning of June, was that no, there is no growth here. There is no growth. Earnings are basically flat. The only growth that’s coming in revenue terms is coming because we bought some companies during the preceding year. Therefore, we now need to look at those assumptions.

1. The 27 May 2013 draft budget was “tested”, albeit not yet tested by either Mr Wood or the Board. On Mr Wood’s evidence, this draft budget generally reflected the locations’ efforts to identify “aggressive yet achievable budget targets”. 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.

# June 2013 management adjustments

1. Mr Crowley submitted that the effect of the stretch targets for gross margin in the 27 May 2013 draft budget, plus the subsequent management adjustments in June 2013 was to strip any P50 character from the FY14 budget. At a high level of generality, I accept that if every element of a budget is optimistic, then that budget would not meet the description of a P50 budget as it was explained. However, the evidence did not identify how the P50 standard was applied in the FY14 budget process. For example, the FY14 budget instructions do not refer to P50. Nor was there evidence directed to the steps that might have be taken, or not taken, to create a P50 budget. In the Holt Memorandum, Mr Holt concluded that WOR’s budgets had not genuinely been P50 budgets (see [402] below). On this basis of the conclusion of WOR’s CFO, I find that the FY14 budget was not a P50 budget. However, the evidence did not provide a sufficient basis for a conclusion that the FY14 budget was not a P50 budget by reason of the management adjustments. Nor does the evidence point to any reduction that ought to have been made to WOR’s forecast NPAT because it was not a P50 budget.

## “First round” adjustments (29 to 31 May 2013)

1. Between 29 and 31 May 2013, Mr Bradie conducted a round of calls to discuss the detailed location budgets with each region. Mr Crowley noted documents from which the following appear:
2. On 29 May 2013, Mr Daly reported to Messrs Holt and Allen in an email headed “FY14 Budget v FY13 Q3F” that, after the day’s calls, $22 million had been added to the $887 million “base”, being the aggregate operational EBIT forecast in the 27 May 2013 draft budget. Mr Daly estimated that they would “end up around $915-920m at operational EBIT level”. Mr Daly noted that the main additions related to overhead savings. Consistent with Mr Wood’s evidence referred to above, Mr Daly said “there was not much top line growth to be had having reviewed the figures in some detail”. Mr Daly also said:

$11m of the $22m relates to ANZ – of this, $6m relates to AUW including provisions in respect of onerous leases in their FY14 figures when the expectation is that these will not be expensed in FY13.

1. On 31 May 2013, Mr Daly reported by email to Messrs Holt and Allen that, after completing the round of calls, they had “ended up with a draft figure of $922m – …there is usually a bit of slippage so we will probably get to approx $920m”. Mr Daly included the following analysis:

For ease of understanding, I have grouped the locations by region and this clearly highlights the problem areas both in FY14 and FY13. For FY14, secured work is approx 53% which is about right and Blue Sky is approx 19% which is also ok. However, 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).

1. An iteration of the FY14 Budget NPAT Tracker (**first 31 May 2013 FY14 Budget NPAT Tracker**), attached to Mr Daly’s email, included a column headed “Adjustments per Stuart’s Review”, which totalled $34.9 million. There are figures in this column against 26 of the 43 locations. A column headed “Status” appears to give brief explanations for each figure. For example, for Australia West, there is an “adjustment” of $8 million for which the brief explanation is “Lease cost write back as assumed reserved [sic – reversed] in FY13 (6m). Overhead reductions (2m)”. It is probable that the notations in the “Status” column reflect instructions to or agreements by the RMDs to revisit their budget submissions having regard to the issues summarised in the notations.
2. The first 31 May 2013 FY14 Budget NPAT Tracker includes a column headed “FY14 GM Split by Confidence” and sub-columns headed respectively “Secured”, “Proposal”, “Prospect” and “Blue Sky”. For each location, there is a percentage figure for each column, with a total figure of 19% for “Blue Sky”.
3. Mr Crowley made the following criticisms of the 29 to 31 May 2013 process:
4. Mr Bradie’s object on the first review calls was to increase EBIT rather than sense-check budgets. None of the adjustments involved reductions to location budgets despite various location and CSG reports of difficult market conditions.
5. Only some of the recorded comments in the “Status” column provide a real basis for identifying the substance of where the adjustment was to come from, for example, in the Australia West or India locations. Most identify only a broad area, for example, “general”, “overhead reductions”, “blue sky” or “????”.
6. The existence of a comment with greater specificity, and a corresponding increase in location EBIT, does not establish that the RMD or location agreed with the comment, or reflected it in their budget in the same way. Mr Ashton conceded that if he, as RMD, formed the view that a specific reason provided by senior management did not support an increase, he would seek to take up the “challenge” in a different way. Mr Wood described conversations of this kind as Mr Bradie saying, “I think you should go and look and see what you can find”.
7. WOR pointed out that the individual “Adjustments per Stuart [Bradie]’s Review” were not reflected in the next iteration of the draft budget. Instead, there were adjustments totalling $31.046 million (that is, $3.854 million less) which did not reflect the proposed adjustments, although there is a general correlation at the regional level. Mr Crowley acknowledged this in a table which recorded the following summary figures:

|  |  |  |
| --- | --- | --- |
|  | **31 May 2013 Adjustment****$000** | **Amount Taken Up****$000** |
| ASCH |  $1,500 |  $1,692 |
| ANZ | $11,000 |  $9,736 |
| CAN |  $5,750 |  $5,480 |
| EUR |  $5,000 | $4,452 |
| LAM |  $1,500 |  $1,439 |
| MENAI |  $4,900 |  $4,910 |
| SSA |  $4,000 |  $2,167 |
| USAC |  $1,250 |  $1,170 |
| **TOTAL** | **$34,900** | **$31,046** |

1. WOR noted that the adjustments made in respect of locations where management had requested an adjustment totalled $29.750 million, the argument being that a further $1.296 million could not, on any view, be characterised as a top-down adjustment.
2. Ultimately, Mr Crowley submitted that Mr Bradie’s review calls might have identified adjustments for specific locations but the regions were left to find the adjustments across all locations within their purview, as revealed by Mr Ashton’s evidence set out above. That general submission is probably generally correct.
3. Also on 31 May 2013, Mr Evans submitted a revised budget to Mr Ross, apparently for the Hydrocarbons CSG. In response, Mr Ross asked some questions including names of people “who will potentially be released from the company”. Mr Evans replied with irritation, including the following complaint:

We have already used the old “add more to people’s day jobs” twice, to get to the self-mutilated point where we are today. You must be joking to ask for us to take even more tasks on for those who would remain.

No RMD has been part of this discussion yet. The history tells us that they have ALL already approved our plan as presented, for every HC person in their Locations, by name, so I imagine these cuts will not be readily accepted. I think that is where you and Stuart have the chat, I.e. who makes the cuts, since yours was a mandate to us. Hard to have it both ways, I think.

You have crossed the line of sensibility, sir, but we have done exactly as you requested. We were shocked yesterday, after having worked carefully from the bottom up.

1. Mr Ross replied to Mr Evans, asking him not to “over-react” and saying, among other things:

The bottom line is that we need to reduce our corporate overhead. If our earnings are not growing then we will have to reduce the overhead – which is less than keeping it the same!

I am acutely aware that the development group is focused on keeping the offices full and winning new work but I can’t challenge the other groups unless we have our house in order. The message will be that we can’t exceed the FY13 spend – hence my request to you.

…

Let’s talk some more next week when you are less emotional about it – unfortunately our business needs to change to be competitive for the future.

1. This email is consistent with Mr Wood’s evidence, set out above, to the effect that a significant issue confronting WOR in late May 2013 was that projected overheads were too high, and reflected an expectation of growth in the workforce of the business that was no longer appropriate.
2. WOR noted that Mr Evans’ complaint did not relate to the alleged management adjustments, because the Hydrocarbons CSG budget did not contribute to operational EBIT.

## 31 May 2013 budget and acquisition stretch

1. On 31 May 2013, Frank Calderone, who appears to have worked in Mr Holt’s team, sent an email to Mr Holt, stating, relevantly:

FY14 Budget NPAT is $288.6m, $49.9m below FY13 Q3F.

Please note that the CSG and Location reviews were held this week and the RMD’s have signed up to an additional $34.9 of Operational EBIT. Locations are currently working through these changes and are expected to have completed their updates by Monday. It is worth noting that locations have come in lower to the target set in the past.

With the Global Functions, reviews are still ongoing. Current estimates from Darren suggests that there are $4.5m of Overhead cuts that his team are working on and updating, however, even with these additional adjustments, Global Functions are still $38.8m above FY13 Q3F.

If Global Functions were held at Q3F levels, NPAT would be ~$316m.

1. Mr Calderone’s email attached a second 31 May 2013 FY14 Budget NPAT Tracker.WOR did not dispute Mr Crowley’s contention that the tracker was based on revenue of $7.466 billion, which was a 3% decline on the FY13 Q3F forecast revenue. The forecast revenue for each location varied against location FY13 Q3F forecast revenue from an increase of 138% for Iraq to a reduction of 40% for Holland.
2. The second 31 May 2013 FY14 Budget NPAT Tracker includes an amount of $12 million for “Acquisition stretch/Group Adjustment”.
3. A figure of about $12 million EBIT had been included in the FY13 budget which (according to an email sent to Mr Ross on 7 June 2013) Mr Allen understood to have been an amount that WOR expected to make on the sale of contracts to “TWPS”. Mr Ross replied, saying that this amount was a fraction of a larger amount, added to the FY13 budget having regard to timing of the completion of the relevant contracts. Mr Ross suggested that $10 to $15 million would be a “fair ask bearing in mind that we have nothing real in the pipeline right now”. Mr Ross proposed a discussion on the topic with CEOC.
4. Later, the **FY14 Group Budget Board pack** dated 7 August 2013 noted, under the heading “Operational Analysis”:
* An additional $12m has been included as group blue sky for acquisitions and -$16.1 as an operational contingency.
1. Mr Crowley submitted that where “there was ‘nothing real in the pipeline’ it ought never to have been retained in the final budget”. I do not accept that submission without further evidence. Board minutes show that WOR’s Board routinely considered prospective mergers or acquisitions in 2013. ExCo also often discussed prospective mergers or acquisitions. Mr Crowley did not identify any standard by reference to which it was inappropriate to include that figure in the FY14 budget. There was no evidence of any decision not to do any activity that might otherwise have led to an acquisition during FY14.

## 31 May 2013 to 10 June 2013

1. Mr Wood received the second 31 May 2013 FY14 Budget NPAT Tracker on 31 May 2013.
2. Mr Wood gave the following evidence of his state of mind after he received the second draft 31 May 2013 FY14 Budget NPAT Tracker:

My initial reaction was, to the effect that, the draft budget was unacceptable and unrealistic as it sought to justify a decrease in operational … EBIT of 1% with an increase in functional costs of 17%. Such an approach was not atypical for “first pass budgets” as locations attempted to set easily achievable earnings targets with a maximum amount of available cost.

My other observations included:

(a) the additional $22m variance of corporate costs was effectively comprised of staff incentive payments. This would have to change in the final version as we were forecasting very little incentive payments being paid in FY13 and, going into a new year budget, we always budgeted a good percentage of incentives being paid; and

(b) despite the direction conveyed in the Ojai strategy sessions and subsequent management meetings that overheads should not be growing any faster than revenue as a percentage, the opposite was occurring in this draft budget. If total global functional costs were held and operational overheads were held at FY13 levels, even with a shrinking revenue, the NPAT would have improved.

1. Mr Crowley did not dispute the facts stated by Mr Wood in this evidence. In cross-examination, there was the following exchange:

Mr Armstrong QC: And that is the – those are two of the critical numbers leading to the conclusion that you describe at paragraph 90 of your affidavit, that you did not consider that this budget result was an acceptable forecast for the business and something needed to change?

Mr Wood: That’s correct. If your revenue is flat or down, your overhead – you can’t spend more; it’s just a normal budgeting.

1. Earlier, Mr Wood had made the following similar observation:

[T]he normal – the normal process, having been an RMD and been through this budget process, would be that there will be a conversation that says: look, I think given your expectations, your revenue is not growing, your overheads are, that’s not an acceptable outcome. Just like in any household, if your revenue is going down, you’ve lost income then you’re not going on holiday… I think you should go and look and see what you can find.

1. Expressed at this high level of generality, Mr Wood’s observations sounded eminently sensible. An examination of the detail might have demonstrated that they were not germane to WOR’s circumstances in late May or early June 2013, but Mr Crowley’s case did not raise any serious question about this aspect of Mr Wood’s evidence.
2. Mr Wood expressed his views to ExCo at a meeting on 3 June 2013. The minutes of that meeting recorded the following concerning the budget process:

8.0 Budget process

Simon provided a summary of the first-pass of the FY 14 budget. Global costs were up and operations income was flat.

It was agreed that we need to challenge the budget on both revenue and costs.

ExCo recognised that a lot of our people would receive no incentives this year and that we need to ensure that we find ways to look after our good people and make them feel special.

1. In an email from Mr Bradie to Mr Wood sent on 31 May 2013, Mr Bradie told Mr Wood that he was “pushing the guys hard” in the Australian North location. Mr Bradie forwarded Mr Wood an email from David Baughen which protested, relevantly:

We have gone through all possible additional routes to push the budget higher and we are convinced that in this falling market with on just over 50% secured and a drastic restructure of the business as it halves its headcount from the peak in FY13 the figures below resulting in a BEBIT for NOPs ( Excluding Evans and Peck) of $43.9m would be an outstanding result for NOPs . The overhead to prof services ratio would support this.

**We strongly advocate no change**

**…**

As an observation the corporate and Global folk based in Brisbane has grown from 19 to 44 in just over a year. I do hope that trend is not happening everywhere and that across the Company we are addressing these costs.

(Emphasis in original)

1. In cross-examination, Mr Armstrong QC suggested to Mr Wood that Mr Bradie thereafter was “pushing the locations hard to achieve not just increased BEBIT but also additional cuts to overheads as a percentage of professional services revenue”. Mr Wood acknowledged that Mr Bradie was “working those issues with the locations”.
2. Mr Wood agreed that, after the 3 June 2013 ExCo meeting, Mr Bradie would have communicated to the RMDs the ExCo expectation that there would be additional savings found in respect of overheads.
3. On 10 June 2013, Mr Bradie wrote to the RMDs in the following terms under the subject heading “suggested budget email”:

[H]aving reviewed the current version of the FY14 operational budgets, after all adjustments have been processed, it is clear that the overall numbers do not hang together.

When compared to FY13, professional services revenue is declining by 2%, gross margin is flat, and overheads are increasing by 3%, producing a year on year decrease in BEBIT of 25mn. These numbers are likely to weaken further as we finalise numbers for Canada and Norway by a further circa 10mn. With that in mind, we need to target improvements in our BEBIT, primarily through overhead reductions but also through GM improvement in some locations.

You will each receive a separate email from Michael [Daly] that initially targets specific locations where the metrics don’t hang together. As we address these I would like you to think about how you would approach either increasing revenue/GM or reducing overhead to achieve a balanced budget.

We ask that the changes are processed in the budget figures by Thursday of this week.

Rest assured there is a lot of focus on the global costs in parallel.

1. On 11 June 2013, Mr Allen made the following comments to Ms Wallace, following a conversation with Mr Daly:

Our guess is that Stu Stu [i.e. Mr Bradie] got a rocket from Andrew 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.

1. There is no evidence that Mr Allen conveyed the concerns expressed in this email to Mr Wood, Mr Holt (his supervisor) or anyone else in ExCo or CEOC. Mr Allen, who remained an employee of WOR at the time of the trial, was not called to give evidence. Even though there is no evidence that Mr Allen raised his concerns for debate with anyone apart from Ms Wallace, it is reasonable to assume that Mr Allen genuinely held the concerns expressed in his email. Mr Crowley submitted that the Court should infer that he had a basis for his concerns. I am prepared to draw that inference, although I am not able to make a finding (and Mr Crowley did not propose a finding) about what constituted Mr Allen’s basis for his concerns.
2. According to Mr Crowley, Mr Wood’s contention was that the challenge he set for the business from this point was an attack on overheads structures that had evolved in a more forgiving revenue environment. That is also how I understood Mr Wood’s evidence, which included the following:

Mr Wood: As I said, you’ve got businesses that have set previous budgets and previous expectations based upon this goal of achieving growth and with an ingrained level of overhead and expenditure both at a corporate level and individual locations. When you’ve got – when we finally – and within those few weeks – we’re talking – we haven’t gone out to every location and said, “By the way, the situation has changed. The corporate strategy has to be remodelled for the environment we’re in”. We haven’t done that. That’s the next conversation, once we’ve got these budgets. So we’ve ended up with – quite frankly – you’ve ended up with a position where we’ve got revenue, we’ve got what our gross margin is. Now we need to look at what do we do with this one and a half billion dollars’ worth of overhead that has been growing quite substantially over the last few years under that premise that the business is growing. That’s the next step in the process.

1. Mr Crowley contended that the following evidence did not support Mr Wood’s narrative:
2. The ExCo minutes and Mr Bradie’s 10 June 2013 email above both refer to challenging the budget on revenue as well as costs.
3. It was only in late June, as recorded in ExCo’s 21 June 2013 minutes, that ExCo agreed “we should accept the work done to date on revenue and gross margin available from the market and do what we can to reduce our costs – $1.5 billion overhead”.
4. As noted above, Mr Wood agreed that Mr Bradie was working on increased BEBIT as well as cuts to overheads as a percentage of professional services revenue, that Mr Bradie considered that he was “pushing the guys hard” and that the Australia North location was arguing strongly against further costs reductions.
5. The following evidence that the locations and regions had not built their budgets with an expectation of overhead spend that was out of step with reality:
	1. the Ojai conference CEOC meeting had set the location overhead benchmarks identified above. In cross-examination, Mr Wood agreed that those targets were set at Ojai;
	2. the location HLBs were challenged against the relevant metrics in April 2013, as appears from Mr Daly’s 16 April 2013 email referred to above and, as Mr Wood acknowledged, the HLB submissions supplemented by the additional $96 million proposed adjustments became, in effect, the benchmark by which the locations’ detailed budget submissions were measured.
6. Mr Crowley submitted that “unless the Court assumes that the Locations were just ‘trying it on’ in the face of all the warnings and challenged from senior management, the inference must be that the Locations had already stress-tested and stretched their estimates *both* as to revenue *and* costs – including overheads – before submitting their final detailed budgets in late May”.
7. The proposed inference requires a uniform conclusion to be drawn in relation to the conduct of the locations. But there were 43 locations and no detailed analysis of the development of any single draft location budget. Further, the proposition that the locations had “stress-tested and stretched” the estimates that were included in the 27 May 2013 draft budget does not prove that subsequent changes to the budget were unreasonable or inappropriate. By way of analogy, solicitors and junior counsel may conscientiously develop a set of arguments; those arguments may still be refined and improved by senior counsel. Mr Crowley’s argument also ignores the elements of the budget that were not attributable to the locations. Accordingly, I do not accept that the evidence justifies the proposed inference.
8. Mr Crowley also observed that the impending “second round of management adjustments” were “something like the eighthround of ‘challenge’ that had been applied to Locations”. Mr Crowley’s eight challenges were:
9. the Ojai growth expectations;
10. whatever internal reviews led to the locations unadjusted HLB submissions;
11. the review calls leading to the adjusted HLB submissions;
12. the locations’ internal reviews for the first-pass detailed budgets;
13. the regional reviews for the detailed budgets;
14. the CSG side-checks;
15. the review calls on about 28 May 2013; and
16. the requirement for further reviews to accommodate the presumed “rocket” that Mr Wood conveyed to (and via) Mr Bradie.
17. Mr Crowley submitted:

It is not surprising, therefore, that Locations first pushed back against the second-round challenges, then “met” them (in the sense of finding ways to pump up the numbers in their budgets) to a lesser extent than the first round, and ultimately reported during the Holt inquiry the sense of resignation and frustration that echoes through the Holt interview notes.

1. Whether that submission should be accepted depends on whether it is accurate to conclude that the “second round” adjustments to the FY14 budget were the product of “finding ways to pump up the numbers” and, by inference, unable to be justified. As recorded below, I was not persuaded to reach that conclusion about the “second round” adjustments.

## “Second round” adjustments (11 to 17 June 2013)

1. As foreshadowed by Mr Bradie, on 11 and 12 June 2013, Mr Daly sent emails to the RMDs, requesting amendments to the draft budgets. The emails followed a similar format. They attached a summary of the relevant region’s budget numbers, analysed as follows:
* Comparison of year on year change in revenue, GM, overheads, BEBIT – in absolute and % terms
* Comparison of year on year change in GM, overheads, BEBIT – in $ per hour terms;
* Overheads as a % of professional services revenue
1. Taking MENAI as an example, the email then stated:

Based on the review, we would request that the figures are amended in the system by Thursday at the latest as noted in the file and as summarised below:-



I do appreciate how difficult it is to find the additional BEBIT but as Stuart [Bradie] notes below, the targets are specific based on the review of the metrics.

1. Also on 12 June 2013, Mr Evans wrote to his team as follows:

Stuart Bradie sent out a requirement today … to the 8 RMDs to add > AUD25MM more to EBIT for FY14. Please engage with the RMDs TODAY to develop a plan on how to achieve the new target. This would result in a (barely) up YOY target.

1. Mr Crowley criticised this aspect of WOR’s process because the proposed adjustments were identified “arithmetically” and “did not stem from any normative feedback during a review call process”. The import of this criticism was that the proposed adjustments were arbitrary. However, Mr Crowley did not adduce evidence that WOR’s benchmarks were inappropriate or unjustifiable. It is not self-evident that there was anything unreasonable in the requests for review and adjustment by reference to metrics.
2. The proposed “second round” adjustments totalled $20.7 million and related to 21 of the 43 locations. In one table, the identified reasons for the proposed adjustments were, in many cases, “drop in GM/hour” and “drop in GM versus revenue”. This was the case in all eight of the affected locations within the ASCH and MENAI regions although, in four of those cases, an additional notation was “overheads increase”.
3. Mr Crowley noted the following negative reactions to the proposed “second round” adjustments:
4. Brian Faulkner (RMD for CAN) replied to Mr Daly:

I would like to discuss this with you. Was there any dialogue with Calgary regarding the “metrics”? Their budget numbers were developed bottom up including things like project mix, growth in Improve, HVE, etc, which were what drove the margin reduction. The Location management was already “stressed” by the last “push”, so adding another $3M without understanding the basis will be really hard to swallow. Also, since the last round of review, they’ve had the Statoil Liesmer project delayed by 4 months (should have already started). That puts them in a hole right out of the blocks.

1. From Brenda Connell (Vice President CFO for MENAI) to Haroon Ahmed in relation to MENAI:

Have you seen this email? I expect these changes will be difficult to make in MENAI. Have you spoken with Chris [Ashton] yet on the request?

1. From Mr Ahmed to Ms Connell:

I have not received anything from Chris [Ashton] yet… We are already stretched and this will be difficult.

1. Mark Trueman (RMD for LAM) replied to Mr Daly:

We cannot give up another 2m without major impact to GM for all the reasons previously stated.

The metric that matters to me is that we are holding BEBIT at this years level despite cancelling 40% of next years GM 6 months before the start of the year.

I will be in touch with Stuart [Bradie] shortly.

1. WOR noted that, in relation to Mr Faulkner’s objection to the proposed $3 million adjustment, no adjustment was made to gross margin and overheads were reduced by $751,000.
2. In relation to the concerns expressed by Ms Connell and Mr Ahmed in relation to MENAI, Mr Ashton gave evidence about how the MENAI region ultimately responded to the request, which was to increase operational EBIT by $4.25 million. Mr Ashton gave the following evidence:

I retained the total $4.25m adjustment sought from Mr Daly, but moved some of the adjustments from Oman to Qatar/UAE (against a requested A$1m), $0.6m for Oman (against a requested $1.25m), $1.25m for Kuwait, and $1.15m for Qatar (against a requested $0.75m). On or around 12 June 2013, I emailed Mr Daly with the adjustments for MENAI. … I changed the requested adjustments to the MENAI location budgets to reflect my understanding at the time of the local markets and my understanding of the scope within the respective location budgets to delivered improved BEBIT.

I discussed the requests with my Location Directors for the purpose of gaining alignment on the proposed adjustments. These discussions were similar to the discussions described in paragraph 81. I considered that these overhead reductions were achievable, particularly as costs are within my discretion and control, and such costs could be cut without affecting the businesses’ ability to generate revenue. The first areas of discretionary spending where I could cut costs in what I refer to as “soft overheads”, which includes costs relevant to travel, training and other discretionary spending.

1. As appears from the table below, LAM did not “give up another 2m” as requested but increased its operational EBIT by $513,000.
2. On 16 June 2013, Ms Wallace sent Messrs Holt and Allen the following message:

Draft budget following changes in locations as requested by Stuart [Bradie]. Functions have also made some adjustments and we’re sitting at **$297m NPAT**.

We’re taking this as the CEOC meeting number and we’ll continue working on the various pieces of analysis needed for the meetings.

(Emphasis in original)

1. As Mr Crowley submitted, the 14 June 2013 FY14 Budget Tracker shows:
2. Compared to the “first round”, the locations took up a lesser proportion of the “second round” challenge. Against the proposed “second round” adjustments totalling $20.7 million, the location EBIT projections improved by $14.093 million, as set out in the table below:

|  |  |  |
| --- | --- | --- |
|  | **12 June 2013 Adjustment****$000** | **Amount Taken Up****$000** |
| ASCH | $3,000 | $2,402 |
| ANZ | $4,000 | $4,000 |
| CAN | $(250) | $(2,122) |
| EUR | $1,500 | $(1,291) |
| LAM | $2,000 | $513 |
| MENAI | $4,250 | $4,315 |
| SSA | $3,500 | $3,615 |
| USAC | $2,700 | $2,661 |
| **TOTAL** | **$20,700** | **$14,093** |

(WOR noted that the total adjustments responding directly to the management requests was $15.170 million. The figure was said to be higher than the total adjustments because Norway revised its budget downwards by $5.164 million but had been asked by management to limit its revision to $2 million.)

1. “Total Functions including Corporate” costs were reduced from $412.5 million to $404.991 million but was still substantially higher than the FY13 Q3 forecast figure of $352.664 million.
2. Aggregate revenue (including the acquisition stretch) was projected to be $7.673 billion, $207 million higher than aggregate revenue of $7.466 billion as at 31 May 2013.
3. The total operational EBIT (including the acquisition stretch) was $944.87 million compared to the figure of $874.514 million calculated on the “as submitted” HLB figures. The difference is $70.356 million (or $58.356 million excluding the acquisition stretch).
4. On 17 June 2013, Mr Holt sent Mr Wood the 14 June 2013 FY14 Budget Tracker with the following message:

Andrew [Wood] here is the budget we are preparing papers against. Some work still to go regarding the numbers. Will call in the morning to discuss. FX at current rates is being finalised on Thursday. Current indications are over 50million at the EBIT line. Global functions will be a topic of discussion on Friday, as will be some of the larger locations.

1. Mr Wood gave the following affidavit evidence concerning the 14 June 2013 FY14 Budget Tracker:

I reviewed the June 14 Draft FY14 Budget shortly after receiving it. This draft Budget indicated Total Operational EBIT of $944.9m (0% variance against the FY13 Q3 forecast) and Group EBIT of $507.1 m (9% less than the FY13 03 forecast). The resulting NPAT was $297.0m (12% less than the FY13 Q3 forecast), which was slightly greater than the projected NPAT from the May 31 Draft FY14 of $288.6m at paragraph 88 [of Mr Wood’s affidavit]. The June 14 Draft FY14 Budget did not predict substantial revenue growth, but rather substantial overhead growth of approximately $50m at the global functions level. In my view, this was not reasonable, because, as discussed in paragraph 90 [of Mr Wood’s affidavit], an increase in overheads without at the very least a corresponding increase in revenue demonstrated that locations were pushing too hard for a given expense budget relative to revenue targets.

Further, the operational revenue was forecast to be down by 1%, whereas operational overhead was forecast to grow by 3% as compared to FY13 Q3 forecast. In my view, this picture did not make sense. Typically, if revenue was forecast to decrease, I would expect to see at the very least a corresponding decline in overheads. Because overheads are largely within WorleyParsons’ control, I knew at the time we could make certain changes to these budget submissions. Based on these budget submissions, I knew that overhead management would need to be a focus going into the 21-25 June management meetings.

1. Mr Crowley did not take issue with the figures stated by Mr Wood in this passage.
2. The evidence identified by Mr Crowley does not support a conclusion that the budget changes which improved EBIT projections by $14.093 million were unreasonable or unjustified, or that they involved artificial “ways to pump up the numbers”. Mr Armstrong QC did not put to either Mr Ashton or Mr Lucey that, to the extent that ASCH and MENAI contributed to the $14.093 million improvement, the relevant region did so by “finding ways to pump up the numbers”.

## “Third round” adjustments (CEOC overhead commitments) (21 to 25 June 2013)

1. Between 21 and 25 June 2015, WOR management met in preparation for the joint management and Board meetings on 26 and 27 June 2013. The main purpose of these meetings was to ensure that WOR’s senior leaders understood the overall outlook for the business and that CEOC members were committed to supporting the FY14 budget.
2. The meetings comprised the following:
3. ExCo met on 21 and 22 June 2013 to discuss strategy and planning for the business, including planning the strategic approach for the business in view of the draft budget submissions and preparation for the portions of the meeting where CEOC and ExCo members were together.
4. CEOC met on 24 and 25 June 2013. ExCo attended the first session on each of those days, but left the rest of the CEOC members to discuss, strategise and work together to refine the budget “directions”, which I understood to be expectations and views that might be relevant to the guidance that WOR would give to the market in August 2013.
5. Whilst the other CEOC members were refining the budget directions, ExCo met separately on 24 June to discuss strategy and planning.
6. On 25 June 2013, CEOC and ExCo members met together to conclude the management sessions, ahead of the joint Board and management meetings.
7. Mr Wood’s evidence was that, based on the 14 June 2013 FY14 Budget Tracker, he was aware that he “needed to lead the business to deliver increased earnings in FY14 by getting leaner, rather than getting bigger”. In particular, Mr Wood noted that the 14 June 2013 FY14 Budget Tracker showed an estimated total overhead of about $1.5 billion, comprised of about $405 million of global functions costs and $1.1 billion of location overhead. Mr Wood said (and Mr Crowley did not dispute) that the primary drivers of WOR’s overheads around this time were non-chargeable personnel, office leasing, travel, entertainment, staff training and information technology.
8. The record of the 24 June 2013 CEOC meeting records the following discussion points:

5.0 Group Discussion

CEOC members discussed the comments made. Some points arising from the discussion were as follows:

* all in the room want to do their best for WorleyParsons
* as an organisation we are very good at coming together to solve problems. However, sometimes problems remain in silos. We need to put the problem out there so we can solve it together
* we need to leave our hats at the door on initiatives and costs and work together to solve our budget issues for the benefit of the company
* even though we have our challenges, as leaders we need to absorb the pressure and become cheerleaders for the business
* we need to have a clear understanding of what we are doing to make our projects successful so that we don’t continue to have problems on project delivery
* we have $1.5 billion of overhead to spend on fixing what our customers want
* We have relied too much on luck in delivering successfully to our customers – this is not good enough
* we need to get the budget right this time – 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
* are we set up properly to grow our business with key customers globally? We don’t seem to transfer learning from one project to another and therefore provide cost efficiencies to satisfy our customers
* we need to have a passion to drive costs down – all global companies are focusing on the effectiveness of their supply chain but we are not responding
* we need to reduce the amount of time on internal matters and standardise how we do things
* we are spending in places that don’t matter – we need to be disciplined and only spend where it matters
* we need to agree the areas in which we are not going to spend and stand behind it – we need to make the tough decisions
* we need to stop value leakage by ensuring we have systems to support delivery certainty
* Absolute focus (fascination) with our customers drives a number of things:
* winning work
* executing really well and safely
* keeping focus on commercial outcomes
* simplicity and discipline across the business
* innovation

6.0 Overall Budget Summary

Simon Holt took CEOC through the overall draft budget summary.

He noted that this was an opportunity for CEOC to look at the budget as a group.

Does it feel right? Can we work it to achieve growth?

We want a reasonably challenging budget but want to be able to achieve it and reward our people with bonuses.

We are not looking to dissect each other’s budgets but to look at the overall picture, and in particular, how we spend our overhead. We also need to think about what we are not going to do.

We should also think about how to simplify the budget process for the future.

*ExCo members and Peter Janu left the meeting at 2:00 PM*

7.0 Budget discussion

CEOC reviewed the budget for the rest of the afternoon.

1. Based on this meeting record, CEOC was engaged in a genuine effort to develop a reasonable FY14 budget. The record does not indicate 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.
2. The record of the 25 June 2013 CEOC meeting records the following:

9.0 Further budget discussions

Simon Holt summarised the work done by CEOC the previous day on the budgets and the savings which had been identified so far.

The meeting discussed a number of issues which needed to be resolved including:

* the lack of visibility at a local level of the global functional people supporting locations – listings of global functional people were provided to the meeting so that this issue could be better understood
* locations need to know the global functional support budgets and vice versa – without that we can’t manage the total overhead.
* we need to have an obsession with making global functional people chargeable
* it would be good to drive as many global people as possible into the local budgets
* We need targets of overheads to remove – we can’t just tinker, we need surgery
* we need to make cuts where it makes sense
* we need to only have people employed in valuable activities – we currently employ a lot of people whose primary function is gathering information

…

1. Mr Ashton described the 25 June 2013 budget discussion as follows:

On Tuesday 25 June 2013, the entire CEOC (including ExCo members) met together to discuss the progress of discussions on the prior day, in effect to present the ideas to ExCo members. After the ExCo members left the room, the remaining CEOC members all went around generating ideas of what further overhead reductions could be achieved. Everyone at the meeting circulated around the room, speaking to every other attendee and sharing ideas for overhead reductions relevant to theirs or the other CEOC member’s area of responsibility. We then came back together and had a discussion about specific areas where overhead cuts could be made and each CEOC member made a specific commitment on the basis of these discussions.

After this session, the ExCo members re-joined the meeting. The total overhead reduction target was presented to the ExCo members.

Consistent with my recollection, the minutes of meeting record that:

*“At 2:30PM ExCo members and Peter Janu re-joined the meeting*

Simon Holt summarised the commitments to overhead savings that each CEOC member had made which came to a total of $42 million. It was agreed that out of these savings, CEOC should have a kitty of $10 million to spend, should circumstances arise that require it.”

The total overhead reduction target agreed by CEOC was $42m. At the time, I strongly believed that this was very achievable without affecting profit generation, given that global overheads totalled $1.5b, $42m was therefore less than 3% of total global overheads. For the MENAI region, I committed to reducing overheads by $2m, which was also less than 3% of the FY13 overheads in the MENAI region. At the time I commenced my role as RMD of MENAI I was already aware, or had a strong belief, that I would be able to reduce overheads by implementing changes such as consolidating certain locations (as discussed in paragraph 17 [of Mr Ashton’s affidavit]), or support functions for locations.

As far as I can recall, none of the CEOC members expressed the view that the overhead reductions committed to were not possible or that they would impact adversely upon our ability to generate revenue.

1. Mr Wood’s evidence was also that CEOC members committed to delivering overhead savings of about $42 million.
2. Mr Crowley submitted that “exactly how these further ‘challenges’ would be reflected in location budgets was not decided until after the headline figure – ultimately identified as $43m – had been included in the FY2014 budget and reported to the Board”.
3. As noted below, the FY14 budget incorporated $33 million resulting from CEOC’s commitments.

# Draft FY14 budget presented to Board (26 to 27 June 2013)

1. WOR senior management presented a pack to the Board entitled “FY14 Draft Group Budget 26th June 2013”.
2. The Executive Summary in the Board pack included a page headed “FY14 Budget Expectations” which relevantly recorded the following:

Locations

* An underlying assumption was communicated to the RMD’s on April 16th that there was to be year on year EBIT growth for each Location in line with the market in which it operates.
* Overheads as a % of professional services revenue to fall within the parameters set for the business lines (Deliver Locations 17%; Consulting Locations 24%) and where current levels are below these targets the location will maintain the current level.
* Overhead growth % to be lower than GM growth %.
* EBIT % and Chargeability % to show a year on year improvement.
* Draft and final budgets to be jointly signed off by Location and CSG management.

Global Functions

* Global function costs have been targeted to remain flat or below.
* Initiatives are to be included at 100% for those deemed essential and 25% for non essential initiatives recognising a level of committed spend before the moratorium was announced.
1. On a page headed “FY14 Budget Status”, there is a bullet point which states:
* In addition to the budget submissions, the CEOC have committed to $33m of overhead reductions which is included in the table below. In addition, a further $20m savings will be reviewed before finalising the budget. This is not included in the numbers below.
1. The “headline numbers for FY14” were presented in the following table:



1. Other bullet points on the “FY14 Budget Status” page included:
* Group EBIT half on half analysis needs to be revisited, currently at 36:64
* Estimated FX Impact of translating the FY14 Budget at rates as at 14th June USD: 0.96; CAD: 0.97; GBP 0.61) is a gain of $32m at NPAT.
1. The pack included a page entitled “Analyst Consensus” which compared the forecast NPAT of $352.1 million against average figures calculated from the “11 primary analysts covering WOR”. This showed that the hypothetical average analyst would predict an NPAT of $374.6 million, which was identified as 6% above the $352.1 million budget NPAT. The range of NPAT figures calculated on the basis of analyst estimates was approximately $120.6 million: the low figure was $308.9 million and the high figure was $429.5 million.
2. The “Analyst Consensus” page included the following bullet points:
* The forecast NPAT has a variance to Analyst estimates ranging between $43.2m and -$77.4m.
* Average analyst consensus is $22.5m higher than FY14 budget (Low: UBS $308.9m; High: Credit Suisse $429.5m).
* Bloomberg NPAT consensus at 17th June 2013 was $359.4m.
1. The draft minutes of the Board’s meeting record that, on 26 June 2013, Mr Holt presented the draft FY14 budget to the Board by way of “scene setting”. Mr Ross presented an outline of the group global strategy and each CSG managing director summarised the primary strategies for his CSG. Mr Bradie provided the Board with an overview of the Operations group budgets, and each RMD summarised the FY14 budget for selected locations in his region. The meeting commenced at 8.30 am and concluded at 5 pm.
2. The draft minutes do not disclose details of the Board members’ engagement with the information presented to them. In relation to the Operations group budgets, the minutes record:

Directors discussed aspects of the presentations with the presenters.

1. On 27 June 2013, the meeting commenced at 9.30 am and concluded at 12.30 pm. The draft minutes record, next to the topic “Functional and Development group budgets”:

Each of Simon Holt (Finance), Iain Ross (Development), Brian Adams (Information Management), Randy Karen (Improve), Barry Bloch (People), Kevin Smith (Delivery/Projects), Marian McLean (Delivery Integrity) summarised the budgets for their area of responsibility. These budgets were discussed with directors.

1. Next to the topic “Discussion of budget issues”, the draft minutes record:

Directors discussed a number of budget issues with management. Some of the matters discussed were as follows:

* EcoNomics – how the company is using and developing EcoNomics in the business.
* Locations at risk – processes for reviewing whether the company continues to operate in particular locations.
* Winning work – directors wanted to know more about Jay Ibrahim’s new role and how it improves the company’s focus on winning work.
* Chemicals – discussed the growth this business [sic] and the plan to potentially build it into a stand-alone sector.
* Project execution – focus on execution is pivotal, there is a concern that our red light project list remains long. We need to continue to develop our EPCM capabilities.
* Need to understand the link between our current reality (FY13 forecast and FY 14 budget) and Vision 2017. Would like to see how the budgeting process fits into the strategy planning process and receive updates on how the company is tracking against its strategy and how it is going to achieve Vision 2017.
* Can add to CEO’s Report:
* progress against strategic plan;
* achievement against initiatives;
* progress in New Ventures Group.
* Discussed opportunities being pursued to capture greater LNG opportunities in US/Canada and in floating LNG.
1. In the “Conclusion” the draft minutes record:

Directors complimented management on the budget process and the quality of the budget information provided.

1. Mr Wood gave the following additional evidence concerning the discussion of the draft FY14 budget with the Board:

The Board complimented management on the budget process and the quality of the budget information provided. The two days were spent in going through all the elements that made up the bottom-up build of the budget. The members of Board asked questions to management during the presentations, with time set aside and utilised on the second day for an extensive question and answer session on the budget and its component parts. As per the Board’s standard practice, members of the Board challenged assumptions particularly around variances (for example, if performance in a location was projected to underperformance [sic] compared to the previous year, what were the reasons and assumptions underlying that projection; and vice versa).

## Mr Crowley’s criticisms of Board scrutiny

1. Mr Crowley submitted that the Board meeting did not provide an opportunity for individual managers to “sound concerns about the budget process, or confess that they regarded the numbers as too stretched … It was not an environment in which executives were likely to break ranks and raise foundational concerns with the process that had led to the draft budget now under discussion by a joint sitting of the three most important management bodies within the company”. The 4FASOC does not plead a case that WOR did not have a reasonable basis for making the August 2013 earnings guidance statement because information was not provided to the Board by WOR employees or because members of the Board failed to make inquiries. There was no direct evidence that, in late June 2013, any individual manager regarded any aspect of the draft budget as “too stretched” or unreasonable, or had any “foundational concerns” with the process by which the draft budget had been developed. Accordingly, it is a matter of speculation whether an opportunity of the kind posited by Mr Crowley would have uncovered any claim that the draft budget lacked a reasonable basis.
2. To this point in the analysis, Mr Crowley has not demonstrated on the balance of probabilities that the draft budget presented to the Board on 26 and 27 June 2013 lacked a reasonable basis in any respect. Accordingly, it is unnecessary to consider whether, had the draft budget been deficient, the Board could or should have detected that deficiency.
3. Mr Crowley submitted that the Court should infer that the Board did not ask searching questions of the managers who gave presentations to the 26 June 2013 Board meetings, because no such questions are recorded in the Board minutes. I do not draw that inference in the absence of evidence about the record-keeping practices of the Board or other evidence to support the proposed inference.
4. Mr Crowley also submitted that “we do know that the Board did not challenge the budget process in any meaningful way at all”. The evidence said to support that knowledge was:
5. The Board’s acquiescence in the repetition of the same budget process that had been used for at least the previous five years.
6. The Board’s failure to require WOR’s executives to undertake a risk-based analysis in relation to blue sky projections or overhead reductions.
7. The Board’s failure to require WOR’s executives to undertake an analysis of downside phasing sensitivities (including cancellation of secured work and poor performance on projects) or any “reasonableness check”, for example, prior period trend analysis to identify any large variations.
8. The latter observations are based on innovations introduced by WOR following the November 2013 revised earnings guidance.
9. I do not accept that the evidence supports a finding that the Board did not challenge the FY14 budget process in any meaningful way. There was little evidence on the issue, which was not raised explicitly on the pleadings and is not directly relevant to the pleaded case that WOR did not have a reasonable basis for making the August 2013 earnings guidance statement.
10. Having regard to the pleadings, it is not remarkable (contrary to Mr Crowley’s submission) that WOR did not lead evidence from its Board members, at least on the question of whether there was a reasonable basis for the August 2013 earnings guidance statement.
11. Further, I do not conclude that the Board, by 26 June 2013, had not put itself in a position of having reasonable grounds for concluding that the budget forecasts were sufficiently “risk assessed” for “downside sensitivities” so as to provide a proper basis for any guidance to the market. This allegation did not form part of the pleaded case and was not raised until closing submissions. In those circumstances, WOR was not given a reasonable opportunity to address it. In any event, Mr Crowley’s case did not identify the likely results of a risk assessment of this kind in June 2013, so the allegation goes nowhere.

# Post Board meeting (27 June to 17 July 2013)

1. On 27 June 2013, Ms Wallace sent Mr Wood the then current breakdown of CEOC agreed changes to the budget as follows:



1. On 28 June 2013, Mr Holt sent an email to the various RMDs and functional departments, effectively seeking their implementation of the CEOC overhead commitments by inclusion in WOR’s budget software, Hyperion. The email included the following:

Hyperion will be open until 10am Sydney time 8th July. After that point we will be making changes to update for local / global moves, allocating global costs to locations, updating the FX rates, rolling out the new CSG allocation by customers etc.

The finance teams will be asked to update for any known issues in mapping, GM / OH splits, revenue classifications, customer tagging and also to revisit the half on half phasing while the system is open, so that we can get a clean cut of the FY14 budget to work with.

As I mentioned in the sessions, we’ll track the changes made after 8th July so that it’s clear what’s moved and why and will provide that to you.

The final budget is signed off by the Board at the meetings on 12th/ 13th August and the expectation is that we go with the position we presented to them.

1. A draft spreadsheet headed **FY14 Budget CEOC Adjustments Tracker** shows that the adjustments entered into Hyperion totalled $37.281 million of Group EBIT, comprising Operations adjustments of $22.648 million and Global Functions adjustments of $14.633 million. This is $4.281 million more than the $33 million ultimately identified in the FY14 Group Budget Board pack as the “CEOC overhead reduction”.

# Late July 2013 foreign exchange update and phasing “concern”

1. Mr Crowley noted that, by mid July 2013, exchange rates had moved favourably again and a further recalculation resulted in forecast NPAT of approximately $370 million. Mr Wood, in consultation with Mr Allen, decided to apply the prevailing foreign exchange rates in the budget and to create a contingency to maintain the FY14 budget NPAT at $352 million. Mr Wood’s evidence was that there was a preference for maintaining the budget NPAT “to minimise surprises to the Board through adjustments that can reasonably be made”. Mr Wood explained:

We ultimately took a contingency of $16.1m as an operational contingency and $7.5m as tax contingency, which were maintained at the Group level. This meant that locations were measured against targets pinned to their budget submissions but allowed the budget to include a buffer in case the business did not perform as anticipated.

1. On 29 July 2013, Ms Wallace sent Mr Wood a draft FY14 Budget Board pack. The Executive Summary contained a slide headed “FY14 Budget Financial Highlights”. Mr Crowley noted the following bullet point:
* The group contingency of $39.2m is in respect of $10m in CEOC overhead reduction risk, $16.1m to hedge against adverse movements in the foreign exchange rates, and a tax contingency of $7.5m.
1. The possible discrepancy in these figures (10+16.1+7.5 = 33.6) was not explained.
2. Mr Crowley noted that, if none of the risks referred to in this bullet point emerged, then the group contingency would make a positive contribution to EBIT with a corresponding NPAT effect, less a deduction for corporate tax. Of course, that positive contribution could also be offset by some other adverse event which might subsequently emerge.
3. On 30 July 2013, there was an ExCo meeting. The draft minutes of the meeting record, in relation to the FY14 budget:

6.0 FY14 Budget

Simon [Holt] provided an update on the FY 14 budget. Everyone will be challenged to meet their budgets however a contingency will be held at group level to manage issues such as redundancy costs.

It was agreed that the first half/second half split was a concern and more work was needed to reduce the weighting to the second half.

Dave [Steele] discussed the work done to date on the cost reductions including the tracking of specific actions for cost reductions which are locked into the budgets. He noted that there were a great range of actions proposed from one-off savings to permanent removal of costs from the business.

He also discussed progress on combining and reorganising functional roles based on the listings provided to CEOC in June. There was still some work to do to conclude this, but it should drive additional savings for the budget.

Dave requested that ExCo members support this process by making sure their people provide the information requested. He will report again on the next ExCo call.

Dave also advised of progress made on understanding all the reports prepared in the organisation with a view to rationalising them. He is working his way through the organisation to obtain the information so that a complete list can be prepared.

7.0 Strategy and Vision

Iain [Ross] outlined the work being done for a presentation to the Board on the links between our current performance and strategy and achieving Vision 2017.

Iain is preparing a report card with a more qualitative assessment of how we are progressing against our vision.

He noted we are tracking below our lowest forecast to achieve vision 2017.

Iain will seek to describe what we will need to do to achieve vision 2017 given where we currently are.

Iain will also prepare a strategy document with updates for this year (third year of three) showing the shifts which have occurred.

ExCo discussed the business plans for locations and suggested it could be worth adding a few of the location business plans as appendices to Iain’s strategy paper.

1. Mr Crowley submitted that Mr Holt’s claim that everyone would be “challenged” to meet their budget bespoke a concern on the part of the CFO that the budget might have been stretched too far. Without more evidence about Mr Holt’s state of mind, I do not agree. However, the succeeding sentence, which refers to “concern” in relation to phasing, indicates that ExCo as a group was concerned about the FY14 budget when examined from that perspective.

# HOH phasing review

1. On 3 August 2013, Mr Bradie sent the following email to all RMDs:

We have now got the budget locked down and the CEOC contingency included. What we now need to do is sort out the phasing. At 43/57 this is too 2nd half weighted. Can you look across your locations and where possible get more into the first half. For the big locations if we can even move 1 or 2 % this will make a difference. If you could let Michael [Daly] and I know Monday even at a high level what you feel can be achieved then we can work the details over a longer period.

1. Mr Crowley submitted that it was not clear how Mr Bradie derived the 43:57 ratio, when a draft FY14 budget Board pack dated 31 July 2013 contained a page headed “FY14 Budget HOH Analysis” which showed a ratio of 34:66 (in contrast to FY13 actuals of 48:52). On the face of the email, the answer may be contained in the attachment to Mr Bradie’s 3 August 2013 email but that document was not in evidence.
2. On 6 August 2013, Ms Connell wrote to Mr Ashton asking what assistance he required to respond to Mr Bradie. Her email included the following comment:

I can get some reports run for the locations mentioned by Michael [Daly] to look at their run rates from last few month of FY13 (adjusted for one off provision releases) and the first 4 months of FY14. My guess is that the extra budget stretch was put in the second half of the year and it is not viable to bring this profit forward into the first half of the year.

1. There is no evidence that Mr Ashton responded directly to Ms Connell’s comment. He forwarded the email chain to four individuals (apparently located at Oman, Abu Dhabi and Al Khobar), copying his email to Ms Connell, and seeking a review of phasing and a conference between each of them and Ms Connell “to agree what we can do”. As Mr Ashton put it:

It’s important to emphasize this is not a request to change overall FY13 [sic] BEBIT, rather to revisit phasing only. In essence we need to take a look at 1st ½ v/v 2nd ½ phasing and determine, based on run rates and other available data, what we can do to improve 1st ½ year.

1. Mr Ashton said that he would then “review with Brenda [Connell]”.
2. On 7 August 2013, Mr Daly sent an email to Mr Holt. It followed an email from Mr Bradie, which asked Mr Daly to procure several changes to the budget. Mr Daly said:

Simon [Holt] – just to close this out, I dropped a note to Stuart [Bradie] yesterday noting that given the feedback received from the RMD’s and the fact that the budget packs have been updated with the current re-phasing adjustments, I was not going to ask for any more changes to the budget phasing. He hasn’t responded yet (he’s in Alaska meeting BP) but I assume this is now closed. I did speak with Brian J yesterday and he will re-phase Canada’s $10m but he cautioned as to meeting the H1 target.

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!

1. The FY14 Group Budget Board pack included, in the Executive Summary, a revised version of the slide headed “FY14 Budget Financial Highlights”. Mr Crowley noted the following bullet point:
* A review was also undertaken of the FY14 half on half phasing. The phasing of $592.2 Group EBIT is 41:59 across the year with budget EBIT in the first half of $241.8m (FY13: $251.9m) and budget EBIT in the second half of $350.4m (FY13: $275.1m).
1. By the standard set in Mr Bradie’s 3 August 2013 email, WOR’s phasing continued to be “too 2nd half weighted” and, in fact, the weighting had worsened since Mr Bradie’s email.
2. Mr Crowley submitted that this weighting demonstrated WOR’s reliance on substantial blue sky revenue appearing as FY14 progressed, although he noted that not all phasing adjustments related to blue sky. Mr Crowley also acknowledged that it is inherent in the nature of blue sky that it will tend to be weighted towards the end of any forecast horizon. Mr Crowley submitted that “[i]f a Location is pressed to maintain its annual gross margin or earnings forecast then an obvious way to pad out its estimates is by loading up its blue sky forecast, especially for the far-end of the forecast year.” Each of these submissions is plausible and I accept them.

# Approval of FY14 budget and August 2013 earnings guidance

## FY14 Group Budget Board pack

1. The final FY14 Group Budget Board pack contained the following information:
2. In the Executive Summary, under the heading “FY14 Budget Financial Highlights”:
	1. the FY14 budget set a budget NPAT of $352.1 million, operational EBIT of $1.030 billion and global overheads of $437.4 million;
	2. there are the following bullet points (among others):
* Subsequent to the June meeting, the budget has been updated as follows:
	+ The CEOC overhead reduction commitment of $33m has been reflected in operational EBIT ($22.6m) and global overheads ($10.4m).
* This includes $12m acquisitions target, restructuring costs of $3.7m and a tax contingency of $7.5m
* In the FY14 budget there is approximately $50m of combined incentives and LTI of $8.5m which is not present in FY13 as the gate openers for Global and a number of locations were not met.
	1. no reference to a $10 million contingency for “CEOC overhead reduction risk” or $16.1 million to hedge against adverse foreign exchange movements;
1. In the Executive Summary, under the heading “Risks and Opportunities”, the following bullet points:
* Right sizing both global and location overheads will be a continued focus for FY14, in particular achieving the CEOC overhead reduction of $33m.
* Delivering a strong second half and delivering increased margins will be a key challenge for FY14.
* Key locations with significant operational EBIT growth year on year include Cord ($34.1m to $76.7m), South Africa (-$2.1m to +$27.1m) and
* Southwest Ops ($81.9m to $110.1m). Secured projects for each are 44%, 57% and 60% respectively.
* Recent FX movements in USD, CAD and GBP have had a significant impact when comparing the FY14 Budget to FY13:

|  |  |  |
| --- | --- | --- |
|   | FY14Budget Rate\* | FY13Actual Av. Rate |
| USD | 0.916 | 1.027 |
| CAD | 0.965 | 1.031 |
| GBP | 0.617 | 0.655 |

\* Spot rate as at 10th July 2013

* A tax contingency of $7.5m has also been established recognising the inherent risks in the group.
* The budget includes $12m EBIT from acquisitions.
1. On a slide headed “Group Financial summary”, there are the following bullet points (among others):
* Restructuring provisions have been held centrally in the FY14 Budget.
* A tax contingency of $7.5m has been budgeted for, recognising the inherent risks in the Group.
1. On a slide headed “Operational Analysis”, the following bullet points:
* FY14 has been budgeted with a 53% secured backlog, 28% prospects and proposals and 19% blue sky.
* Key proposals secured since the June Budget meeting include Enbridge - Surmont in Cord and GES + in Saudi Arabia. In addition a letter of intent has been received on the Nacala proposal in South Africa and the Sohar PTA proposal in Oman. Key unsuccessful proposals to date are the 3A Wellpads for MEG Energy of $5.2m and additional work for Enbridge in Cord of $5.4m.
* An additional $12m has been included as group blue sky for acquisitions and -$16.1m as an operational contingency.
* Operational chargeability is 86% for FY14 Budget compared to FY13 (85%) and FY12 (84%).

## A&RC approval of draft earnings guidance

1. On 9 August 2013, Mr Holt sent Mr Wood and others a draft media release, also to be sent that night to the Board. Mr Crowley noted that the draft media release concluded, under the heading “Outlook for the WorleyParsonsGroup” with the following words which reflected Mr Wood’s then views (**draft August 2013 earnings guidance statement**):

Commenting on the outlook for the WorleyParsons Group, Mr Andrew Wood said:

[“Subject to the markets for our services remaining stable, we expect to achieve increased earnings in FY2014.

“We have a clear growth strategy in place which includes developing our skill set and geographic footprint across our three customer sectors. This will be achieved through organic growth as well as by taking advantage of acquisition opportunities that provide value for shareholders.

“We are confident that our medium and long term prospects remain positive based on our competitive position, our diversified operations and strong financial capacity.”]

1. The A&RC met on 12 and 13 August 2013. Next to the heading “Draft ASX announcement”, the meeting minutes for 12 August 2013 record:

Simon Holt tabled Draft 2 of the ASX Media Release which was proposed to be released with the full year financial report on 14 August 2013. Draft 2 identified changes from Draft 1 which had been circulated to directors as an additional paper prior to the meeting.

*(Clare McManus joined the meeting at 2.15 pm).*

The committee members suggested a number of additional changes. The Committee Chairman requested that the draft ASX/ Media Release be updated and resubmitted to the committee at its meeting on 13 August 2013.

1. The revised draft media release, in a form intended for issue to the Board on the evening of 12 August 2013, shows that there had been substantial amendments following the A&RC meeting that day. In particular, the first sentence of the draft August 2013 earnings guidance statement was amended as follows:

~~Subject to the markets for our services remaining stable, we expect to achieve increased earnings in FY2014~~While recognizing the uncertainties in world markets, we expect our geographic and sector diversification to deliver increased earnings in FY2014.

1. Next to the heading “Draft ASX announcement”, the minutes for 13 August 2013 record:

Simon Holt tabled Draft 3 of the proposed ASX/ Media Release which had changes marked up from Draft 2 which was considered by the committee the previous day. Committee members and directors discussed the document and proposed a few further changes.

1. It seems that the A&RC appointed a special purpose “Disclosure Committee” comprising Messrs Grill, Wood and Holt to finalise the final full year documents (including the earnings guidance statement) for release to the ASX consistent with the consensus reached by the Board in the 13 August 2013 meeting.
2. I accept Mr Crowley’s contention that the August 2013 earnings guidance statement was developed during the A&RC meetings on 12 and 13 August 2013. Mr Crowley submitted that, by its amendment to the draft statement, WOR removed the qualified statement conveying that its guidance was conditional upon markets remaining stable. To my mind, the main effect of that change was to remove the implied possibility of markets remaining stable, replacing it with a more pessimistic acknowledgement that world markets were affected by uncertainties.
3. I accept Mr Crowley’s contention that the August 2013 earnings guidance statement is expressed to convey that WOR has taken into account the relevant uncertainties.
4. I also accept that WOR, through its A&RC, was very careful in its choice of language in its earnings guidance.
5. Mr Crowley contended that it was important to consider the purpose of the August 2013 earnings guidance statement. He observed that WOR monitored the forecasts reported by major investment analysts covering its share performance, and internally described the average across the analysts as a “consensus” or “analyst consensus”. Mr Wood agreed that the last information he had prior to the August 2013 earnings guidance statement was an “analyst consensus” NPAT figure of $374.6 million. This evidence was given by reference to the “Analyst Consensus” page in the FY14 draft group budget Board pack dated 26 June 2013.
6. Mr Wood was clear that, by its statements to the market, WOR aimed to get the analysts to align with WOR’s expectations.
7. Thus, as Mr Crowley contended, it is fair to say that at least one of WOR’s purposes in issuing the August 2013 earnings guidance was to encourage analysts to forecast WOR’s FY14 NPAT at around $352 million.

## Board approval of FY14 budget

1. Sometime after the A&RC meeting ended on 13 August 2013, the Board members reconvened for the Board meeting. Relevantly, the minutes of the Board meeting record:

FY14 Budget

Simon Holt discussed with the Board the FY 14 Group Budget document. He summarised the changes which had been made to the draft budget presented to the Board in June, including new slides providing analysis by revenue type and the review undertaken concerning half-on-half phasing. The budgeted NPAT for FY 14 is $352.1 million compared to the FY 13 result of $322.1 million, reflecting a 9.3% increase.

**It was RESOLVED** to approve the FY 14 Group Budget.

### Mr Crowley’s criticism of Board’s failure to make inquiries

1. Mr Crowley repeated his criticism that the Board failed to scrutinise the FY14 budget before approving it. Again, to the extent that this criticism is made in support of a conclusion that the FY14 budget did not provide a proper basis for the August 2013 earnings guidance statement, no relevant allegation was pleaded and accordingly, it does not form part of the case that WOR was required to answer. In any event, Mr Crowley’s criticisms go nowhere in the absence of evidence that, had the Board acted in the manner that Mr Crowley now contends was required, the Board would not or could not have approved the FY14 budget, or would have or should have decided that the FY14 budget was deficient. In particular, the evidence does not support a finding that the omission of a risk-based analysis led to the FY14 budget being materially overstretched at the EBIT line, as Mr Crowley claimed.

## Evidence of Messrs Wood, Ashton and Lucey

1. Mr Wood was “comfortable” with the final FY14 Budget for the following reasons:
2. The budget was a bottom-up build by location managers who had direct knowledge of their locations.
3. Location managers were supported by regional or local finance teams during the budget preparation.
4. Location managers were supported by regional sector personnel, who communicated with and debated budget inputs with location managers and regional managers during the budget preparation.
5. The budget submissions by location managers were reviewed and checked by RMDs and their direct report, Mr Bradie.
6. The budget submissions were reviewed and checked by the CSG leads and their direct report, Mr Ross. This involved cross-checking the budget submissions against the strategic vision and their knowledge of the direction of the industries and location. This cross-check was a process of oversight to check that both projected costs and revenues matched the strategy work and matched our observations regarding the markets.
7. The location managers, regional CSG leads and RMDs had to agree, and did agree, with respect to each locations’ budget submissions.
8. Messrs Bradie and Ross had to agree with respect to the budget submissions once reviewed in aggregate.
9. The budget submissions were checked top-down by Mr Wood and others sitting in global roles, as to whether the submissions lined up with the expectations from the strategy-setting sessions, whether costs matched revenues and whether overall the group aggregated budget submissions aligned with the current and forecast market conditions.
10. The budget submissions had been challenged throughout the process, by RMDs, regional and global sector leads, Messrs Bradie and Wood.
11. Mr Ashton gave the following evidence:

Given the rigorous process we had followed in order to prepare the MENAI FY14 Budget, I had a detailed understanding of the MENAI FY14 Budget and the underlying assumptions upon which the budget was built. On the basis of this knowledge, I was confident that the MENAI FY14 Budget was reasonable, meaning that it was a P50 budget – not too easy, not too stretched. A budget is a snapshot in time of what we believe is achievable at that point in time. At the time of the MENAI FY14 Budget being approved by the Board, I considered it was achievable.

1. Mr Lucey stated:

On the basis of the process undertaken in ASCH between February and June 2013, I was comfortable that all relevant stakeholders had reviewed and approved the ASCH Locations’ budget submissions and that the ASCH budget submission to be presented to CEOC, ExCO and the Board between 24 and 26 June 2013 was reasonable. The budget had been through a bottom-up process, whereby the people with the most intimate knowledge of the local market conditions, clients and business needs (eg the project managers, Location BD managers, Location Directors and their finance directors) had prepared the budgets, in consultation with the relevant Regional CSG and Service Line personal. Those draft budgets had then been stress tested by me…. For the purpose of FY14, an emphasis had been placed on cost saving but cost savings were never made at the expense of the revenue line – if a cost saving measure might impact the Location’s ability to bring in revenue, the measure was not implemented.

1. The cross-examination did not demonstrate that Mr Wood’s comfort with the final FY14 Budget was misplaced having regard to what was known at the time of the Board approval. Nor did the cross-examination cast doubt on the evidence of Messrs Ashton and Lucey set out above. In particular, Mr Lucey was not challenged in relation to his evidence that costs savings were not made at the expense of the revenue line. This evidence directly contradicts Mr Crowley’s argument that there is a direct connection between blue sky and overheads, namely that reduced overheads required WOR to forego blue sky revenue.

# What was conveyed by the August 2013 earnings guidance statement?

1. As earlier noted, WOR’s August 2013 earnings guidance statement, published on 14 August 2013 was in the following terms:

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.

1. Mr Crowley made submissions about the briefing call with investment analysts conducted by Messrs Wood and Holt immediately following the release of the August 2013 earnings guidance statement.
2. In particular, Mr Crowley referred to the following exchange:

John Purtell: Good morning. John Purtell from Macquarie. Look, I had two questions, just the first one, in relation to the drivers of growth in 2014, presumably you factored in some FX benefit working in a positive manner. You've outlined the restructuring costs of $26 million, which hopefully don't recur at that level. So the question is, do you see organic growth in the business beyond those two items?

Andrew Wood: I think in terms of exchange rates and where exchange rates are going to go, you guys are pretty better at working that out than we are. So, we try not to factor too much into our estimates as to a guess on exchange rates in the next little while. So, fundamentally, when we talk about growth in the business, we are expecting some level of underlying growth in – right across the business.

1. Mr Wood’s answer indicated that he expected organic growth in WOR’s business.
2. Mr Crowley noted that, following the August 2013 earnings guidance statement and briefing call, the major analysts covering WOR updated their assessments of its performance and projected FY14 results as follows:
3. Credit Suisse anticipated a FY14 NPAT result of $382.7 million or “12% underlying NPAT growth in FY14 after adjusting for restructuring costs”;
4. Deutsche Bank projected a FY14 NPAT result of $391 million (a net increase on their forecast prior to 14 August 2013);
5. Morgan Stanley said that “Given recent strong contract win momentum, and with WOR saying it expects underlying organic growth, we remain comfortable with our forecasts, with risks potentially skewed to the upside” and estimated FY14 NPAT at $374 million;
6. Macquarie forecasted 11% NPAT growth in FY14 to $360 million;
7. Citibank commented, “Earnings growth should be supported by mid single-digit organic top-line growth, FX tailwinds, acquisition growth and roll off of underperforming projects, but underlying margin expansion will likely be gradual given business mix and competitive pressure”; and
8. UBS was the most sceptical analyst, projecting an FY14 NPAT result of $328.9 million.
9. Mr Crowley contended that the “consensus” before the August 2013 earnings guidance statement was $374 million. He argued that after that announcement the “consensus” was lower, based on the following statement by Macquarie:

WOR expects to deliver increased earnings in FY14, including growth in each division. [Macquarie] currently forecast 10% NPAT growth in FY14 to $364m (approx 4% is due to FX and rest is underlying inc 1-2% accretion for TWP and Rosenberg acquisitions). Consensus is similar at $368m.

# Did the FY14 budget provide reasonable grounds for the August 2013 earnings guidance statement?

## Pleaded case

### Growth strategy

1. Ultimately, Mr Crowley’s case did not make good the proposition that WOR’s budget process “required Locations to reflect WOR's FY14 ‘growth strategy’ as determined by ExCo and CEOC without any or due regard to the market conditions”.
2. As noted earlier, Mr Crowley did not contend that Messrs Wood and Holt were wrong to convey the “growth assumption” to the senior executives, as they did. Mr Crowley accepted that a reasonable budget would pay “conscientious regard to ‘growth’ and overhead reduction directives issued by senior management”.
3. As explained below, I am not persuaded that WOR “required” the locations to adopt any particular budget, in the sense that any WOR officer with responsibility for a location was compelled to adopt or accept a budget that formed part of the FY14 budget against that person’s wishes. Except to the extent addressed below, Mr Crowley’s submissions did not seek to demonstrate that any location budget reflected WOR’s “growth strategy” without due regard to market conditions affecting the relevant location.

### $88.6 million operational EBIT

1. Although Mr Crowley maintained that senior management “demanded” adjustments to operational EBIT totalling $88.6 million, the evidence did not support a conclusion to this effect. Nor did the evidence support the allegation in the particulars, set out above, that management adjustments were made on the basis of instructions to the locations or were “added” by senior management. Nor did the evidence support the contentions in Mr Crowley’s opening submissions that adjustments were made by Messrs Bradie, Daly and Allen or were “imposed” by senior management.
2. Mr Crowley’s case as finally articulated also did not include a contention that the FY14 budget included an amount of $88.6 million for which there was no reasonable basis. Rather, the relevant adjustments to operational EBIT, upon which Mr Crowley relied, totalled approximately $67.739 million, including the “third round” adjustments of $22.6 million as recorded in the FY14 Group Budget Board pack (31.046 + 14.093 + 22.6 = 67.739).
3. Mr Crowley emphasised the “demanding” behaviour of WOR senior management in relation to the increases to FY14 operational EBIT. As I understood it, the case was that the adjustments lacked a reasonable basis because they were added or imposed arbitrarily by senior management, without any or any meaningful indication that the locations accepted that they were achievable. The case was maintained in closing submissions: Mr Armstrong QC submitted that “you can’t have the high blue sky and then also impose the swingeing cuts to overheads”. He also submitted that the Holt Memo interview notes show “it’s not the case that the locations willingly agreed to the budgets. They were pushed simply too hard”.
4. However, the evidence does not support a conclusion that any figure was imposed on a location budget in the sense that it was added or subtracted without the relevant location’s knowledge, or pursuant to a direction from senior management to make a change that was not believed by a relevant person within the location to be reasonable and achievable.
5. Mr Ashton gave evidence concerning the relevant process in the following exchange:

Mr Edwards: And you took those challenges and consulted with the locations and sectors before making them?

Mr Ashton: Yes. So I – I would bring back the data, look, you know, the – the challenge [Mr Bradie] gave, have a conversation with each of the location managers and look at the – the – the likelihood of the realistic nature of being able to deliver them, but I did it on a portfolio basis. So, you know, what adjustments do I believe could be made, where could they be made to ultimately deliver on the – the increase in profitability target he could have been looking for.

1. I am not persuaded that WOR’s locations were “pushed simply too hard” during the process that led to the approximately $67.739 million increase to operational EBIT. The Holt Memo interview notes provide 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, but the evidence does not demonstrate on the balance of probabilities that this occurred in relation to any single location or more generally.

#### First round adjustments

1. As previously noted, the evidence was that the total of all adjustments made by the locations to the draft FY14 budget during the period 31 May 2013 to 3 June 2013 was $31.046 million.
2. WOR noted that this figure was not simply a portion of the $34.9 million adjustments that were proposed. Rather, it also included adjustments made by the locations for reasons that were not related to the proposed $34.9 million adjustments. For example, locations that adjusted their budget during the first round adjustments, apparently otherwise than at the behest of Mr Bradie, included Malaysia WP and Singapore WP in ASCH.
3. The first adjustments related to the ASCH and MENAI regions totalled $6.602 million (1.692 + 4.910 = 6.602). As noted above, Messrs Ashton and Lucey each gave evidence that they considered their respective regional budgets for FY14 to be reasonable. It was not suggested to either of them in cross-examination that there was no reasonable basis for the adjustments incorporated into their respective draft FY14 budgets during the period 31 May 2013 to 3 June 2013.

#### Second round adjustments

1. As noted above, the evidence was that the locations increased their EBIT projections by a total of $14.093 million in response to a request for adjustments totalling $20.7 million.
2. Almost 50% of the $14.093 million adjustments related to the ASCH and MENAI regions. Thus, Mr Crowley had an opportunity to test the reasonableness of those adjustments with Messrs Ashton and Lucey respectively. Each gave affidavit evidence concerning the steps that led to the adjustments. It was not put to either witness that there was no reasonable basis for the adjustments made in relation to his respective region.
3. Accordingly, I am not persuaded that any portion of the adjustments totalling $14.093 million lacked a reasonable basis.

#### CEOC overhead commitments

1. Mr Crowley did not submit that there was no reasonable basis for the inclusion of these amounts in the FY14 budget, or any of the integers that made up these amounts.
2. The FY14 Budget CEOC Adjustments Tracker suggests that the total of $33 million comprised amounts referable to each of the regions, “Global Business” and seven sections within “Global Functions”. The figures in the tracker do not correspond with the final FY14 budget, suggesting that the ultimate breakdown of the $33 million was not achieved immediately.
3. As WOR submitted, accepting that the amount of $10.4 million was taken from global overheads (based on the FY14 Group Budget Board pack), the impact of the CEOC overhead reduction commitments on operational EBIT was $22.6 million, rather than $33 million.
4. Mr Crowley did not challenge the evidence of Messrs Ashton and Lucey that each of them believed the adjustments to their locations based on the CEOC commitments were reasonable. Nor did Mr Crowley challenge Mr Wood as to the reasonableness of the reduction of global overheads by $10.4 million.
5. If it was suggested, I am not persuaded that there was no reasonable basis for the inclusion of the $33 million CEOC overhead reduction commitment in the FY14 budget; nor that WOR lacked a reasonable basis for adding $22.6 million to operational EBIT on account of the CEOC overhead reduction commitment.

### Acquisition stretch

1. I do not accept that this item ought not to have been in the FY14 budget, noting the following matters:
2. Mr Crowley did not identify a standard by reference to which it was inappropriate to include that figure in the FY14 budget. In particular, he did not identify a standard by which the contention that the figure lacked a “proper basis” could be tested.
3. The inclusion of a figure for acquisition stretch does not appear unreasonable or inappropriate in the light of WOR’s recent history of acquisitions, comprising one acquisition each year since 2009 including the acquisition of Bergen Group Rosenberg AS completed on 1 March 2013 and the acquisition of TWP Holdings Limited completed on 13 March 2013. The FY14 Group Budget Board pack noted:

Norway and TWP have contributed $15.3m and $17.1m respectively to FY14 BEBIT. Their contribution to FY13 BEBIT of $10.6, and $1.5m was for 6 months and 4 months respectively.

1. The transcript of the earnings call for the fourth quarter of 2013 (**Q4 2013**) on 13 August 2013 records the following exchange between Mr Wood and an unidentified participant (**Q**):

Q: Can you talk about M&A? Are there any big ones around, and what are your conversations with people having – with respect to that?

Mr Wood: I'm happy to talk about M&A in the context that we are considering a number of opportunities at any time. And that consideration of opportunities, both big and small, is ongoing as it has through our – as it has been through our history.

Q: Can you just sort of – is there a particular part of the market that would take your interest more than another part?

Mr Wood: What I'd guided you to our commentary on our strategy, on where the business is focusing. If there are opportunities, acquisition opportunities, that will help us drive our strategy, then we'll take them on. In fact, as we've said in the past, our acquisitions are a tool of strategy and we look to see how we implement strategy. And if acquisitions make sense in that context, then we'll look at the opportunities that are available to us. So, if you want to know where to look for where we may be looking at acquisition opportunities, it's just simply look at our strategy.

1. Consistent with this exchange, there was no evidence of any decision that WOR would refrain from doing any activity that might otherwise have led to an acquisition that could have contributed an amount in the order of $12 million during FY14.
2. Although Mr Ross said there was “nothing real in the pipeline”, he also proposed the inclusion of $10-15 million in the budget for “acquisitions” as “fair”, apparently on the basis of reasoning that the previous year’s acquisitions had added about $40 million although only a fraction had been added to the “bottom line” due to timing. Mr Ross also proposed a discussion about the figure at CEOC.
3. Mr Wood’s evidence in cross-examination was that, notwithstanding Mr Ross’s comment, WOR was considering a number of acquisitions at that time: “some of them quite large and others reasonably small”. Mr Wood said that he did not know what Mr Ross meant by “nothing real” but “in fact there were about six or seven various things … in different stages of pursuit”.
4. The following documents:
	1. Mr Wood’s CEO Report dated May 2013, reporting the period to 30 April 2013, contains a detailed section entitled “Mergers & Acquisitions” including discussion of four acquisition targets (excluding one said to be “closed”) and a lengthy “Active Pursuit List”, as well as a notation that eight opportunities had been assessed and declined in the previous month.
	2. Mr Wood’s CEO Report dated June 2013, reporting the period to 31 May 2013, contains a detailed section entitled “Mergers & Acquisitions” including discussion of four matters under the heading “In a sale process”, a matter under the heading “In Transaction” described as a joint venture contract buyout and a notation that eight opportunities had been assessed and declined in the previous month.
	3. A WOR slide pack entitled “Global Development Group” dated June 2013 identifies “Acquisitions (within categories)” as one of three areas of focus. The categories are:

MAJOR ACQUISITIONS?

* Improve
* Resource Infrastructure

SMALLER ACQUISITIONS

* Developing world
* Capability acquisition
* Improve
	1. The minutes for the 24 June 2013 ExCo meeting record the following:

*The meeting reconvened at 2.00 PM with all ExCo and Peter Janu present*

Iain [Ross] discussed the Project Elk (Exmouth sale) proposal with ExCo. Ex Co provided its support for the proposal to go to the Board for approval.

Iain discussed the Transfield assets which could potentially be purchased.

ExCo agreed that we would only be interested in Transfield’s share of TW NZ.

ExCo also discussed:

* MWH – Andrew and Iain will met the CEO.
* FW – Proposal for them to sell us their E & C business – the prize for us would be their downstream and petrochemicals business (particularly in the US) and their expertise in project delivery.
* Chemtech (Brazil) – we will have a look at this
* Advisory – one of the first things to do in Dave’s New Ventures group is to identify targets
	1. The minutes for the 28 June 2013 Board meeting record:

Other M&A opportunities

Iain Ross advised of the potential acquisition of the joint venture interest held by Transfield Services in TransfieldWorley NZ, the acquisition of which would be within the CEOs delegation of authority.

He discussed the transition programs in progress for new acquisitions TWP and Rosenberg and advised they were both progressing to plan.

Iain discussed other active targets and developing relationships. He advised the Board that some exploratory discussions had taken place with Foster Wheeler concerning structures which could allow the company to acquire their E&C business which is a downstream large project company with a substantial US presence. Directors discussed the merits of this concept with management. The Board had no objections to management continuing these exploratory discussions.

* 1. On the evidence, I infer that the figure of $12 million was discussed by ExCo on 24 June 2013 and ExCo decided to include it in the draft FY14 budget.
1. On this evidence, and without any positive evidence that the figure of $12 million was not achievable or unrealistic or should not have been included for some other reason, I am not persuaded that WOR lacked a reasonable basis for including this item in its FY14 budget.

### Contingency against operational underperformance

1. As earlier noted at [283], the 29 July 2013 draft FY14 Budget Board pack referred to a “contingency” of $39.2 million, said to comprise $10 million in CEOC overhead reduction risk, $16.1 million to hedge against adverse movements in the foreign exchange rates, and a tax contingency of $7.5 million.
2. The final FY14 budget Board pack did not refer to a $10 million contingency but did refer to the tax contingency of $7.5 million and an “operational contingency” of $16.1 million.
3. In final submissions, Mr Crowley did not put a case that the absence of a contingency against operational underperformance caused the FY14 budget to lack reasonable grounds, or contributed to a lack of reasonable grounds for the FY14 budget.
4. As discussed below, Mr Crowley contended that the “operational contingency” ought fairly be regarded as a foreign exchange contingency. Even assuming that the contingency of $16.1 million did not deserve the description “operational”, it is not self-evident that the FY14 budget required a contingency against operational underperformance in order to have reasonable grounds. It was not suggested to Mr Wood that the FY14 budget lacked reasonable grounds or was otherwise deficient for failing to have a contingency against operational underperformance.
5. In any event, I accept Mr Wood’s evidence that the $16.1 million contingency was not a contingency against adverse foreign exchange movements (or forex). Mr Wood explained the position as follows:

[T]he way we budget, and the way we have always budgeted, is we take the forex at the point in time that we’re approving the budget. So it wasn’t taking advantage of a gain. It was completing the calculations properly, as we always do. And we take a particular point in time as – as we do that. And when we did that for the board at the time we approved it, the number came in at three hundred and – 368, and we said, “No, we will take that as a contingency within the budget.” So it was not a question of taking a gain, you know – you know, as a result. It was completing the process as we had always done. As I said, we – as far as the – the exchange rate is concerned, we would then report against the – both – both the current rate and a constant currency rate. And you – you can often see that in our – in our – our reporting statements to the market. We would go back and say, “Well, here is what we had at the time”. And whether the exchange rate helped us or hindered us, we would report we would report both, such that we’re all working on the same basis. So this is a true contingency on operating earnings, not a contingency taken for forex. … It’s not taken to offset an expectation or to accommodate a movement in forex.

### Failure to include adjustments for projected restructuring costs

1. In final submissions, Mr Crowley did not put a case that the failure to make adjustments for projected restructuring costs caused the FY14 budget to lack reasonable grounds when it was approved, or contributed to a lack of reasonable grounds for the FY14 budget when it was approved in any specific amount.
2. As noted at [297], the FY14 Group Budget Board pack recorded that the FY14 budget allowed for restructuring costs of $3.7 million. In the end, WOR’s FY14 pre-tax restructuring costs were $35.4 million. However, Mr Crowley did not contend that WOR should have forecast those costs in its FY14 budget at the time that is was approved.

### Blue sky revenue forecasts

#### Inadequate or no review of forecasts before FY14 budget was approved

1. Mr Wood’s evidence was that the FY14 budget included about 20% blue sky revenue, broadly in line with historical metrics.
2. In cross-examination, Mr Wood disagreed that, if the kind of “critical look” applied to blue sky and phasing estimated in mid-November had been applied before the FY14 budget was approved, the FY14 budget would have forecast an NPAT result materially lower than the FY13 result of $322 million. It was not suggested to Mr Wood that a review of blue sky forecasts before the FY14 budget was approved would have indicated that projected revenue for any particular location or region should have been reduced, except as addressed below.

#### ASCH region

1. Mr Lucey was questioned about the forecast for blue sky revenue in the China location, recorded in the China budget reporting pack dated 16 May 2013. Mr Lucey agreed that the projected blue sky was “fairly aggressive”. Mr Lucey agreed that a phasing chart in the pack showed budgeted revenue of 55% in the second half and, in relation to Hydrocarbons, the projection was 62% in the second half. Mr Lucey agreed that China’s forecast revenue from the Hydrocarbons sector was not insignificant, but also said that, in China, chemicals (in the MM&C CSG) was the predominant sector.
2. On 6 June 2013, Paul Aslett sent Mr Lucey an email, stating that he had reviewed the “Improve budgets”. Mr Aslett noted, relevantly:

China budget is very aggressive – 700% increase, this may be realignment of contracts such as BASF to Improve, but will need significant support.

1. Mr Lucey maintained that, until the 2+10 forecast (discussed below, and for which preparation commenced in September 2013 incorporating actual results for July and August 2013), he was “very happy that the China budget was – the – the delivery of the China budget was reasonable, and that the budget was reasonable”.
2. Mr Lucey did not accept that an “aggressive” figure was an unreasonable figure. Nor did he accept that there was anything unreasonable about the FY14 budget. However, he said, as to the budget changes in November 2013, there was a “realisation that there was too much blue sky in quarter 4 in the 3+9” and that he, Mr Daly and Mr Holt agreed that it was excessive. As explained below, WOR prepared a 3+9 forecast using actual results for July, August and September 2013, and forecast figures for the remainder of FY14. In the 3+9 forecast, China’s BEBIT was reduced from $66.737 million to $61.926 million (just over $5 million).
3. Ultimately, the highest that Mr Crowley’s case was put in relation to the ASCH FY14 budget was that there was a “real question about the reasonableness of the China budget, particularly in relation to blue sky”. I accept that proposition. The reduction of the China budget blue sky forecast in November 2013 raises that question.
4. However, I am not persuaded that there was no or no adequate review of the China blue sky forecast before the FY14 budget was approved, or that any such review would have affected the FY14 budget.
5. Mr Lucey’s evidence was that it was very rare for him (or Mr Bradie) to challenge the location budgets at the revenue line. However, he also said that he had ongoing interactions and discussions with regional CSG leads and ASCH senior management about market conditions that enabled him “to get comfortable with the blue sky component in the budget”. Specifically, Mr Lucey said:

In relation to the blue sky component, there was no formula used to produce these figures. In forming an opinion as to the right level of blue sky to be included in any given Location budget, I relied on the knowledge and experience of the relevant Location Director, supported by the Location leadership team and the Regional CSGs, as well as my own knowledge and experience.

1. Consistent with this evidence, an email from Mr Evans sent on 18 June 2013 provides evidence that he reviewed the Hydrocarbons revenue, gross margin and EBIT targets for each region and that he had received materials from the ASCH region for that purpose. There was also evidence of a review by the MM&C CSG recorded in emails between Raymond Chui, Regional Director of MM&C for ASCH, and Mr Lucey dated 23 May 2013.

#### MENAI region

1. In cross-examination, Mr Ashton confirmed his affidavit evidence that blue sky revenue is a function of market buoyancy. He agreed that that “if markets are hot, there’s more blue sky available” although he clarified that the prospects for blue sky revenue are affected by not just the type, but the size, of the market, saying:

So it’s a function of the size of the general capital spend in the markets and the nature of the market, the – the buoyancy of the market.

1. As to whether there is likely to be less blue sky in a “cold” market, Mr Ashton said:

Yes, that – that will vary, yes. Depending on how you – on how the market is – and if you look at the Middle East in 2013, with the price of oil per barrel, you know, the – the – being, again, a petrodollar economy, there was a massive push to – to militarise the assets in the ground, and that meant to capital investment, you know, up and running, get facilities expanded, get production capacity increased to militarise the asset. So, in that time, at $100 a barrel, at – you know, the markets were – were very buoyant and there was a – a lot of opportunity – a lot – you know, we didn’t necessarily know what the specifics of the opportunity were, and that’s what we put in blue sky.

1. As Mr Ashton agreed, the relationship between blue sky prospects and “hot” or “cold” markets is a rule of thumb.
2. Mr Ashton also confirmed that, in working through the bottom-up build of the MENAI budget, the location directors and regional sector leads had “a lot of input, working with input from the location sales teams” in relation to forecasting proposal prospects and blue sky, saying:

[S]o the blue sky would be – again, it would be the result of a discussion, you know, between the location management, the sector leadership, input from the location sales leadership and my own knowledge of the region. I had been working in the region since 2005, so I had a – I had a pretty good understanding of the region as well.

1. Mr Ashton was questioned about the changes to the MENAI budget that formed part of the so-called “first round management adjustments”. As earlier noted, the MENAI budget’s contribution to operational EBIT increased by $4.910 million.
2. Mr Ashton agreed that Mr Daly proposed increases to the budget for each location within MENAI, based on reasons that included “go gets” and “metrics”. In the case of the Saudi Arabia location, Mr Daly proposed an increase of $700,000 for blue sky. Mr Ashton commented that this is a “pretty small amount going into the budgeting process”. Mr Ashton also said that his adjustments to the draft MENAI budget at this time affected both gross margin (increased) and overheads (reduced). However, in the case of Saudi Arabia, the adjustment was an increase to gross margin of $703,000.
3. Mr Ashton agreed that an assumption underlying the Saudi Arabia location budget was that WOR would secure the “GES Plus” contract. Another assumption was that blue sky revenue would be secured based on a relationship with Aramco, and other clients within Saudi Arabia. Mr Ashton did not recall whether a go-get discount was applied to the GES Plus contract, which was a “frame arrangement” under which specific pieces of work would be awarded on an ongoing basis, but later agreed that a measure of discount was applied. Mr Ashton agreed that the GES Plus contract contributed to 5% of total gross margin for Saudi Arabia.
4. Mr Ashton’s affidavit evidence was that, in around September 2013, WOR’s local partner in Saudi Arabia was black-listed with the result that WOR had to come up with a new corporate framework to undertake work that would otherwise have been secured through the GES Plus contract. Mr Ashton agreed that, by October 2013, he had formed the view that the GES Plus revenue scheduled for the second half of FY14 would not be realised in that half.
5. Mr Ashton was also questioned about an email sent from Jim Osborn to Mr Evans on 24 June 2013, providing analysis about forecast revenue for MENAI Hydrocarbons. The email noted that the forecast blue sky revenue for the UAE location was 40% of gross margin, and contained the following comment:

The UAE is the area of our greatest concern for the region with the highest blue sky at 40% and least secured EBIT at 25%. There are many prospects to build the forecast but changeover in the Location Manager and BUGM will complicate how quickly we secure work in this increasingly competitive location. This location has the highest hill to climb and the lowest confidence interval for achieving the goal.

1. Mr Ashton agreed that, notwithstanding these concerns, he considered that, as a whole, the MENAI region had a balanced budget.
2. It was not suggested to Mr Ashton that there was no reasonable basis for the FY14 budget forecasts for any location within the MENAI region.
3. Mr Ashton was also taken to an email chain in late October 2013 which annexed data for the MENAI 3+9 forecast. Mr Ahmed’s email to Mr Ashton stated:

We just completed all the inputs for the 3+9 forecast. Please see attached for the 3+9 forecast vs FY14 budget. Excluding Saudi (which is behind by AID $10M), we are ahead by $1.2M as compared to the budget. I suggest we reduce Iraq numbers (YTD they are behind by AUD $850k for the first 3 months while forecast is showing AUD $400K difference from budget) and may be some adjustment in Qatar also?

1. Mr Ashton stated that he took a critical look at the blue sky forecasts for the purposes of the 3+9 forecast. His evidence was that, apart from Saudi Arabia, the MENAI region was tracking well against the FY14 budget.
2. It was not suggested to Mr Ashton that the MENAI budget ought to have been revised in any particular respect prior to the changes in November 2013. Mr Ashton’s evidence was that he was not consulted in relation to the changes that were made the budget at that time, which reduced the EBIT for the MENAI region by $10 million.
3. It was not suggested to Mr Ashton that there was no or no adequate review of blue sky revenue forecasts for the MENAI region prior to the approval of the FY13 budget, or prior to 20 November 2013.

#### Conclusion

1. On the available evidence I am not persuaded that the blue sky revenue figures in the FY14 budget were insufficiently scrutinised, or that any greater scrutiny would have affected the FY14 budget prior to its approval in August 2013.

### Unreasonable forecasts

1. Mr Crowley’s pleaded case that WOR budgeted for an unreasonable amount of blue sky revenue was directed specifically to the ANZ region and the SWO location of the USAC region.
2. As WOR noted, this pleaded case is in tension with the proposition that the draft budget produced by the bottom-up build in late May 2013 was a “good first cut”, except to the extent that it can be demonstrated that blue sky revenue forecasts were increased after late May 2013. In opening, Mr Armstrong QC agreed that Mr Crowley’s case was that WOR had reasonable grounds “for a budget that it developed with a forecast NPAT of $284 million” and “those were the grounds that [WOR] had at the time that it came up with that budget”. As noted at [45], the $284 million figure was not forecast by WOR. Rather, it was the approximate sum of the 27 May 2013 forecast NPAT of $252 million plus an allowance for foreign exchange effects accrued between that time and the final budget. Accordingly, Mr Crowley’s case can be understood to accept that there was a reasonable basis for the blue sky revenue forecasts in the 27 May 2013 draft FY14 budget.
3. In closing submissions, Mr Crowley argued:

The reasonable forecast (and consequent guidance) ought rather to have reflected an NPAT result consistent with the Locations’ and Regions’ (and CSG representatives’) estimates derived through the exacting process of formulating their bottom-up budgets during May 2013, before the three rounds of Management Adjustments during June 2013. The May 2013 budgets already included optimistic targets for blue sky (especially given expected market conditions) and had been prepared with an acute consciousness of the need to control overheads.

1. This was one of several propositions tending to suggest that there was a single reasonable forecast for FY14 that WOR could have discovered or calculated. But, at the risk of stating the obvious, a forecast is a prediction in the absence of certainty about future events: the evidence did not suggest that there was a single reasonable forecast that WOR could or should have divined before making the August 2013 earnings guidance statement.
2. In any event, the argument finally put was that the May 2013 budgets included “optimistic” blue sky forecasts, and not that there were no reasonable grounds for any of those forecasts.
3. WOR sought to demonstrate that little or no increases were made to the locations’ blue sky revenue forecasts from 27 May 2013.

#### ANZ region

1. The ANZ region comprised six locations: Australia North, Australia South, New Zealand, Australia West, TW Power Services and Evans & Peck.
2. As noted earlier, Mr Wood accepted in cross-examination that the FY14 budget included blue sky figures for Australia North and Australia South that were optimistic.
3. The executive summary of the FY14 budget reporting pack for Australia North dated 27 May 2013 recorded as a risk:

The high % of unsecured work coming from blue sky is a risk in the current trading environment.

1. A page entitled “Full Year Performance Measures – Location Currency” recorded the following comment:

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.

1. The executive summary of the FY14 budget reporting pack for Australia West dated 27 May 2013 recorded as a risk:

31% Bluesky in flat market

1. On a slide headed “FY14 Budget – Phasing and Confidence”, there is the following commentary:

Commentary: Gross Margin Security

Overall trend in bluesky is aligned with decline in secured and unsecured projects with 11% growth in chargeable hours in FY14 Q4 weekly hours.

Perth contributes 72% of AUW Gross Margin with 31% Bluesky and 47% secured. The bluesky is primarily Improve 54% with Deliver 33% and Consulting 13% with 78% derived Hydro sector and 18% from MM&C. 44% of Bluesky is budgeted for the Hydro Improve space with an expectation that Chevron and Woodside brownfields projects highly possible.

With the transition to CSG by Client revenue recognition, the Perth Power and I&E sectors are greatly reduced with clients primarily Horizon Power, Water Corporation, local councils, Ports and Rail, and infrastructure. This has resulted in a predominatly [sic] MM&C and Hydro based budget. JV’s and Other Entity CSG allocations remain unchanged.

1. Mr Crowley noted that an aide memoire submitted by WOR showed that blue sky revenue had increased during the budget process from 16% of Australia West’s gross margin on 16 May 2013, to 26% by 31 May 2013. Mr Crowley noted Mr Wood’s acknowledgement that the available inference was that the locations were “stretching to achieve budget targets”.
2. On 31 May 2013, Mr Daly also expressed concerns about the level of blue sky in the ANZ region to Messrs Holt and Allen as follows:

…we will only get a better true understanding when the May numbers are completed. I have also included FY12 for comparative purposes. For ease of understanding, I have grouped the locations by region and this clearly highlights the problem areas in both FY14 and FY13. For FY14, secured work is approx. 53% which is about right and Blue Sky is approx. 19% which is also ok. However, 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).

1. After the so-called management adjustments, budgeted blue sky revenue in Australia North increased by 1% of gross margin. Mr Crowley did not dispute WOR’s calculation that this adjustment added $1.87 million to the draft FY14 budget gross margin.
2. In Australia South, the increase was $66,000, while in Australia West it was $40,000 and in New Zealand, the increase was $8,000.
3. Mr Crowley submitted that, by 21 September 2013, “hockey stick” revenue projections were a key feature of the underperforming Australia North and Australia South location budgets.
4. On 14 October 2013, Mr Allen provided Mr Holt with the September 2013 results, and commented, relevantly:

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. Key locations driving this are Cord, Calgary (expected) and Australia North (fall off on MAK), Brunei (restructuring costs), South Africa (they are saying VOC but there must be more to it than that).

1. On 29 October 2013, Mr Daly noted, as one of four “major material risks”:

The relatively high levels of blue sky in Australia West, Australia North, China Calgary and Houston. In each of these locations, secured workload looks reasonable but the proportion of blue sky is relatively high.

1. On this evidence, although I accept that WOR’s forecasts may have been excessive, I am not persuaded on the balance of probabilities that WOR budgeted for an unreasonable amount of blue sky revenue in any location within the ANZ region in the FY14 budget.

#### SWO location of USAC

1. The SWO budget reporting pack dated 16 May 2013 forecast that blue sky revenue would contribute 10% of gross margin (total gross margin being forecast at $173.665 million). It identified the following risk in the executive summary:

Blue Sky accounts for ~29% of unsecured Gross Margin total ($17.9M of $62.4M)

1. The comparable budget reporting pack dated 3 July 2013 forecast that blue sky revenue would contribute 11% of gross margin (now forecast at $173.593 million).
2. Mr Crowley did not dispute WOR’s calculation that the difference in blue sky before and after the management adjustments was approximately $1.73 million.
3. Without more evidence or analysis, I am not persuaded that WOR budgeted for an unreasonable amount of blue sky revenue in the SWO location.

#### Argument based on Holt Memo interview notes

1. Mr Crowley submitted that the use of blue sky as a means of “padding-out” budget estimates is a “constant theme” in the interview notes. The comments by those involved in preparing the FY14 budget in the Holt Memo interview notes record:
* People put in numbers which look right rather than are right
* Exco will make the decision anyhow, and they WILL be asking for more

…

* Push to Grow regardless of actual trading conditions and cycle
* Every budget has a perceived target which requires bluesky with great deal of uncertainty
* Higher and higher BlueSky with lower and lower probabilities leads to falling behind on actuals
* Nervous about the degree of BlueSky in the budget
* General recognition of P50 trending now to P25

…

Culture & Behavioral vs the Process

…

* Why bother putting honest numbers at the first pass since they will be challenged on an unrealistic basis
* Expectation of growth on the headline number

…

How can we improve the process

…

* 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 cost costs vs speculative revenue.

…

1. Mr Crowley also cited the following notes recording feedback to Mr Holt from his discussions with the RMDs and ExCo members:
2. Mr Lucey: “Too much stretching … Give me $5 million and I don’t care where it comes from, resulting in Bluesky over stretched towards the end of the year”;
3. Mr Bradie : “The budget process itself is fine, but then we talk it up”;
4. Mr Steele: budgeted “with numbers that looked good in front of the headmaster … Too much push from the high level expectation”; and
5. Mr Wilkinson : “Pushed 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”.
6. Mr Crowley emphasised Mr Holt’s conclusion in the Holt Memorandum that WOR’s budgeting process had been infected with optimism bias. Mr Holt expressed the view that 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. Mr Holt continued:

… in many cases, the bottom up build that the locations submit does not match the expectations of growth from senior management. 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. Therefore, the probability that the budget will be met decreases. A conclusion from this is that our budgets have not genuinely been P50 budgets. This is supported by the fact that we have missed budget five out of the last six years.

1. Mr Crowley did not rely on these matters to put the pleaded case that the FY14 budget contained unreasonable blue sky forecasts. Rather, the argument put was that the May 2013 budgets contained optimistic targets for blue sky and, thereafter, senior management “could have the blue sky, or have the overhead reductions, but it was not reasonable to expect both. Yet that was the effect of the post-May 2013 adjustments (other than forex). They demanded more savings, whilst conceding no revenue”.
2. WOR needed to incur costs in order to earn blue sky revenue and accordingly the inclusion of blue sky revenue in a budget necessarily entailed an inclusion of overheads. Thus, in an email sent on 7 November 2013, Mr Daly noted:

…where overhead increases are evident in the 3+9 in locations such as China, I suspect that overhead has been increased in line with the stretch targets they have taken up i.e some locations added blue sky to increase their figures to maintain budget but increased overhead in line with this proportionately. However, the reasoning will follow that if this overhead is removed, the blue sky should also be factored down as otherwise this becomes an even greater part of the EBIT with its inherent risk.

1. However, without more analysis, it is not reasonable to assume a direct relationship between blue sky revenue and overheads, not least because WOR’s overheads included a substantial amount for Global Functions.
2. Mr Crowley suggested that the comment in the Holt Memo interview notes, recorded above under the heading “How we improve our process” indicates that if costs are cut then the ability to earn blue sky is impaired. Obviously, cutting staff may have impaired WOR’s revenue earning capacity. The comment suggests that locations may have sought to justify the retention of staff by the inclusion of blue sky revenue in the FY14 budget. The proposal seems to have concerned improving discipline to identify unnecessary costs.
3. The evidence did not analyse whether any overhead reductions in the FY14 budget produced the result that one or more locations was placed in a position where it could not bid for or secure blue sky revenue for want of resources.
4. Accordingly, I am not persuaded that the Holt Memo interview notes justify, either alone or with the other evidence, a conclusion that the FY14 budget included an unreasonable amount of blue sky revenue.

## Closing submissions

1. Finally, Mr Crowley put a case that eight core factual matters support a conclusion that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement (identified at [52] above). Below are my conclusions in relation to those matters.

### Track record of underperformance against internal budget

1. The Holt Memorandum demonstrates a significant record of underperformance by WOR against its internal budget every year since FY09, with the exception of FY12. The memorandum states, relevantly, that in the past six years, WOR had underperformed its original budget by 10% or more five times. This proposition is apparently based on figures set out in the memo. The following table sets out the relevant figures and the percentage differences between the budget and actual results:



1. The FY14 budget process was not materially different from the process that had been followed in the preceding years.
2. Mr Crowley acknowledged that the final FY13 results were not available to WOR when the process of preparing the FY14 budget commenced. However, he observed, by at least May 2013, WOR had been sufficiently confident in its FY13 underperformance to amend its market guidance. On the basis of the “8+4” results available when the FY14 budget commenced, the information available to the Board (as recorded in the Holt Memorandum) would have shown the following variations against the FY13 budget:



1. Based on the figures in the Holt Memorandum, Mr Crowley made the following contentions:
2. WOR showed less inaccuracy in budgeting revenue than EBIT and NPAT, but this only highlights its poor forecasting of the latter two metrics. Its forecasting history provided no reasonable grounds for confidence that WOR’s performance on revenue would lead to a corresponding performance on EBIT or NPAT.
3. On any view, the historical NPAT figures show “consistent, substantial underperformance”.
4. Even if the revenue miss in FY10 was explained by the unanticipated effect of the GFC, that does not provide an answer for the disproportionate underperformance against EBIT and NPAT budgets compared to revenue in other years. WOR’s performance against budget showed systemic problems in accurately forecasting EBIT and NPAT even putting aside FY10 on the basis of the GFC.
5. Given that WOR essentially achieved budgeted revenue in FY09, it is not apparent how its underperformance could relate to the GFC.
6. Accepting propositions (1) and (2), more detailed analysis would be required to make a finding about the reason or reasons for WOR’s historical underperformance against EBIT and NPAT budgets. WOR’s performance against budget certainly raised an issue about systemic problems in accurately forecasting EBIT and NPAT, but it does not provide a basis for making a finding of systemic problems in accurately forecasting EBIT and NPAT without more.
7. These facts provided WOR’s officers with a basis for scepticism as to the grounds for the FY14 budget. However, without knowing more about the reasons for WOR’s underperformance in any year, WOR’s track record does not itself provide a sound basis for a conclusion that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement.

### FY13 earnings guidance downgrades

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.
2. These are additional matters that provided WOR’s officers with a basis for approaching the FY14 budget with caution but again, without knowing more about the reasons for WOR’s underperformance against its internal budget in FY13, they do not themselves provide a sound basis for concluding that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement.

### WOR’s major markets

1. Mr Wood’s evidence set out above supports Mr Crowley’s contention that, as the FY14 budget setting process began, WOR’s major markets were “either not growing or were deteriorating”.
2. In its defence, WOR admitted that by 14 August 2013, it was aware that:
3. In FY13, WOR had experienced challenging conditions in a number of its key markets.
4. There would be continued uncertainty in the markets for its services in FY14.
5. Statements to this effect were made by WOR in its 2013 annual report, lodged with the ASX and publicly released on 14 August 2013.
6. This is a persuasive reason for approaching the FY14 budget with caution. Whether it provided a basis for concluding that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement must depend upon the extent to which the budget reflected the perceived market conditions. That question was not analysed in sufficient detail to permit a conclusion that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement.

### Characteristics of the budget compiled by late May 2013

1. Mr Crowley submitted that the late May 2013 draft budget incorporated “stretch targets” in respect of both revenue and costs savings, which were optimistic given market conditions.
2. As set out above, there is evidence that aspects of the 27 May 2013 draft budget were optimistic and that, overall, the draft budget was “ambitious”. However, without more analysis, I do not accept that, as a corollary, there were no reasonable grounds for the alterations to the FY14 budget that were subsequently made.

### Management adjustments

1. This aspect of Mr Crowley’s case is addressed above. In short, the so called management adjustments were not the result of senior management demands and the evidence does not support a conclusion that they were unreasonable in any respect.

### $12 million acquisition stretch

1. As explained above, I do not accept that the acquisition stretch lacked a proper basis.

### FY14 budget was “not a true P50 budget”

1. Based on Mr Holt’s conclusion in the Holt Memorandum set out at [402], I accept that the FY14 budget was not a true P50 budget.

### Lack of risk-adjusted review

1. The evidence did not explain what a risk-adjusted review would have entailed, why it was necessary or desirable in order to test the FY14 budget and, most significantly, what it would have discovered about the FY14 budget. Without more, the lack of such a review does not indicate that the FY14 budget lacked reasonable grounds.

### The eight matters considered together

1. Considered together, there were reasons for WOR’s Board to approach the task of approving the FY14 budget with caution (although there is no evidence that the Board ought to have known that the budget was not a true P50 budget). However, the matters identified by Mr Crowley fall well short of proving on the balance of probabilities that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement.

## Conclusions

1. On the facts set out above, I am not persuaded that the FY14 budget was overstated. I am not persuaded that the process by which the FY14 budget was developed and approved was deficient, or that the budget itself was deficient, so as to cause WOR to lack reasonable grounds for the August 2013 earnings guidance statement.

# 2013 Annual Report

1. The 2013 annual report included the following statements:

**3.3 MANAGEMENT OF MATERIAL BUSINESS RISKS**

The Group has a Corporate Risk Management Policy and Risk Assurance framework. The Board requires management to design and implement risk management and internal control systems to identify, assess and manage the Group's material business risks and report to it on whether those risks are being managed effectively. The Risk assurance framework describes the objectives, strategies, resources and responsibilities for managing risk and how assurance is provided to the Board and management in relation to compliance and effectiveness.

The Group’s risk management approach is based on the International Standard ISO 31000:2009 Risk Management- Principles and Guidelines. This approach adopts best practice in risk management insofar as it relates to the Group’s requirements. The Group’s Risk Management systems are mature and embedded throughout the operations via the Group’s Enterprise Management System.

The Group has processes to systematically identify, assess and report on both financial and non-financial material business risks. Part of this process requires the Internal Audit Group to report to the Board as to the effectiveness of the Group's management of its material business risks and internal controls. A strategic and operational Corporate Risk Management report is prepared and analysed by both management and the Board on a bi-annual basis. The Board receives reports from management on the effectiveness of the Group's management of material business risks during the Reporting Period.

This process enables the Board to consider the effectiveness of the Group's management of its material business risks. The Board has also received a written assurance from the CEO and the CFO that the declarations provided by them, in accordance with s. 295A of the Act and ASX Recommendation 7. 3 are founded on a sound system of risk management and internal control and that the system is functioning effectively in relation to financial reporting and material business risks.

**…**

**3.5 CONTINUOUS DISCLOSURE**

The Board is committed to ensuring that the Company complies with the continuous disclosure obligations and has approved a Continuous Disclosure Policy that applies to all Group personnel, including directors. The Board seeks to promote investor confidence by ensuring the trading in the Company's shares takes place in an informed market.

The Continuous Disclosure Policy is designed to ensure that all Group personnel are aware of the Company’s obligations and to ensure accountability at a senior executive level for timely disclosure of material information. This policy aims to ensure that shareholders and the market in general are kept properly informed of material price sensitive information affecting the Company, on a timely basis. The Company discharges its obligation by releasing material price sensitive information to the ASX in ASX announcements and other documents distributed to shareholders, such as the annual report.

# FY14 performance (August to September 2013)

## July 2013 results (About 22 August 2013 to 9 September 2013)

1. The “Finance Report – ExCo July FY14” set out the following financial performance highlights:
* Group NPAT of $11m above budget by $1.2m. Favourable FX impact of $0.2m with underlying performance above budget by $1m.
* NPAT variance due to overall savings across the global support functions of $3.7m, mainly in iM and Operations.
* Aggregated revenue below budget by $8.4m or 1.5%.
* Operational EBIT of $54.2m below budget by 1%, with Hydrocarbons above budget and MM&C and Infrastructure below.
* Group EBIT of $22.3m above budget by 16%.
* Group EBIT margin of 4% above budget of 3.4%.
1. Mr Crowley submitted that there were reasons to regard the result as unfavourable. In an email sent by Mr Holt to Messrs Bradie, Wood and others on 22 August 2013, Mr Holt stated:

Please find attached July results.

While we are ahead against budget at $11m for the month it is not flash and when compared to last year is significantly less even with FX on our side.

Key areas of concern against budget are South Africa, Cord (verbal responses from Cord are concerning, numbers are not quite as bad). I am extremely concerned about our exposures/issues in South Africa Hydrocarbons.

Against last year July locations overhead results are of particular concern. While I understand FX having an impact against location overheads against the back drop of revenue are high. The locations driving this are Edmonton, Eastern Canada, Cord, Brazil, South Africa, SouthWest Ops and Western Ops. Further works need to be done to understand this.

…

1. On 9 September 2013, an agenda was distributed for a call with the principal topic being a finance update led by Mr Daly. The participants were to include Messrs Bradie, Ashton, Daly Lucey and several others, but not Mr Wood. The agenda was sent with a slide pack entitled “Finance Update Global Operations July FY14”. On a page headed “July Performance - Highlights”, the following results are recorded:
* Versus budget:

Bebit = $54.2m versus Budget of $54.8m, Variance = ($0.6m)

Bebit Margin = 10% versus Budget of 10%, In line with budget

…

* Versus prior year

Bebit = $54.2m versus PYR of $65.7m, Variance = ($11.5m)

Bebit Margin = 10% versus PYR of 10.7% (0.7%) adverse to prior year

1. Under the heading “Areas of Focus/Key Risks”, the slide stated:
* Budget back-end loaded - H1:H2 split is 45:55
* Continued focus on chargeability and cost base in all locations to ensure sized for future workload
* Early impressions are that a number of locations have ambitious budgets based on initial review of pipeline of work - support needed from all locations
* Continued focus on WIP conversion and cash collections
1. Mr Crowley’s ultimate submission was “[s]imply put, the July 2013 results cannot be dismissed out of hand just because the NPAT result was in line with the July 2013 forecast”.

## 2+10 forecast (early September 2013)

1. In early September 2013, WOR commenced preparations for a “2+10” forecast. The 2+10 comprised a comparison of the results for the first two months of the new financial year against the full year budget and a high-level re-appraisal of expectations for the remaining 10 months of the year. As Mr Lucey explained it, the purpose of the 2+10 was to provide up to date information on the full year outlook to the Board, and to Mr Wood, ahead of WOR’s Annual General Meeting (**AGM**) on 9 October 2013 and the Investor Day presentations in the following week. The 2+10 was intended to inform a market update at the AGM.
2. Mr Crowley noted that the preliminary instructions for the 2+10 included that:

This exercise is intended to capture any **known material upside variances** to your full-year FY14 budget numbers. Any material downsides (increases in cost) will need to be discussed with Stuart Bradie and approval sought before being submitted to Finance.

Materiality level has not been defined by Group Finance but in discussion with Darren, we are looking at anything over $0.5M for the O&D Function and **over $200K per** **each Group**.

This will not be a detailed exercise and no budget templates will be sent out.

**I’m looking at the Group Managers, in conjunction with their 1 down direct report/budget holders, to ascertain if there is anything material that needs to be factored into the 2+10.** The consolidated results will be used by Group Finance to get a feel for where the Company is heading before any further decisions are taken. It will not be used in any reporting until we have completed the 3+9 …

(Emphasis in original)

1. Mr Crowley submitted that an obvious inference of the requirement for advance discussion of material downsides before inclusion in the 2+10 was that bad news had to be run through the filter of Mr Bradie before it could be reflected in the new report. I do not accept that submission. To my mind, the more likely inference is that Mr Bradie wished to test any identified increased costs to satisfy himself that they could not be avoided.
2. Mr Crowley referred to the following comments in the Holt Memo interview notes, in support of his case that bad news was discouraged at WOR:
* Expectation of growth and success in the company, when people in the business tell a different story there is pushback

…

* No one wants to give the bad news, which often leads to missing or delayed but pertinent negative indicators (information) results in the inability of management to react and take corrective action on a timely basis. Results in the failure of management to focus on the correct things.
1. Mr Crowley also referred to the following passage in the Holt Memorandum:

... the intention behind our re-forecast process is to give management an assessment, on a quarterly basis, as to how the group is tracking versus its original budget. This assessment is then used to determine whether WorleyParsons current market guidance is appropriate.

In practice, it appears that similar issues to those identified in the budget are cropping up in the re-forecast process. In particular, locations are under significant pressure to “hold the line” with respect to their original blue sky forecasts, even in situations where the local market conditions are such that it has become less likely that this work will materialise.

The reason given for this approach is to continue to put pressure on locations to perform. However, the risk is that our re-forecast is still about work we hope will come, rather than about work that we feel the market for our services will deliver.

1. This passage appears to be directed to quarterly re-forecasting rather than the 2+10, but it is reasonable to assume that Mr Holt believed that a similar attitude affected the 2+10 forecast.
2. In any event, except to the extent described below, Mr Crowley did not identify specific elements of the 2+10, or the process by which the 2+10 was developed, that were wrong or unreasonable.

## “Major reset” (21 September 2013)

1. The email that preceded Mr Bradie and Mr Wood’s agreement that a “major reset” was required was from Mr Daly to Mr Bradie. In that email, Mr Daly provided an update on the 2+10 process. Relevantly, Mr Daly said:

[B]ased on the calls earlier this week, provisionally it looks like the “2+10” update will show that we are adverse to budget at an operational EBIT level by approximately $23m and I would expect this order of magnitude variance to continue through to the “3+9” update when the locations do a more thorough review of their forecasts.

1. Mr Daly identified negative variances in the Canada, South Africa, Chile and Saudi Arabia locations which totalled $23 million.
2. Mr Daly continued:

In terms of upside, I would suggest that ANZ (West and North, not South) may have more to give, in particular as they have a good balanced H1:H2 split. To get more confidence, we need to see the blue sky proportion in AUW diluted. Canada has potential – Cord will be putting together a claim on ATM which has potential upside of $20m and is forecasting strong workload in the second half, Edmonton also looks positive later in the year. However, it is certainly too early to predict as there is potential downside of $20m on ATM if we don’t get the incentive and LD’s arise and the second half performance is very reliant on Brion. US SW Ops, our largest location, has a “hockey-stick” budget with 56% of EBIT budgeted in the second half but its performance has been good and they should come in in line with budget.

The other locations worth highlighting at this stage are:-

Brazil – due to the size of the claims on MMX, Skanska and Jirau, this could be a material swing factor

Brunei – a more thorough bottom up “3+9” forecast is likely to show that they are off budget by approx. $3m-$4m due to workload

US Eastern Ops and US Western Ops – both of these locations have 42-58 H1:H2 splits which will be a challenge. Eastern Ops has only 44% secured workload

UAE – Iraq performance is pulling it down and secured workload is currently only 42%

UK – secured workload is only 49% and there is too much blue sky and I think they will struggle to meet budget

Offsetting the above should be stronger performance in China, Indonesia, Qatar, Norway, Holland – the outlook for all of these is currently good (assuming no downside on the NDPP claim). The other upside has to be very active management of overhead – looking at workload, it needs to be “right-sized” in particular in ANZ South and North (as part of the synergy work bringing them together), Calgary, UK, Brazil, Chile, South Africa and Brunei.

1. Mr Bradie forwarded Mr Daly’s email to Messrs Wood and Holt on 21 September 2013, saying:

Below is a good summary from the reviews this week. I have not seen the overall group position for August yet or how we are trending in the other functional areas but my sense is that the October sessions will be very important.

The MMC are still having a significant business impact in SA and LAM and power is slow also.

We need a major reset out of the CEOC/ExCO. Doing what we are doing today will not get us there all be it there are many people working hard with the right intent.

1. Mr Wood responded as follows:

I agree there is a major reset required. I will be in the US this week so lets make time to talk ahead of our meetings in Sydney.

1. Mr Crowley noted that, in cross-examination, Mr Wood insisted that WOR was “largely on target”. In context, Mr Wood’s evidence was as follows:

Mr Armstrong QC: Mr Wood, why is it that you took the view, as at 22 September, that a major reset was required in respect of the company’s financial performance?

Mr Wood: Because we believed there were, as you can see from the note from – from Michael [Daly] to – to Stuart [Bradie], there’s a whole raft of swing factors in there. What we’ve seen in the first month is that we were largely on target. The second month, we had a project that was – that the result was – was poor and had impacted, but the rest of – of the business was largely on - largely on target. For that project, we had the potential of a claim to offset the … losses that we were recording at that point in time. But to … reinforce our ability to meet guidance. Then, again, looking very closely at where we were spending money, what we were – and – and how we were doing it and the – then … a reset of expectations was necessary. But at no point, at this stage, did we consider that we were not in a position to – to meet guidance.

1. Mr Crowley submitted that Mr Wood’s evidence “sits uneasily with the other evidence”, and the true position was that senior management was “seriously concerned”. Mr Crowley referred to the following matters:
2. The August FY14 finance report to ExCo (sent to Mr Holt on 20 September 2013), included the following result in the executive summary:
* **Net Profit after tax and MI** of $14.9m **below FY14 budget by $14.2m** or 49%, and **below prior year by $23.6m** or 61%.

(Emphasis in original)

1. Compared with the H1 (1 July to 31 December) budget of $143.2 million, although one-third of the half-year had elapsed, profit was just 10% of the half-year target. In order to make up the shortfall and achieve its FY14 H1 budget, WOR would need to achieve an average monthly group EBIT of $51.1 million over the four remaining months of the half-year, although it had achieved a monthly run rate of just $7.45 million for July and August 2013. Mr Crowley submitted that $51.1 million run-rate now required was a “stiff ask” given its average monthly rate of $41.4 million in H1 FY12 and $42 million in H1 FY13.
2. The measures that followed the “major reset” had “no apparent relation to the on-ground problems at IOL ATM, and were on a scale far beyond anything suggested by the problems identified in Mr Daly’s email”, which concerned particular locations. In particular, Mr Crowley referred to a program of redundancies called the **EBIT Improvement Program**.

### EBIT Improvement Program

1. Mr Crowley noted that the evidence does not reveal when the basic parameters of the EBIT Improvement Program were defined, and acknowledged that it may have been evolved from an existing initiative. In any event, Mr Wood’s evidence was that, by 21 September 2013, WOR saw some issues in various locations “and that the market continued to be challenging” and decided at that point that a more rigorous cost program was needed. Mr Crowley noted the following steps that were taken:
2. The 5 October 2013 CEOC meeting recorded that a best practice location organisation and overhead structure should achieve a reduction of 600-800 full time equivalent (**FTE**) positions across the business. Mr Crowley submitted that the work done to identify the proposed reduction must have commenced by 4 October 2013.
3. By 23 October 2013 (that is, after the dates referred to in Mr Crowley’s performance and consensus cases), the EBIT improvement steering committee had determined that their target was “a reduction in total overhead budget of 1500 FTE (excluding office services and recognising the FTE numbers presented in the CEOC meeting were budget numbers)”. The task was described as “urgent” and the recommended first stage “would be to effect a reduction of 950 FTE by the 31st Dec 2013 in order to feel the benefit during the second half of FY14”.
4. By 31 October 2013, (that is, again after the dates referred to in Mr Crowley’s performance and consensus cases), the total “improvement” from the EBIT Improvement Program was calculated at $53 million, with an NPAT effect of $38 million, recorded in the ExCo minutes of 31 October 2013.
5. Mr Crowley submitted that, even if it evolved from some existing plan, the EBIT Improvement Program was “dramatically escalated and expanded” in response to the 21 September 2013 “major reset” realisation. Mr Crowley contended that this was the import of the following exchange:

Mr Armstrong QC: And that it was because of that awareness that the company, in fact, was not tracking in accordance with the budget that you pressed for the EBIT improvement program and an additional $38 million in savings to the EBIT line?

Mr Wood: We saw in the – we saw, at that point in time, that we had had some issues in various locations, and that the market continued to be challenging. And we – and we decided, at that point, that a more rigorous cost program was needed. It was a cost program that had been identified earlier, and as I explained before, we were going through a period of – of quite significant shifts in our markets. As a result, we were – we were requiring a shift in our overall strategy, and so many of the cost elements and the structural elements that we had put into our organisation to deliver a growth strategy, now, needed to be reversed, and that’s what that process was about. Yes, as we – as we saw from what was the early indication of the 2+10, which is not a formal reforecast, as we said before, that – that taking, being very cost conscious for the remainder of the year, was going to be really important, but, at that point in time – and as these –these sequences work, at that point in time, our market still looked okay. We were looking to offset what we had seen as a – as a – as a couple project upsets.

1. Mr Crowley posed the following question: “Why such an aggressive redundancy program in response to a set of results that, on Mr Wood’s evidence, must have been regarded as pretty good?”
2. In cross-examination, Mr Wood agreed that by about 21 September 2013, WOR had lost a few recent major tenders on price grounds and there were indications that some of its competitors were willing to bid at low margins in some markets in order to secure work. Mr Crowley noted the following passage from Mr Wood’s CEO’s Report for September 2013:

In general, our markets appear to be fairly stable. There are numerous quality opportunities available in our major markets across the globe and we are well positioned to secure a large number of them. We have however lost a few recent major tenders on price and there are indications that some of our competitors are willing to bid at low margins in some markets to secure work.

1. Mr Wood disagreed that WOR was losing work as a result of being overweight in terms of cost structures, saying that, first, WOR was already at a lower overhead level that it was expecting and budgeting for; and secondly, the major locations were competitive.
2. In relation to his second point, Mr Wood said:

[S]econdly, if you look to the locations that were achieving the target levels of overheads, they were typically our major project locations – the larger locations. That’s why, even though you saw high numbers in red, you saw the overall number was still only – you know, it was around 18 per cent, not – so just slightly above the 17 per cent target.

1. Mr Wood’s evidence in cross-examination referred to an overhead analysis in the “Finance Update Global Operations July FY14” slide pack. The pack included a page entitled “Overhead Analysis - trending over past 3 months”. For “Deliver Locations” (as distinct from “Consulting Locations”), the overhead cost as a percentage of professional services revenue was measured against a benchmark of 17%.
2. Mr Crowley’s response was that even a miss of 0.6% against the benchmarks for both “Deliver Locations” and “Consulting Locations” would be sufficient to negate the entire $43 million CEOC overhead reduction commitment. Mr Crowley also observed that trend analysis showed that, as at July 2013, WOR was exceeding its benchmarks (Deliver Locations were tracking at 19% compared to a target of 17% or less, while Consulting Locations were tracking at 30% against a target of 24%).
3. Mr Wood rejected the proposition that the July overhead trend analysis showed that WOR’s locations were not managing to bring down their overheads in accordance with targets that had been identified for them. But, Mr Crowley said, the trend analysis showed that over the period from about April or May to August 2013, the “Deliver Locations” had not moved their performance, while the “Consulting Locations” had worsened from 26% to 30%.
4. None of this sheds particular light on the question whether WOR was being priced out of work because of stubborn overhead costs, as Mr Crowley claimed.
5. Mr Crowley submitted that Mr Wood’s explanation for the “major reset” emails and the EBIT Improvement Program was incoherent and should not be accepted; that Mr Wood was conscious that WOR was not going to perform to the FY14 budget and, in response, drove the EBIT Improvement Program to make new and very substantial contributions to NPAT.
6. On this basis, Mr Crowley submitted, senior management ought reasonably to have been aware by 21 September 2013 that WOR was no longer tracking in line with the FY14 budget but rather at a level very materially below it.
7. WOR disputed that this submission was relevant to Mr Crowley’s case as pleaded. In any event, the “major reset” emails show that Messrs Wood and Bradie were concerned that WOR would not achieve the projected NPAT without positive action. However, I am 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. There was no evidence that any relevant person within WOR had formed the view that WOR was tracking at a level very materially below the FY14 budget by 21 September 2013. In those circumstances, I do not accept that WOR’s senior management ought to have determined that this was the position by 21 September 2013.
8. Mr Crowley noted that, by early October 2013, as explained below, the 2+10 was already the new basis for guidance to the market. Mr Crowley argued that, in the circumstances, the 2+10 was the occasion for a “proper” review of the assumptions underpinning the FY14 budget and the August 2013 earnings guidance statement. In particular, Mr Crowley said, there should have been a reassessment of the prevailing revenue projections.
9. However, Mr Crowley did not seek to demonstrate the likely results of a reassessment of revenue projections on or about 21 September 2013. In those circumstances, I am not persuaded that WOR (through its relevant officers) ought to have known on or about 21 September 2013 that the FY14 budget did not provide a reasonable basis for the August 2013 earnings guidance statement, or that its FY14 earnings were likely to fall materially short of the consensus expectation NPAT of $364.6 million.

## Late September 2013

1. On 24 September 2013, Mr Wood received the FY14 August financial report Board pack for comment. The pack contained the following financial performance highlights:
* Group NPAT of $14.9m below budget by $14.2m. Favourable FX impact of $0.7m with underlying performance below budget by $14.9m.
* NPAT variance due to higher costs associated with the IOL ATM project and other projects in Cord, Calgary and Edmonton ($20.1m) and lower than expected performance in South Africe [sic] ($3.0m)
* All CSG’s are below budget; Hydrocarbons (-$15.7m) due to IOL ATM, Infrastructure (-$3.8m) due to lower volumes in Australia South and lower utilisation and charge out rates for Evans & Peck, and MM&C (-$2.0m) due to lower chargeable hours and increased provisions for Australia North and due to demobilisation and slow ramp up on Vale projects in South Africa
* Group EBIT of $37.4m below budget by 30%.
* Group EBIT margin of 3% below budget of 4.3%.
1. The slide for Hydrocarbons noted:
* Year to date EBIT of $73.3m, $15.7m below budget and $20.7m below prior year.
1. The following extract from the August 2013 outlook is set out at the bottom of the slide:

Continued growth of the US gas, downstream and petrochemicals market, opportunities in Norway and in the developing world. Potential market slowdown in Australia expected to be offset by continued global growth. Expected medium to long-term growth resulting from global diversification and ongoing strengthening of customer relations. We expect improved earnings in the Hydrocarbons sector in FY2014.

1. The FY14 August financial report ExCo pack reviewed analyst coverage of WOR, including a comparison of the FY14 budget variance to the analyst “consensus”. One point made is:
* FY14 internal forecast NPAT of $352.1m is $12.5m or 3.5% below the average analyst estimate of $364.6m
1. ExCo met on 25 September 2013. The minutes record the following:

5.0 Finance

Simon discussed the August FY14 Finance Report with ExCo.

He noted that the August results were greatly affected by the ATM project in Canada. The cost to complete has increased and claims of $33.5 million have been prepared.

Other comments:

* A 2+10 forecast will be prepared for a market update at the AGM.
* Global support costs are $4 million under budget but some is timing
* WIP conversion is an issue, particularly in Canada
* Jirau and Skanska change orders could have an impact on the forecast if they are resolved by December
* We have a claim on MMX however there is uncertainty of how it will progress given the change in ownership of the customer

6.0 Operations update

Stuart provided a quick update of the Operations group:

1. ANZ - generally in good shape and there could be upside. The suspension of the MAK project due to lack of payment will have an effect.

2. ASCH - Brunei work has been reduced by Shell - we will need to let go approximately 100 people. China is okay although the chemicals market is flat - HVE is on budget. RWP is going well although the 100% Malaysian business is not.

3. AME - UAE has a low workload but other locations are okay. We still have issues in Saudi getting our entity in place.

4. EUR - going well although greater workload is required in UK. Holland is good on the back of Southstream and Kazakhstan good due to TCO.

5. SSA - some movement in Angola on visas. Nigeria - some challenges on Egina execution. South Africa - workload challenges - rationalisation of outlying offices (sale considered) - VOC contract issues - market conditions are generally not good.

6. LAM - many issues largely due to poor market conditions in M&M affecting Chile and Peru. Brazil needs to replace MMX with a major win.

7.. USAC - overall is fine. South West ops are overachieving, East is on track and West is improving.

8. Canada - is going well, other than ATM.

Stuart advised that on signing the Shell UCOG contract there was a positive deliver-focused session with Shell which discussed how it can be improved. It was agreed to hold both WP and Shell people on site jointly accountable.

We need to do similar for Chevron and BP - we need to engage our customers on deliver and agree how improvement will be achieved.

1. On 27 September 2013, a first draft of the FY14 2+10 group forecast slide pack became available. The Executive Summary contained the following financial highlights:
* As presented and approved at the August 2013 Board meeting the FY14 budget is an operational EBIT of $1,030.1m and global overheads of $437.9m resulting in a FY14 Group EBIT of $592.2m reflecting a 12.4% growth from FY13 EBIT of $527m.
* The 2+10 forecast NPAT is $333.0m, $19m below the budget of $352.1m, representing growth of 3.4% against FY13 compared to 9.3% growth in the budget.
* Total operational EBIT was reduced in the 2+10 forecast in three key locations within Canada due to higher costs associated with IOL ATM and Husky Sunrise which has impacted Cord (-$4.2m), Calgary (-$7.4m) and Edmonton -$2.9m). Other locations forecasting lower than FY14 budget include Brunei (-$3.6m), South Africa (-$3.4m), Chile (-$2.3m), Malaysia (-$2.3m), Saudi Arabai (-$2.0m) and Bulgaria (-$2.0m), offset by an increase of $1.7m in Eastern Canada and $1.0m in Malaysia RWP. All other locations remain materially in line with budget for total EBIT.
* Group EBIT HOH split is forecast to be 37:63 across the year, compared to a budget split of 41:59 (FY13 split 48:52). H1 NPAT, is forecast to be $120.2m, a decrease of $34.9m from the prior year and a decrease of $24.8m from the FY14 budget.
1. The draft pack included a sensitivity analysis, marked “DRAFT - awaiting further info”. It shows an NPAT range of $290.2 to $339.4 million with a base of $321.9 million. The sensitivity analysis was revised at least twice before it was finalised. Mr Wood confirmed that the sensitivity analyses did not involve a reassessment of blue sky in the budget.
2. Mr Crowley submitted that an operational analysis in the draft pack showed that WOR was not turning blue sky or other unsecured work into revenue in the amounts budgeted, but did not explain the basis for this interpretation. A bullet point on the relevant slide stated:
* Key proposals secured since the FY14 budget include Enbridge - Surmont in Cord (GM +$3.9m), NWR - Tank Farm in US Eastern Ops (GM +$3.6m), Appamatox project for Shell in Southwest Ops (GM +$1.1m) and the HH1 Rasgas Flow assurance project in Malaysia (GM +$1.2m). Key unsuccessful proposals to date are the 3A Wellpads for MEG Energy (GM $5.2m), additional work for Enbridge in Cord (GM $5.4m) and Lukoil Gissar in Malaysia RWP (GM $1.6m).
1. Mr Crowley noted that the draft pack was sent to Mr Allen by Ms McIernon with the following note:

3. FX scenario was run using the Spot rate as at 20th September which resulted in an FX loss of $6.3m at NPAT level versus the budget rates.

1. Mr Crowley submitted that this calculation meant that more than half of the foreign exchange hedge (rebadged as “operational contingency”) had been “consumed” only two months into the new financial year. The evidence did not identify relevant standards for accounting for foreign exchange.
2. The Board pack for the 2+10 group forecast was distributed on 4 October 2013. Mr Crowley noted the following aspects of the forecast:
3. One of the “financial highlights” was:
* HOH split is forecast to be 36:64 across the year, compared to a budget split of 41:59 (FY13 split 48:52). H1 NPAT is forecast to be $120.2m, a decrease of $34.9m from the prior year and a decrease of $24.8 from the FY14 budget.

However, the slide headed “FY14 Half on Half Analysis” shows a split of 34:66.

1. In the sensitivity analysis, the NPAT range was $324.8 to $382.6 million with a base of $352 million. The downside risks were $33 million. Mr Crowley noted that this figure was $52.9 million in the previous draft. He says that there was no explanation for the removal of the following items (which totalled $19.9 million) from the downside risks:
* Saudi Arabia: costs to meet the requirements of GES+ contract and delays
* UAE: Iraq not converting proposals/Loss of Shaheen and Shell Majnoon projects
* US Eastern Ops - low level of secured work
* Chile - low level of secured work and restructuring
* Bulgaria - Belene uncertainty
* FX - Group EBIT (Rates 20.09.13)

An amount for “FX - Group EBIT (Rates 20.09.13)” is in the base case calculation of the final sensitivity analysis, which would appear to explain the removal of that item from the “low” calculation.

1. The base case includes an “operational contingency” of $16.1 million and $3.0 million for restructuring, having the effect that all contingencies had been deployed – just two months into the year – to bring the “base” case from $333 million (in the first draft of the 2+10 forecast) to the original forecast figure of $352 million.
2. Mr Wood agreed that an “apples with apples” comparison would be between the $352 million in the approved budget and the $333 million figure, that is, the NPAT figure prior to the release of contingencies. Mr Wood also accepted that, as at the time of the 2+10 forecast, currency movements had had an adverse impact of $3.3 million to the NPAT line. Mr Wood also accepted that, if WOR’s operational performance was as forecast and the only thing that changed was a movement in foreign exchange that was less favourable to the NPAT line, the effect of that single change would be to “wipe out the $16.1 million contingency”.
3. Based on this evidence, Mr Crowley contended (contrary to Mr Wood’s position) that the “operational contingency” ought fairly be regarded as a foreign exchange contingency. Further, Mr Crowley contended that by early October 2013 the intervening foreign exchange movements indicated it was unlikely to be released to rescue the NPAT result. I do not accept Mr Crowley’s contention because there was no legal or practical reason why the contingency could only be released in response to foreign exchange movements, and the evidence does not justify a conclusion that there would be unfavourable foreign exchange movements to “wipe out the $16.1 million contingency”.
4. Next, Mr Crowley contended that, by late September 2013, or at least 3 or 4 October 2013, the grounds on which WOR had constructed the original FY14 budget had, in important respects, fallen away. On an “apples for apples” comparison, the original budget forecast of $352 million had been restated internally at $333 million. WOR was making up the shortfall, as a matter of its internal projections, by:
5. assuming that it was going to achieve in 1 January to 30 June 2014 (**2H14**) the second half of FY14 twice the earnings it was expecting in 1 July to 31 December 2013 (**1H14**), that is, WOR had adjusted its phasing assumptions (despite the attention given to accurate phasing assumptions in the original budget);
6. initiating, or significantly enlarging and accelerating, a major redundancy program (the EBIT Improvement Program); and
7. shifting the group-level contingencies (for foreign exchange, tax and restructuring costs) into assumed components of the NPAT forecast, from their former position as potential additions to the forecast.
8. Thus, Mr Crowley submitted, by late September 2013 (or at the latest, by 4 October 2013), WOR had “relinquished” significant elements of the grounds for its August 2013 earnings guidance statement. Mr Crowley submitted that, in the circumstances, ExCo and the Board knew, or at least ought reasonably to have recognised, that absent the very different assumptions listed in the preceding paragraph, WOR was likely to fall materially short of the guidance it had promoted, of FY14 NPAT around $352 million. In particular, Mr Crowley noted:
9. If the phasing had been held at the budget rate of 41:59, then the 1H14 result of $120.9 million would translate to a FY14 NPAT of 120.9:173.98 and totalling $294.88 million. If the FY13 split of 48:52 is used instead, then the figures become 120.9:130.98 with a total FY14 NPAT of $251.88 million.
10. the EBIT Improvement Program by late October 2013 was hoped to contribute $38 million NPAT, implying a shortfall of a similar amount in the early October 2013 expectations; and
11. the group-level contingencies comprised at least $16.1 million foreign exchange and $7.5 million tax, totalling $23.6 million EBIT and implying a corresponding shortfall in the expectations reflected in the original budget.
12. However, Mr Crowley contended:
13. Market conditions did not justify the assumption that 2H14 earnings would be twice those of 1H14;
14. the EBIT Improvement Program was still too inchoate to constitute a reliable component for NPAT guidance, and in any event the savings derived from a redundancy program were qualitatively different from the increased revenues implied by the forecast of “underlying growth”; and
15. the recent history of foreign exchange movements did not support that contingency being assumed as a contributor to NPAT, for the purposes of a market guidance.
16. As to [481](1), in cross-examination, Mr Wood agreed that the 2+10 showed a “fairly significant movement in the phasing split, five per cent each way, occurring two months into the new financial year”. However, Mr Wood said that the movement was explicable as follows:

[W]hat you’ve got is a single item. One’s – in fact, you’ve got two items. We’ve got a cost, a single one-off cost coming in from one project in Canada, 20-odd million, and to compensate for it – so that’s in the first half. That’s – so all of that is going to go in the first half. So to compensate for it, we’re releasing contingency, and of course, the contingency gets released in the second half. So effectively, yes, you’ve got a 50 million split on – as a result of one item. The rest of the business and the phasing for the rest of the business remains unaltered, but, as you quite rightly point out, it is a significant shift early in the year.

1. Subsequently, Mr Armstrong QC asked Mr Wood’s several questions directed to the FY14 HOH analysis in the FY14 2+10 group forecast slide pack. Mr Armstrong QC returned to the movement in the phasing split and Mr Wood essentially repeated the evidence set out above. The relevant question and answer were as follows:

Mr Armstrong QC: And now two months into the new year, there has been a five per cent movement each way on the phasing forecast. It has gone from 41 to 59, to a new forecast of 36 to 64 after, really, only a very small part of the new year, hasn’t it?

Mr Wood: It has and, as we talked about yesterday, it results from – from specific items. ATM coming into the first half and the costs driving up in the first half and, therefore, a release of contingency and an expectation of – of further reduction in overheads in the second half, causing that swing, effectively, without the knowledge of the – of the 3+9, the other – there were – the – the phasings for the rest of the business remained unaltered, as far as we were aware.

1. Mr Armstrong QC asked more questions on this topic but did not demonstrate that Mr Wood’s evidence should not be accepted. Mr Wood was not asked to address the proposition in [481](1) in cross-examination.
2. Having regard to Mr Wood’s evidence, I am not persuaded that market conditions were required to justify WOR’s phasing assumptions. Nor do I accept, without more evidence, either that the EBIT Improvement Program required further development to support WOR’s forecast or that WOR’s forecast should have taken account of the recent history of foreign exchange movements, in the absence of evidence
3. Mr Crowley contended that “several vectors triangulate around the $284m estimate” (posited by his counterfactual budget forecast) by late September or early October 2013, namely:
4. It is roughly equivalent to the FY14 estimates produced by subjecting the 1H forecast in the 2+10 to the original FY14 budget’s phasing split.
5. It is roughly equivalent to the FY14 estimates produced by subjecting the 1H14 forecast in the 2+10 to the FY13 phasing split, and adjusting for forex movements.
6. It is roughly equivalent to the FY14 forecast in the 2+10 ($333 million), reduced by the apparent value of the concerns that led to the EBIT Improvement Program (ultimately $38 million) and reduced further by re-excluding the contingencies.
7. As was also the case in August 2013, a forecast in the vicinity of $284 million was roughly equivalent to the NPAT estimated in the May 2013 detailed budget submissions, adjusted for foreign exchange, and is roughly the midpoint of the range that the company eventually adopted when, in November 2013, it did undertake a “very critical look” at the blue sky forecasts, and applied a “risk based analysis” to its projections.
8. Assuming the factual accuracy of this analysis, it is not persuasive. In particular, the evidence does not demonstrate that the calculations are sufficiently meaningful to call into doubt the FY14 guidance representation in late September or early October 2013.

# CEOC and Board meetings (4 to 8 October 2013)

1. Mr Holt presented the 2+10 to CEOC at its meetings over 4 and 5 October 2013. The minutes recorded:

6.0 Finance update

Simon Holt provided an update on Finance matters.

1. Year-to-date results - although the business is largely achieving budget, issues on ATM project in Canada have impacted our YTD results. Collecting cash remains vital.
2. 2+10 forecast - forecast first half unlikely to be achieved. Currently will retain full year forecast which will make required second half a big ask.
3. Mr Crowley submitted that Mr Holt understated the significance of the calculations in the 2+10 to CEOC. That is, according to Mr Crowley, WOR would achieve its August 2013 guidance of increased earnings over FY13 only on the assumptions that:
4. the various contingencies reflected in the original budget would all be 100% deployed; and
5. the business would achieve in 2H14 twice its current forecast for 1H14 - a result that would have significantly beaten its previous best second-half result of $167.1 million.
6. Having regard to Mr Wood’s evidence and, in particular, his evidence concerning the 2H14 forecast, I am not persuaded that Mr Holt’s recorded statement to CEOC about the 2+10 forecast was an understatement.
7. Mr Crowley suggested that the market in FY14 was “at best stable for some sectors, and otherwise ‘exceptionally difficult’”. The submission refers to Mr Wood’s evidence, as follows:

Mr Armstrong QC: Well, by 2013 you had had the global financial crisis and at least two years of the decline in the resources sector; correct?

Mr Wood: Not true. What we had seen was - we had had the global financial crisis, which was absolutely correct, but what we saw coming out of the global financial crisis was a period of growth on - in both the resource market and in hydrocarbons market on the back of very high resource prices and high levels of activity. Then we saw in - as I said yesterday, this was an incredibly turbulent period, very difficult period in which to budget and fore-cast. What we saw in FY13 was, even though - we saw a rapid falloff in key-resource prices and, basically, the minerals-and-metals market pretty much calling a halt to further development, and that impacted our business. But at the same time, we saw significant activity in the hydrocarbons market and that, with high oil prices, and an outlook, continued outlook from most of the major fore-casters and our customers that they expected that to continue. So it’s a - was an incredibly turbulent period, and then we found what we then led into was the biggest crash in activity levels and prices for a couple of generations, in the following year. That’s the period we were trying to fore-cast in. It’s [an] **exceptionally difficult** time.

(Emphasis added)

1. As I understood it, Mr Wood was reflecting back on the position and the difficulty of forecasting accurately during the relevant period.
2. Also at the CEOC meeting, Mr Steele “distributed packs detailing the overhead analysis work which are being carried out to date analyzing functions across global and locations”. The minutes recorded:
* Overall, a reduction of 600-800 FTE should be achievable across the business
1. Following discussion in workshop groups, the minutes record several points of agreement including:
* this needs to be done urgently
* target 600 to 800 reduction in overhead FTEs out of the business - not to be just reallocated to another overhead position

…

* each MDO is to take this away and come back in 4 weeks [by 4 November 2013] with a plan of what this will mean for their locations and what they are committed to doing.
1. On 8 October 2013, the 2+10 was presented to the Board. The minutes record the following next to the heading “Finance update”:

FY14 Outlook update

Simon Holt presented the FY14 2+10 group forecast and discussed the major variances to budget with the Board.

The known risks and opportunities detailed in the sensitivity analysis were discussed. The directors also discussed the forecast first half/second half earnings split which was now more weighted to the second half than was budgeted.

Directors discussed whether the full year outlook provided with the FY13 results was still achievable and whether additional guidance should be given to the market at the AGM the following day.

The Board agreed that a statement should be made to the market to clarify that it is now expected that the company’s first half result for FY 14 will be less than that achieved in the previous year.

The Board noted that based upon the forecast presented, the company would achieve its full year outlook of increased earnings in FY 14. Therefore, the board agreed that the full year outlook statement did not need to be changed. However, the company’s forecasts for the rest of the financial year should be closely monitored to ensure the market is properly updated in accordance with the company’s continuous disclosure obligations.

1. On 9 October 2013, WOR held its AGM and lodged with the ASX and publicly released a transcript of the Chairman’s address to the AGM.
2. The 9 October 2013 announcement approved by the Board was made by a release to the ASX and coinciding with Mr Wood’s presentation to the 2013 AGM. Mr Wood said at the AGM:

As I mentioned earlier in my address, while the first half of the year was quiet in terms of new contract awards, there was a strong flow of awards in the last six months.

Looking at our company’s outlook, the flow pattern of awards will see earnings in FY14 being more heavily biased to the second half than in recent years. That is, we expect our first half FY14 earnings to be lower than those for the prior corresponding period.

However, despite ongoing challenges in the markets in which we operate, we can confirm the outlook we provided with the full year results, which was:

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

1. On 10 October 2013, Mr Daly wrote to Mr Allen, relevantly:

I saw Andrew’s statement yesterday talking to a lower H1 than last year and I am certainly glad he highlighted this.

1. On 11 October 2013, Mr Allen replied, relevantly:

Andrew 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.

1. Mr Wood did not recall such a conversation with Mr Allen.
2. On the facts and evidence set out above, I am not persuaded that WOR (through its relevant officers) ought to have known on or about 9 October 2013 that the FY14 budget did not provide a reasonable basis for the August 2013 earnings guidance statement or that its FY14 earnings were likely to fall materially short of the “consensus” expectation NPAT of $364.6 million.
3. Further, I am not persuaded that the maintenance or repetition of the FY14 guidance representation was misleading or deceptive or likely to mislead or deceive by 9 October 2013, or that the 9 October 2013 announcement was misleading or deceptive or likely to mislead or deceive.

## Market reaction

1. The major analysts duly reported on the 9 October 2013 announcement. Mr Crowley referred to the following reactions:
2. JP Morgan commented, “Expectations for 1HFY14E to fall short of 1HFY13 were surprising, given tailwinds from M&A, FX and net one-offs. In our view, weak underlying momentum presents continued downside risk to FY14E earnings”.
3. UBS said “UBSe had assumed 1H14 would be down 6% vs the pcp already given challenging conditions in Australia had only really impacted the pcp in the 2H13. Our FY14 earnings assume 2% growth vs the pcp…we believe the 2H14 growth rate of ~34% implied by consensus (assuming a ~6% decline in 1H14) remains unreasonable given ongoing challenging markets”.
4. Deutsche Bank: “We were surprised by mgt’s guidance that 1H14 NPAT will be below pcp given the company should benefit from FX tailwinds and lower corporate costs. We have lowered our 1H14 NPAT to be - 3.9% lower than pcp, however we do not expect the company to miss its FY2014 Guidance given mgt took restructuring costs & cost overruns above the line in FY13. We calculate WOR could achieve 2H14 NPAT of only $176m (which would imply a ~12% organic decline in the 2H14 period) and still achieve 1% growth on reported NPAT for the full year”.
5. Credit Suisse: “Another weak 1H: There is little doubt that Worley is testing the patience of its believers. The AGM statement saw guidance for 1H14 to be below pcp ($155mn). Against this, WOR maintained FY2014 Guidance of ‘growth’. Having attended the AGM, it was made clear by management that their expectations for FY14 have not changed materially. The big uptick in contract wins seen YTD should allow them to hit consensus numbers”.
6. The analyst summary prepared by WOR in reporting its September 2013 results shows that the “consensus” for FY14 NPAT dropped to $353.6 million, down from $364.6 million in the FY14 August financial report ExCo pack referred to at [469]. The summary also refers to a Bloomberg consensus of $356.3 million, with the following footnote:

Bloomberg Revenue and EBIT/EBITDA consensus does not treat associate income consistently across analysts and may therefore be an unreliable measure.

# FY14 performance (mid-October 2013)

1. On 10 October 2013, Mr Wood gave a strategy presentation on behalf of WOR to members of the investment community. WOR lodged a slide pack of Mr Wood’s presentation with the ASX and publicly released the slide pack. By the presentation WOR repeated the August 2013 earnings guidance statement.
2. On 11 October 2013, Mr Calderone sent Mr Daly the September 2013 location results, with the following analysis:

Operations are down $20m for the month and $40m YTD vs Budget. Key locations that are down for the month include South Africa $5m (primarily VOC, however, Francis has not reviewed the result and does not believe they will be $5m down), Brunei $2.5m (restructure costs), Calgary $2.3m, Cord $2.2m and Australia North $2.0m (Mak contract finishing). What is even more surprising (and concerning) is that these major variances were not picked up in the 2+10 for the month of September as we are down $13.6m vs the forecast.

1. Mr Daly responded, identifying matters for re-checking and analysis, and concluded:

The above amendments will help but I agree that it is a very poor month.

1. On 14 October 2013, Mr Allen provided the September 2013 results to Mr Holt, commenting:

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. Key locations driving this are Cord, Calgary (expected) and Australia North (fall off on MAK), Brunei (restructuring costs), South Africa (they are saying VOC but there must be more to it than that.

At the NPAT line this has translated, after some further savings in global costs, to being off $5.8m to budget and $4m to the 2+10.

Year to date we are effectively down around $5m to forecast and $20m to budget at the NPAT line.

1. A few hours later, Mr Allen sent Mr Holt a September NPAT tracker with the following comment:

Hot off the press. Will get a final location breakdown for you tomorrow but the major ones are those in my earlier email, and pretty much everyone else is down a little bit, which adds up to down a lot.

1. On 15 October 2013, Mr Wood presented at the Macquarie WA Investor Forum. Mr Wood did not recall any discussion with Mr Allen, Mr Daly or Mr Holt in the course of his preparation for the forum but said that is was most likely that he “continued to talk” with them. The slide pack for the forum ended with several bullet points including:
* We remain committed to our Vision 2017

…

* Expect improved earnings FY14 across all sectors
1. Mr Crowley submitted that this reassurance was “surprising” in the light of the September 2013 results that were circulating among WOR senior management by this date.
2. Even so, on the facts and evidence set out above, I am not persuaded that WOR’s position had significantly changed since 9 October 2013. Accordingly, I am not persuaded that WOR ought to have known on or about 15 October 2013 that the FY14 budget did not provide a reasonable basis for the August 2013 earnings guidance statement or that its FY14 earnings were likely to fall materially short of the “consensus” expectation NPAT of $364.6 million.
3. Nor am I persuaded that the maintenance or repetition of the FY14 guidance representation was misleading or deceptive or likely to mislead or deceive by 15 October 2013.

## Late October 2013

1. WOR commenced its quarterly “3+9” budget review at the same time as preparing its September 2013 results. The 3+9 forecast was based on actual results for July, August and September 2013, and forecasted figures for the remainder of FY14. It was created following a bottom-up review of the integers that had gone into the FY14 budget.
2. By 19 October 2013, Messrs Holt and Allen received the September FY14 finance report to ExCo. It showed a continuation of the trend reported the previous month:

Financial Performance

* Group NPAT of $28.6m below budget by $19.8m, including favourable FX impact of $0.8m.
* NPAT YTD variance due to higher costs associated with the IOL ATM project and other project underperformance for Cord, Calgary and Edmonton ($26.0m) as well as underperformance in South Africa ($4.4m).
* All CSG’s are below budget, Hydrocarbons (-$23.1m) due to IOL ATM, Infrastructure (-$8.4m) due to lower volumes in Australia South, lower utilisation and charge out rates for Evans & Peck and a project provision in Bulgaria, and MM&C (-$3.0m) due to MAK demobilisation in Australia North and demobilisation and slow ramp up on Vale projects in South Africa.
* Group EBIT of $63.3m below budget by 27%.
* Group EBIT margin of 3.4% below budget of 4.7%.
1. The September 2013 results were considered at an ExCo meeting on 22 October 2013. The minutes record:

4.0 Finance

Simon presented the Finance Report for September FY 14. The report now included various metrics from the scorecard such as chargeability.

He noted that most metrics were below budget and revenues appear to be falling. ExCo agreed that our overhead is not reducing quickly enough. is even more pronounced than in the previous month’s results [sic].

Stuart noted that man-hours in key developed world locations are down although they are flat in the developing world. Overall, gross margin is lower.

The 3+9 forecast is being prepared and will provide a more accurate assessment of our outlook for FY 14.

1. The minutes also recorded:

ExCo discussed:

* The need to reignite the passion in our locations for developing local relationships and getting after work opportunities
* Although there has been push-back from the business to reduce overheads, we all just need to face up to it and get on with it
* Major areas of focus for overhead are Australia, UK and Canada
* We need to remove a lot of the overhead in surveillance and reporting
* We need to unwind the culture of tying up large numbers of people in procedural meetings and pre-meetings for internal matters such as monthly reviews
1. Also on 22 October 2013, Mr Daly sent Mr Holt an email entitled “high level ‘guesstimate’ of 3+9 forecast”. Mr Daly wrote, relevantly:

We won’t have the final information for another few days but based on the calls the “expected guesstimate” of the 3+9 forecast is that operational EBIT will be approximately $30-35m off budget ...

1. Mr Daly identified “the main adverse variances” by reference to 10 locations and included a positive offsetting figure of $15m for “strong performance in total in a number of locations including Norway, Holland, China, Singapore, Indonesia, Ranhill WP”.
2. On 22 October 2013, Mr Holt distributed to ExCo a single page entitled “Overhead Analysis” for a discussion the following day. The analysis proposed:

Overall summary

The 2014 budget had an 8% increase in revenue over FY2013. YTD September has revenue decline of 6%. All overhead numbers should reflect this swing.

…

What this implies is that if we are to hold last years numbers we need to take out $40m of global overhead. To this we need to reduce current run rate to $71m a qtr and keep the current savings as booked year to date.

At a location level we need to take out about $100m which represents the difference between FY14 budget and FY13 budget. However if we maintain current rub rate [sic] we will have already achieved $50m, however there is a hockey stick in … location overhead.

1. Mr Crowley contended that Mr Holt’s 6% figure reflects a comparison between revenue for the first three months of FY13 and FY14. Mr Holt’s message was that to achieve NPAT of $352 million NPAT, the business had to find an additional $140 million of overhead savings.
2. On 23 October 2013, Mr Steele circulated an email to CEOC reporting on a meeting of the EBIT improvement group which included the following outcomes:

1) The appropriate target for total overhead across the company should be 70 per 1000 employees

2) The 70 per 1000 target would require a reduction in total overhead budget of 1500 FTE (excluding office services, and recognising the FTE numbers presented in the CEOC meeting were budget numbers)

3) Given the urgency and the practicality of the task, the recommendation was to achieve target in two stages. The first stage would be to effect a reduction of 950 FTE by the 31st Dec 2013 in order to feel the benefit during the second half of FY14. The remaining 550 FTE reduction would be fully executed before 30th June 2014

4) The split between Location and Global for the two deadlines should be:-

**By 31/12/13**

Global 250 FTE

Local 700 FTE

**By 30/06/14**

Global 250 FTE

Local 300 FTE

1. On 24 October 2013, Mr Calderone sent a first cut of the 3+9 forecast for operations to Messrs Daly and Allen, saying:

... It does not make for great reading.

Operational EBIT is down $50.8m vs Budget and $24.0m vs 2+10. Against Budget, key locations that are down include; Calgary ($11.2m), Saudi ($10.0m), South Africa ($5.7m), Chile ($5.2m) and US Eastern ($5.0m). All regions are down against Budget. Please note that New Zealand is included at 100% ownership from November.

What is just as concerning is our HoH split of 38:62, vs Budget 45:55. Key locations that have significantly reduced their phasing include; Cord, Calgary, Edmonton, China, Aust North, UK, UAE, US Eastern and US Southwest.

In relation to the phasing, the 3+9 has 67% of projects secured (of which H1 has 92%). When you compare vs last years 4+8 of 75% secured, we are well down. The year on year shift seems to be coming from Blue Sky (15% in the 3+9 vs 9% in the Fy13 4+8). This suggests that we do not have enough projects in the pipeline to meet our operational Budget.

1. A few minutes later, Mr Calderone sent Mr Allen the first draft of the 3+9 forecast NPAT tracker, noting:

NPAT is down $39m vs Budget and $20m vs 2+10. Please refer to my previous note as to the key locations driving down operational performance.

The attached suggests that there is a bit of work to do around Global Overheads as costs have gone up against budget and the 2+10.

The other key take away is how far down our HoH NPAT metric is. The 3+9 is at 28:72 vs budget 41:59.

1. The attached spreadsheet showed an FY14 Q1 forecast NPAT of $313.4 million.
2. On 25 October 2013, Mr Calderone sent Messrs Wood and Holt a draft 3+9 forecast by location, saying:

Overall BEBIT is down 5% vs Budget, driven primarily by a reduction in aggregated revenue (down 1%) and gross margin (down 4%). The savings in location overheads are 3%.

First half location BEBIT is down $90m or 19% vs Budget, again driven by a reduction in aggregated revenue and gross margin. It includes 92% of secured projects.

Please note that there is $16m of Operational Contingency included in the forecast.

1. A slide pack dated 25 October 2013, entitled “Finance Update - Global Operations and Delivery” contained the following highlights:
* Budget very back-end loaded - need to ensure budget targets are met
* Focus on key proposals and prospects to be awarded
* Focus on chargeability and cost base in all locations to ensure sized for current/future workload
* Continued focus on WIP conversion and cash collects (September net cashflow was positive but behind budget)
1. On 29 October 2013, Mr Daly wrote to Messrs Holt and Bradie as follows:

Simon - as I’m sure you know, the forecast operational EBIT figures look like they will be approx $35m off budget excluding Evans+Peck. Including Evans+Peck, this is approx $37m. While the figures are broadly in line with the attached, there obviously remains a significant risk around delivering this forecast EBIT given the phasing and some of the assumptions used in the forecast.

In terms of phasing risks

* Cord is the single largest factor and, within Cord, (other than ATM), BRION is the single biggest factor as it is forecast to deliver approx 25% of Cord’s gross margin in FY14
* In addition, significantly improved second half performance is forecast in the UK, Brazil, China, Edmonton, Calgary, US-Eastern Ops and Saudi

In terms of other assumptions, the major material risks relate to

* The relatively high levels of blue sky in Australia West, Australia North, China, Calgary and Houston. In each of these locations, secured workload looks reasonable but the proportion of blue sky is relatively high
* There are also some “swing factor” assumptions in terms of claims and VO’s on ATM, MMX, Jirau, Skanska, VOC, NDPP and Lekas (liabilities with Maser and TDE) and ongoing negotiations in terms of Hebron
* Belene remains an unknown but may not be resolved for some time
* $12m is included for acquisitions but I have no sight of its likelihood

All of the above items need to be taken into account in the sensitivity analysis and I know that Frank [Calderone] is picking this up from the packs. I assume he will pick up some positive factors in addition to these (!).

In terms of the half year, current run rates (as adjusted for ATM) would suggest an operational EBIT position of approx $380m which is actually how the forecast is currently presented. This compares to approx $448m in FY13 and $433m in FY12. The single biggest year on year effect at September is the reduced volume of work in Australia North, Australia West, Calgary (all high rate locations in FY13) + the Cord year on year impact. Chargeable hours in these 3 locations are down by 1.2m hours which is approx 10% of total group chargeable hours.

In terms of how the half year might be improved, my suggestions would be to investigate whether there is an opportunity to frontload BRION work or whether we can take a more positive position in respect of some of the current negotiations such as ATM or MMX and this would obviously need to be reviewed with Stuart and the projects. We also need to review all reserves. Currency should also help to a degree.

1. On 30 October 2013, Mr Calderone sent Messrs Holt and Allen a further draft 3+9 NPAT tracker and extracts from the 3+9 ExCo pack, stating:

I have manually included Local overhead saving of $45m, Global overhead savings of $38.2m, ATM $5m and rephased global STI.

The above adjustments increase NPAT to $385m for FY14 with H1 at $120m (an improvement of $34m for H1).

1. Mr Crowley noted that the scale of proposed savings there was in similar order of magnitude as ~$140m hurdle contemplated by Mr Holt’s 15 October 2013 “overhead analysis”.
2. On 31 October 2013, Mr Holt distributed a “FY14 Q1 Group Forecast” slide pack to Mr Wood and others, for discussion at ExCo that day. Mr Crowley describes the projections in this document as “simply delusional”, reflecting “just how badly awry [WOR’s] forecasting process had gone by this stage”. In particular, the document recorded an increase in the NPAT forecast to $385.8 million. In cross-examination, Mr Wood said that the figures seemed “counterintuitive to what we had seen happening within the business”.
3. Mr Crowley noted that, on 31 October 2013, Mr Wood also attended a meeting with UBS for the “Project Zeus” deal and disclosed WOR’s forecast financial results to them. The next morning he reported to ExCo that UBS advised that “raising the equity required was more problematic than had been assumed”.
4. As a result, ExCo recommended (and the Board agreed) that Project Zeus would not proceed. The ExCo minutes recorded:

ExCo agreed that its first priority was to turn the business around.

1. Mr Crowley criticised Mr Wood’s failure to direct a more detailed review of WOR’s forecasts at this point. I do not accept that criticism as warranted where the budget process included the 3+9 which involved a detailed review of WOR’s forecasts.

## Early November 2013

1. On 1 November 2013, emails were distributed to each of the Global Functions groups with instructions to reduce their forecast overhead expenditures to achieve the $38.2 million referred to at [529]. By email dated 2 November 2013, Mr Karren complained:

The 3+9 forecast was not developed from the ground up and was not socialized with the Improve group other than myself and as such there is no need for an email as outlined below.

The Improve 3+9 forecast should be amended to 9500 total cost with 8000 staff cost.

1. As I interpret Mr Karren’s email, he is saying that the 3+9 forecast contains figures that are already substantially lower than those included in the relevant instruction to reduce overhead expenditure.
2. The Board met on 1 November 2013. The minutes record, next to the heading “Forecast update”:

Simon Holt advised that a high-level first draft 3+9 forecast had been prepared. A full 3 + 9 forecast, including a bottom-up analysis and confirmation of overhead reductions, would be prepared for consideration at the Board briefing later in the month.

The Board and management agreed that the company’s forecast position would need to be closely monitored in the coming weeks and months and the Board should be updated, as appropriate, to ensure the company complies with its continuous disclosure obligations with respect to outlook statement.

1. Mr Crowley described this minute as a “stop-gap platitude”. He did not suggest that the minute was inaccurate or that it did not reflect the actual agreement between the Board and management as to what was required in the circumstances. Mr Crowley’s pleaded case did not allege any wrong doing on the part of the Board at its 1 November 2013 meeting. Accordingly, I do not adopt Mr Crowley’s description.
2. Under the heading “Changes to business model”, the Board minutes record that Mr Wood informed the Board that “the company needs to ensure that support is directed only to where it is needed. Large reductions in overhead are targeted across the board, but particularly in Canada and London”.
3. On 5 November 2013, a draft communications strategy for the EBIT Improvement Program was circulated. A “SWOT” analysis in the pack noted as a weakness:
* The change is still about cutting costs
	+ Hard to position as anything other than “a pig with lipstick”
1. On 7 November 2013, Mr Daly wrote to Mr Holt noting that, in some cases, overheads savings were already embedded in the 3+9 forecast. He included the following comment:

Conversely, where overhead increases are evident in the 3+9 in locations such as China, I suspect that overhead has been increased in line with the stretch targets they have taken up i.e. some locations added blue sky to increase their figures to maintain budget but increased overhead in line with this proportionately. However, the reasoning will follow that if this overhead is removed, the blue sky should also be factored down as otherwise this becomes an even greater part of the EBIT with its inherent risk.

1. On 11 November 2013, Mr Daly told Mr Holt:

Simon [Holt] - I am still waiting for some locations to revert so I’m afraid I don’t yet have a complete picture of location overhead savings but currently we have very approx. $25m versus the “3+9” with the detail noted below. I am still waiting for submissions for LAM and SSA - both of these locations are outside the overhead guidelines and had very high potential savings in David Baughen’s presentation to the Exco (total $45m) but both are very difficult to draw savings out. SAF has the added issue that PRB was misclassified in overhead and this has pulled down its reduction figure significantly. I should have figures for both tomorrow. I am also waiting for final confirmation of the AUW figure - they are within their metrics but I am pushing them for a bit more. I have also gone back to Canada and asked for another $2m.

For the moment, please keep this to yourself as this is very draft and I have not yet taken Stuart [Bradie] through this and I suspect we will be squeezing more out of some locations when we review together. There is also a global ops call on Tuesday when this will be discussed. That said, I actually do not think there is much more to give in FY14 in the locations I have been through so far (i.e. exc LAM and SSA).

As I mention below, as I have worked through the detail, it has become obvious that some savings were already embedded in the “3+9”, in particular in ANZ and the US due to consolidation. There have also been various overhead reclassifications, most notably the misclassification of PRB in overhead (as opposed to in direct costs) in South Africa. Ranhill Worley also has a cost of approx. $5m in overhead due to amortisation of the Lekas settlement and this skews the figures.

Redundancy costs are not factored in as the locations have yet to work these out.

In terms of Global costs, I have been working with the CSG’s and Project Delivery Groups and both of these groups will deliver in line with thee targets.

I will provide a further update on our CFO call on Tuesday.

1. On 11 November 2013, Mr Holt received an email concerning the performance of the Global Functions. The key points included:
* Total **saving for GSG is $29.5m or 8% compared to budget**. The savings are a mix of detailed cuts (where time permitted) and expected changes which are to be validated.
* As a significant portion of these savings are realised in H2, in reality we are saving closer to double that (16%).

(Emphasis in original)

1. On 12 November 2013, Mr Daly wrote to Mr Holt again:

Simon [Holt] - approx $5m has been added for South Africa in addition to the figures below so we are currently at the level of approx $30m to be deducted from overhead, excluding any redundancy/restructuring provisions.

Frank [Calderone] called earlier and advised that he needs to put together the Exco and Board pack with the revised “3+9”. As I think it will take a little while to finalise the location figures, I would suggest that a high level provisional estimate figure for location savings of approx $30m exc redundancy is included in the forecast.

1. On 14 November 2013, Mr Daly sent another message to Mr Holt saying, relevantly:

Simon [Holt] - just to confirm that I took Stuart [Bradie] through the detail today and $30m is our best estimate of additional overhead savings in FY14 from the locations excluding redundancy/restructuring. I am sitting with David Baughen on Thursday morning to take him through thee detail as this will need to be managed extremely tightly to achieve. I will send through some detail to you tomorrow so that you have this as well. All of these savings are targeted for the second half, given that we are already in mid-November. Frank [Calderone] called today again and I advised this figure to him. As I said in my earlier noted, I would suggest that you book this as a high level provision if it needs to be included in any October Board or Exco papers with the detail by location dropped into the forecast for the next update.

## 15 November 2013

1. On 15 November 2013, Mr Holt sent Mr Wood the October FY14 finance report to ExCo, with the message: “We should probably have a discussion on this one”.
2. The Executive Summary included:

Net Profit after tax and MI of $46.7m below budget by $29.5m or 39%, and below prior year by $41.1m or 47%

1. A few hours later, Mr Holt wrote to Messrs Bradie, Ross, Steele, Karren and Bloch, copied to Mr Wood:

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 [Daly] 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.

The other question that comes to my mind is that if the business is shrinking then have we gone hard enough on the overheads.

Therefore we need to do more work in better understanding revenue numbers and the achievability of them in the second half.

3+9 tracker is still being updated but it [is] the latest as of today.

…

I am sure we will have a robust discussion on the EXCO next week.

1. The same day, Mr Wood spoke with Mr Holt and said words to the following effect:

I am concerned that the 3+9 forecast is too high. I do not think this forecast is achievable. You will need to take a very close look at it. Certain elements of the 3+9 reforecast must be wrong, in particular the forecast run rates for particular locations. The numbers need to be subjected to a very serious challenge. I want to see the results of your investigation and a revised reforecast as soon as it is ready.

1. On 19 November 2013, Mr Daly sent Messrs Holt and Bradie the results of his review of “the operational EBIT forecast in the light of the H1/H2 phasing and the amount of blue sky in some locations”. Mr Daly provided the following summary:

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 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).

I have sense checked the revised EBIT margin versus the budget EBIT margin and they are similar at 16.2%. I have also sense checked the revised full year professional services revenue figure versus the year to date professional services revenue (columns AZ to BD) and the figures look reasonable although ANZ North in particular may be a bit pessimistic. I believe Eastern Canada year to date revenue includes “pass through” hence this is standing out. (Please note this professional services revenue is “bare” and does not include reimbursables).

1. There was contention about how Mr Daly conducted his exercise. Mr Ashton said that he did not recall the exercise, and said that he was never consulted on the data shown in Mr Daly’s work. Mr Crowley also suggested that Messrs Bradie and Holt conducted a parallel review.
2. Mr Crowley’s case was that two senior executives of WOR worked overnight on 18 and 19 November 2013, “bluntly stripping $97m in projected earnings from the then-current FY2014 forecast”. Mr Crowley also characterised the effect of the change as follows: “some $97m in EBIT (or around $60m in NPAT) was stripped from the forecast, thereby bringing the numbers back to something very like the ‘good first cut’ in late May 2013”. The figure of $97 million is consistent with a list of reductions in operational EBIT proposed by Mr Daly. The list suggests that Mr Daly proposed round figure reductions in relation to 17 locations.
3. The effect of Mr Daly’s review was to propose a reduction of operating EBIT by a total of $97 million, plus the further $12 million for the acquisition stretch. From his spreadsheet, it appears that Mr Daly’s adjustments were attributed either to blue sky or “phasing”. Mr Crowley submitted, and I accept that it is plausible, that the adjustments reflected judgments that blue sky budgeted revenue would not be earned, or that budgeted revenue would not be earned in FY14. Mr Crowley also suggested, and I accept that it is plausible, that the proposed blue sky adjustments may reflect a reduced revenue earning capacity consequent upon overhead reductions. However, the evidence does not permit quantification of any such element of Mr Daly’s proposed blue sky adjustments.
4. Mr Crowley argued that Mr Daly’s review proposed that WOR “back out” the economic effect of the whole of the management adjustments, that is, the changes to the draft budget after 28 May 2013. Mr Crowley also contended that Mr Daly’s analysis “reverse-engineers his suggested EBIT changes to estimate a ‘Total Operations’ figure of - $580.9m against the 3+9 forecast, enabling the reduction in EBIT to be applied at the revenue line”. Mr Crowley said that Mr Daly’s work was “rough-and-ready” but he did not suggest that Mr Daly’s proposed changes to the budget were unreasonable.
5. Mr Crowley also contended that Mr Daly’s proposed adjustments, if adopted, would result in WOR returning to “something resembling a P50 budget”. Again, without evidence about how to assess whether a budget has a P50 character, I do not accept that contention.
6. Mr Crowley noted that WOR presented a document entitled “Aide Memoire 5 - Operational EBIT Adjustments 19/11/2013 cf Location Adjustments in June 2013” (Exhibit 10), which shows that Mr Daly’s proposed reductions (which, according to Mr Crowley, were almost precisely replicated in the final 3+9 forecast) did not correspond precisely with the management adjustments. Mr Crowley submitted that “it would lend dignity to a farce to attempt to correlate every item in Daly’s revisions, to the individual items adjusted in response to the management adjustments (or, at least the June 2013 management adjustments).
7. In the light of Mr Crowley’s case that WOR failed to adopt a reasonable budget by reference to the 27 May 2013 budget, and instead adopted a budget that included unreasonable management adjustments, it is relevant to consider the extent to which the November 2013 adjustments can be explained by reference to changed perceptions about forecasts incorporated into the 27 May 2013 budget, or changed perceptions about the feasibility of the management adjustments. The evidence tends to suggest that the explanation is the former rather than the latter because Mr Daly’s revisions seem to be directed to a reduction in revenue expectations, while the management adjustments were mainly concerned with reducing expenditure.
8. There was no detailed analysis of whether the $97 million reduction in projected earnings was based on facts known before the approval of the FY14 budget, or before the reduction occurred. In those circumstances, I do not accept that the reduction provides “clinching support” for Mr Crowley’s case.
9. On 19 November 2013, Mr Calderone sent Messrs Holt and Allen a revised NPAT tracker with NPAT reduced to $298 million. Mr Calderone made the following comments:

All reduction to Blue Sky and Prospects are in H2 for locations. We have reduced based on existing location EBIT margins.

As a result of the changes, Revenue is reduced by $668m, GM $210m and EBIT $105m. As result of the decrease, Overheads will reduce by $105m. There is potentially a double count in overheads with the $331m identified through DavidBaughen’s analysis.

With the STI release of $15m, I have included that in H1.

1. Later the same day, Mr Calderone sent a further revised 3+9 NPAT tracker, saying:

Attached is the updated 3+9 NPAT tracker that includes an additional $10m in redundancy costs as well as the rephrasing of the STI release.

NPAT is not [sic – now] at $291m. HoH phasing is 34:66 with an expected H1 NPAT of $98.5m.

## 19 and 20 November 2013

1. ExCo convened on 19 November 2013. The minutes record ExCo’s agreement that “a recommendation be made to the Board that the company announces a revised forecast for FY14 of $280-300m”.
2. The minutes also record:

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 level of ‘blue sky’ (EBIT not supported by prospects and proposals) in the forecast and noted it was high than it would usually be as there was less coming through in proposals. Simon 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 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 $290 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 provided details of the reductions in blue sky suggested for each location. The M&A stretch would also be removed.

1. The Board met on 20 November 2013. The minutes of their meeting record that Mr Wood summarised the position as follows:

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.

1. Next, Mr Holt “summarised the Finance Report for October FY 14 which showed a significant shortfall in financial performance for the month compared to budget”.
2. Next to the heading “Forecast update”, the minutes record:

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 every 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.

The directors discussed a number of matters, including:

* the effect of cost reductions on the forecast
* the sensitivity analysis
* the half-on-half analysis
* the operational analysis
1. Next to the heading “Draft market update”, the minutes record:

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 expanded to $260-300m.

# 20 November 2013 revised earnings guidance

1. Shortly after the Board meeting concluded on 20 November 2013, WOR issued the following market update:

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.
1. WOR’s share price declined by $5.59 per share, or 25.89%, from its 19 November closing price of $21.59 to its 20 November closing price of $16.00, on trading volume of 8.3 million shares. The closing price of $16.00 per share was $2.00 per share lower than the opening price that day of $18.00 per share.
2. Mr Crowley submitted that WOR “experienced a performance problem, not a market problem. It issued a downgrade because it had to write down an overly-optimistic budget. It did not revise its guidance because of an unexpected deterioration in market conditions”, despite Mr Wood’s evidence to the contrary. Mr Wood’s evidence was as follows:

Mr Armstrong QC: I was going to suggest to you that there was a third step, which was the CEOC meeting on 24 and 25 June where the CEOC representatives identified a further $43 million in overhead savings, of which roughly $22.5 million was to be taken from - was to be achieved by the locations. So those three separate processes. Do you recall?

Mr Wood: Yes. Yes.

Mr Armstrong QC: We’ve been discussing them? And I’m putting to you that the economic effect of the adjustments that are being proposed by Mr Daly and Mr Bradie and Mr Holt to the ExCo meeting on 19 November is to at least strip out all of the EBIT gains that had been identified by the locations in the budget submissions that they put forward after the budget submissions collated on 28 May 2013?

Mr Wood: And it was very lucky we did, wasn’t it? Because what we talked about were - were all cost savings, and what we’ve just identified now is that our revenue - because the market dropped, our revenue dropped. So we were dealing - we - we put pressure on the organisation to take costs out because we thought revenue was flat. Revenue came down. As - as a result, we saw a plummeting revenue. If we hadn’t have taken those and pushed on costs, we would have been in far worse place than we ended up. In fact, the team delivered a great outcome; a really impressive outcome in the year with such turmoil.

1. Mr Crowley submitted that the following matters contradict Mr Wood:
2. The Holt Memorandum made no mention of declining markets being the causative factor and no contemporaneous comment is recorded to that effect in the Holt Memo interview notes. As Mr Crowley expressed it, those documents were brought into being with the purpose of determining “what went wrong”.
3. WOR’s evidence from Messrs Ashton and Lucey does not support a conclusion that market conditions deteriorated. Mr Ashton’s evidence was that the market in the MENAI region was favourable throughout the relevant period; his concern was an “internal structural issue” in the Saudi Arabia location. However, the final 3+9 forecast removed $10 million EBIT from MENAI, including $7 million that did not relate to Saudi Arabia.
4. As to (1), the Holt Memorandum is considered in detail below. Its stated purpose was:

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

1. Having regard to that purpose, I do not agree that it is significant that the Holt Memorandum did not refer to declining markets as the causative factor that led to the revised guidance.
2. Mr Ashton’s evidence is inconsistent with reductions to MENAI’s budget on the basis of market conditions. Mr Crowley did not address Mr Lucey’s evidence. The final 3+9 forecast removed $10 million EBIT from ASCH, including $7 million for China and $1 million for each of Brunei, Malaysia Ranhill WP and Malaysia WP. As noted above, Mr Lucey said that there was a realisation that China had over-forecasted its blue sky revenue.
3. I accept that Mr Ashton’s evidence casts doubt about whether WOR’s problem (if there was a single problem) concerned its markets or its performance. In particular, I accept that Mr Ashton’s evidence indicates that WOR did not have a problem with market conditions in MENAI. However, without more evidence, I am not persuaded that I should not accept the reasons given by WOR for the November 2013 revised earnings guidance in its 20 November 2013 market update.

# December 2013

## Holt Memorandum

1. The November 2013 revised earnings guidance led to reflection among WOR senior management about what might have gone wrong in WOR’s budgeting process.
2. Some of this reflection is recorded in the Holt Memorandum, addressed by Mr Holt to the A&RC and dated 5 December 2013. The memorandum’s stated subject is “Financial forecasting process”. Its stated purpose is identified above (at [571]).
3. The Holt Memorandum was prepared at Mr Wood’s request following the November 2013 revised earnings guidance. Mr Wood had input into the final draft of the Holt Memorandum and thought that the issues raised in the memorandum were a reflection of issues that needed to be further investigated. Rather than a formal interview process and a full investigation, the Holt Memorandum followed a “download of the issues as people saw them”.
4. There is no reason to doubt the accuracy of facts stated in the Holt Memorandum. Nor is there any reason to doubt that the opinions expressed in the document are informed and thoughtful opinions, expressed as they were by the CFO to the A&RC.
5. Mr Crowley submitted that the Holt Memorandum is a “damning assessment” of WOR’s “high pressure budgeting culture”. This is exaggeration. However, the Holt Memorandum does criticise WOR’s budgeting performance, notes significant adverse consequences of WOR’s “poor budgeting and forecasting” and foreshadows a more thorough review of the budgeting process which would include external advice.

### Content

1. Mr Wood noted that WOR came within 5% of budgeted revenue except in FY10 and FY11. Mr Wood also stated that WOR’s performance in FY09 and FY10 was affected by the GFC, which was a very unstable period. Mr Wood’s view, I inferred, was that the FY09 and FY10 figures did not suggest any particular flaw in the budget process but rather that the company was operating in a “very, very unstable market”.
2. Under the heading “Reasons for poor budgeting/forecasting performance”, the memorandum states:

The CFO has undertaken a review to seek to understand why budgets and forecasts have consistently not been met over the last six years. This review has included discussions with EXCO, The Managing Directors of Operations and the Finance Leadership Team including the Finance Directors …

1. The memorandum identifies the following “key points”:
* 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 being made in the budget for potential downsides.
* There is continued tension between locations and senior management as to whether locations are “stretching” themselves sufficiently in preparing their budgets.
1. Each of these points was developed in two or three paragraphs.
2. In particular, under the heading “The budget process”, the memorandum states:

The current budget process is a result of refinements made over a number of years. As it stands, it appears that the data collection and aggregation itself is working well. However, there are still questions around whether the current process is appropriate for all locations and whether there is sufficient analysis being done of the reasonableness of the budget numbers at a group level. The budget process needs to be challenged/refined around the level of comfort placed in the go/get of prospects/proposals versus a scenario based methodology and the impacts of binary outcomes of the same prospects/proposals.

In addition, it was recognised that we go through too many iterations to achieve what is presented to the Board.

1. Under the heading of “A culture of optimism”, the memorandum states:

A consistent message is that there has been an expectation at group level that the company will grow, or grow at a certain rate versus previous years. This expectation seems to be driven both internally (“WorleyParsons has always grown at these type of rates”) and externally (“the market expects us to grow at x% so therefore that is what we need to do”). It does not necessarily seem to be driven by our own assessment of the markets in which we operate.

This expectation is then communicated back to the locations. The consequence of this is that, in many cases, the bottom up build that the locations submit does not match the expectations of growth from senior management. 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. Therefore, the probability that the budget will be met decreases. A conclusion from this is that our budgets have not genuinely been P50 budgets. This is supported by the fact that we have missed budget five out of the last six years.

1. Mr Wood said that he did not agree with the first sentence extracted immediately above, that is, the sentence commencing “A consistent message”.
2. However, putting aside other years, the evidence demonstrates a strong expectation to this effect for FY14, which was communicated to the organisation, for example, through the “growth assumption” and through WOR’s Vision 2017. I do not accept that there was a “blind drive for growth”, as Mr Armstrong QC suggested to Mr Wood, but the position was (as Mr Lucey expressed it) that growth was “pretty well mandatory (unless there’s a very good reason for not complying)”.
3. Under the heading “Insufficient allowance for potential downsides”:

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.

1. Under the heading “Are we stretching?”:

Another common message is that there is an assumption that locations are not “stretching” when they put in their initial budgets. The reasons for this appear to be both historical (based on the fact that for many years WorleyParsons consistently outperformed its budgets) and remuneration related (because location managers are rewarded based on their performance versus budget there is an assumption that they will always look to put in a low budget).

This perceived lack of trust in the initial location budget places pressure on the process, and leads to a considerable amount of back and forth between locations and management. It also obviously has the potential of penalising locations who make a genuine effort to get their forecasts correct, but who are still assumed to be “sandbagging”.

1. Under the heading “Consequences”:

…

In addition to the direct financial impact on staff, the setting of budgets that are considered unrealistic has, at least in some parts of the business, had a de-motivating effect. It is hard to engage staff when their views on budgets are not being taken into account and when they are being set targets they believe have a low probability of being met.

Another potentially less understood consequence has been that it has potentially allowed additional overhead to creep into the organisation. That is, we build an overhead structure for the revenue that we budget for, which includes blue sky. As blue sky revenue tends to be back ended, the overhead costs most likely get added earlier than when the blue sky revenue is earned. Consequently, if the revenue does not arise as forecast, it is not possible to remove the associated overhead in time to compensate.

1. Finally, under the heading “Potential Solutions”:

We are currently working through a number of potential solutions to the issues discussed in this paper. In doing this we are instituting a more thorough review on the existing process which will include external advice. This review will seek to address both the cultural issues identified in the paper, as well as examining the current process in more depth. Changes that arise from this review will be implemented in the FY15 budget process.

1. The Holt Memorandum was preceded by a process of obtaining “comments and feedback” from WOR employees, recorded in the Holt Memo interview notes already referred to in these reasons. The particular individuals who provided observations included the members of ExCo. It is not clear when the interview notes were collected but it is likely that they were collected after the November 2013 revised earnings guidance.
2. Mr Wood’s evidence was that, following the November 2013 downgrade, Messrs Holt and Allen carried out conversations that led to the creation of the Holt Memo interview notes. However, the possibility that some of the interview notes may have been gathered earlier arises because, in mid July 2013, Mr Wood had identified a list of topics raised by the Board in the “wrap up” session on 27 June 2013 including, relevantly, how could WOR streamline the budget process so that it did not take so much time and effort. The proposed action (to be owned by Mr Holt) in response to this question was:

To review the budget and forecasting process and propose FY14/15 approach for EXCO endorsement.

1. Mr Wood accepted that the Holt Memorandum was not the report on streamlining budget setting procedures that was contemplated by the Board’s request.

### Purpose of Holt’s inquiry

1. An important objective of the Holt Memorandum was to provide the A&RC with some accurate indicators of the types of concerns that WOR employees had raised about the budget setting process. As Mr Wood noted, the Holt Memorandum is dated only 15 days after the November 2013 announcement. The memorandum appears to have been generated to stimulate conversation at the A&RC about WOR’s “poor budgeting/forecasting performance”.
2. Mr Crowley submitted that the Holt Memorandum and the related interview notes were created for the purpose of reporting to the Board on how WOR’s budget process had miscarried in FY14, leading to the November 2013 announcement. There are several difficulties with this characterisation. First, the evidence does not reveal that anyone, including Mr Wood, intended the documents to be created for this specific purpose. Secondly, the content of the documents is much more general than the topic of the FY14 budget process. There was no suggestion that the documents expressly dealt with the more general topic of WOR’s budgeting processes to conceal consideration of the much narrower subject of how the budget process miscarried in FY14. Thirdly, the documents do not deal in any detail with the narrower subject, and would have been inadequate for the purpose identified by Mr Crowley.
3. Even so, I accept that the Holt Memorandum provided a foundation for discussion at the A&RC of the particular subject of the FY14 budget, and the circumstances that had led to such a substantial revision to the budget.
4. Mr Crowley correctly observed that the Holt Memorandum and the related interview notes collect candid comments and feedback at a time when the FY14 budget process was fresh in the interviewees’ minds. The comments and feedback were collected from senior managers intimately involved in the FY14 budget process.

### Conclusions that can be drawn from Holt Memorandum

1. I have principally addressed this question earlier at [410] and following.
2. The Holt Memorandum tends to support Mr Crowley’s case that WOR’s historical performance against budget reflects defects in WOR’s budgeting process. However, the memorandum does not analyse how any particular defect affected any element of any budget. Nor does it attempt to quantify the impact of any defect in the budget process. For example, the memorandum does not analyse how any of its “key points” affected the budget EBIT or NPAT figures in any year or years. Nor does the memorandum 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, perhaps unsurprisingly, does the memorandum contain a broad conclusion that WOR’s budget process was “not reliable”, as Mr Crowley contended that the Court should find.
3. Mr Crowley submitted that, having regard to the purpose of the Holt Memorandum and the related interview notes, and the reliability of the views recorded in the notes, the conclusions reached in the memorandum and the “trenchant comments” in the interview notes assist the Court in making the findings urged by Mr Crowley on specific issues relating to the WOR budget process. I accept that the evidence supports the following conclusions:
4. WOR’s budget-setting process was affected by a culture of optimism. The Holt Memorandum and the related 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.
5. 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.
6. 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.
7. There is no reason to doubt that the Holt Memo interview notes used in the preparation of the Holt Memorandum reflect candid and genuinely held views of WOR senior management. The notes record strong criticism of aspects of WOR’s budgeting and reforecasting processes.
8. However, as I have already observed, the notes do not provide significant weight in support of a conclusion that the FY14 budget lacked a reasonable basis to any particular extent, or that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement.
9. Mr Crowley also noted that, on 1 November 2013, Mr Bradie had invited regional managing directors and locations managers to attend, on 12 November 2013 a “one hour session to share your feedback and have a conversation around the theme of ‘Delivering what we Promise’… and what is preventing us from doing so”. None of the questions for discussion were directed explicitly to budget setting or the FY14 budget. However, a slide pack distributed on 15 November 2013 recorded as a “common theme”:

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)

1. Mr Crowley suggested that the Holt Memorandum seems to have been part of a “wider search for answers as to what had gone wrong, in particular during the months prior to November 2013”. I do not agree. The evidence does not suggest that Mr Bradie’s 1 November 2013 session was out of the ordinary for WOR.
2. Even so, the bullet point set out above shows that at least one location manager believed that budgets had been set that could not be supported with facts, and that budgets had been unilaterally changed after preparation on the basis of supporting evidence. This is a serious criticism and was apparently taken seriously, as evidenced by its inclusion in the revised slide pack. However, the precise facts underpinning the criticism are not identified.

## ExCo 8 December 2013 meeting

1. ExCo met on 8 December 2013. The minutes of the meeting record relevantly:

**6.3 Budgeting/forecasting**

Simon led ExCo in a discussion of the paper on financial forecasting to be presented to the Audit and Risk committee. Points raised by ExCo included:

* We will be improving the process so that the output it provides is more reliable
* The cultural piece around growth expectations should be tempered by filters which assess what is actually achievable
* Maybe we need a different process for forecasting than for budgeting?
* We need to increase the focus on first half/second half split so we can stop the practice of pushing shortfalls further and further back in the year
* This is another change process we will need to manage

## A&RC (11 December 2013)

1. The A&RC met on 11 December 2013. The minutes recorded, next to the heading “Financial Reporting”:

Financial forecasting process

Simon Holt addressed the committee on the financial forecasting process paper. Simon also displayed on the screen the chronology of events which was prepared to respond to the query received from ASX following the trading update on 20 November 2013.

Simon advised that a common query from analysts and investors was why we had not known of the issues affecting our outlook earlier than 20 November.

Directors noted that our budgeting process currently is lacking a risk adjusted view for public commentary purposes. It was 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.

Further comments from directors included:

* We need to ensure that our scheduled announcements to the market occur only after the most recent relevant financial information has been received and assessed. Our 2013 AGM was earlier than usual and September financial results were not yet available when we confirmed our outlook to the market.
* We need to have the prior month’s financial results before each board meeting.

Andrew advised there are two areas of focus:

1. we need to work through how we can bring forward the timelines for the delivery of our results;

2. we need a better understanding of our forward workload – the market wants this information and we don’t currently compile it.

Directors asked if there were any other financial indicators available since 20 November which indicated whether the company’s revised outlook would be achieved. Simon replied that the only indicator was an increase in hydrocarbons chargeability. For other indicators, we would need to wait until the November financial results were compiled.

# WOR FY14 actual results

## Half year results

1. On 26 February 2014, WOR released its 1H14 results and made an announcement to the ASX entitled, “Earnings in line with guidance, strong cash flow”. Relevantly, the announcement stated:

Professional services company WorleyParsons Limited today announced statutory net profit after tax (NPAT) of $112.1 million and underlying\* NPAT of $100.7 million for the six months to 31 December 2013. This was in line with guidance issued in November 2013 and is down 35% on the previous corresponding period.

Key points from the results were:

* Statutory revenue and other income of $4,823 million was up 9%, Aggregated revenue of $3,793 million was down 2%;
* Underlying EBIT of $178.2 million was down 29%;
* Underlying EBIT margin on aggregated revenue of 4.7% down from 6.5%;
* Operating cash flow of $230 million; up 84%;
* Decline in earnings due primarily to contraction in the Australian market and additional project costs in WorleyParsonsCord (Cord);
* Hydrocarbons aggregated revenue flat;
* Growth in chemicals partially offset weakness in minerals and metals;
* Infrastructure down on lower demand in Australia and Europe;
* 40 significant project and long term contract awards during the period; and
* Interim dividend 34.0 cents per share, partially franked at 25%, compared with 41.5 cents per share in the corresponding period last year.
1. Mr Crowley noted that the announcement stated that WOR’s “decline in earnings was further impacted by restructuring costs of $13.6 million”.

# WOR FY14 final results

1. WOR released its final FY14 results on 27 August 2014, accompanied by an announcement to the ASX entitled “FY2014 result in line with guidance, strong cash flow”. WOR reported statutory NPAT of $249 million, down 23% and underlying NPAT of $263 million, down 18%.
2. In its announcement to the market, WOR noted that aggregated revenue and NPAT were down when compared to FY13 “primarily due to the downturn in the Australian business, previously the major contributor to the Company’s earnings, and additional project costs in WorleyParsonsCord experienced in the first half”.
3. The announcement also stated that WOR now employed 35,600 people, down from 39,800 people at the same time last year. It recorded that approximately 1,200 overhead roles were removed in the second half, in addition to the reduction of 500 overhead roles in the first half.

# Continuous disclosure

1. At the relevant times, s 674(2) of the Corporations Act imposed an obligation upon WOR to notify the ASX of “information” in certain circumstances. By s 674(2)(b), the obligation only arose if WOR had information that was required by the ASX Listing Rules to be notified to the ASX. By s 674(2)(c), the relevant information was required to be information that was not “generally available” and was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of WOR shares.
2. WOR admitted that:
3. At all material times, the ASX was a market operator of a listing market, namely, the ASX’s financial market, in relation to WOR for the purposes of s 674(1) of the Corporations Act.
4. At all material times, r 3.1 of the ASX Listing Rules applied to WOR.
5. Section 674(2) of the Corporations Act applied to WOR by reason of s 111AP(1) and/or s 674(1) of the Corporations Act.
6. Mr Crowley alleged that WOR was required by s 674(2) to notify that ASX of the Material Information and or the Earnings Expectation Material Information (each as defined at [20] above) on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013.
7. Mr Crowley’s case based on contraventions of s 674 arising out of non-disclosure of the so-called Material Information fails because 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. Accordingly, the so-called Material Information was not “information” to which s 674(2) could have applied.
8. 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.
9. Even to the extent that I have 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. Accordingly, there was no “information” of the kind identified by Mr Crowley in his 4FASOC.
10. It follows that Mr Crowley’s case based on alleged contraventions of s 674 fails entirely.

# Misleading or deceptive conduct

1. At the relevant times, s 1041H(1) of the Corporations Act provided:

(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

1. Section 12DA(1) of the ASIC Act provided:

(1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

1. Section 18 of the Australian Consumer Law provided relevantly:

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

## FY14 guidance representation

1. As previously noted, Mr Crowley contended that by making, repeating and maintaining the August 2013 earnings guidance statement, WOR made the FY14 guidance representation, namely that:
2. it expected to achieve NPAT in excess of $322 million in FY14; and
3. it had reasonable grounds to expect that it would achieve NPAT in excess of $322 million in FY14.

### Representation with respect to future matter

1. Mr Crowley contended that the FY14 guidance representation was a representation with respect to a future matter, within the meaning of s 4 of the Australian Consumer Law and s 12BB of the ASIC Act. By s 4(1), if a person makes a representation with respect to a future matter, and the person does not have reasonable grounds for making the representation, the representation is taken to be misleading. Section 12BB(1) is in materially similar terms.
2. As to [624](1), WOR acknowledged that it made the representation that it expected to achieve NPAT in excess of $322 million in FY14. By reference to the FY14 budget, this representation was true.
3. As to [624](2), WOR contended that, at all relevant times, WOR through its Board considered that it held the relevant expectation on reasonable grounds. If the FY14 guidance representation was a representation as to future matters, then WOR had reasonable grounds for the representation because at all relevant times prior to 20 November 2013, WOR’s internal forecast NPAT was greater than $322.1 million.
4. In *Willett v Thomas* [2012] NSWCA 97 at [160], Macfarlan JA stated that “[w]hether an expressed belief related to a future matter depends on the words used and the context in which they were used (see *Digi-Tech (Australia) Ltd v Brand* [2004] NSWCA 58 at [99]-[102]”.
5. In *Ting v Blanche* [1993] FCA 524; (1993) 119 ALR 543 at [51], Hill J stated:

Whatever may be the case where there is an express representation as to the maker's state of mind concerning a future matter, it is not, in my opinion, correct to treat a representation as to an event or conduct in the future, be that in the form of a prediction or otherwise, as not being a representation with respect to a future matter merely because it implies a representation as to the maker's present state of mind…

1. In *GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd* [1998] FCA 1486; (1998) 29 ACSR 584, Emmett J concluded (at 616-617) that a statement as to the belief of the Board or as to “confirmation” by the Board was “a statement with respect to a future matter, notwithstanding that the belief itself relates to a future matter or that the confirmation relates to an earlier statement with respect to a future matter”. The relevant representation was “The board of AMP believes that the prospectus forecast range is still an appropriate range for inclusion in this Part A statement…In confirming the prospectus forecast range, the board of AMP has assumed that there will be some recovery in global equity markets prior to 31 December 1998”.
2. In *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 (***Campbell***) at [33], French CJ stated relevantly:

A statement of opinion may be a statement with respect to a future matter. It may take the form of a prediction. A forward estimate relating to the financial results of a business is a class of prediction.

1. In *Myer* at [1323], Beach J considered that in his view “it is not in doubt” that a representation in 2014 to the effect that “Myer [in FY15] would likely have a net profit after tax (NPAT) in excess of Myer’s [FY14] NPAT” was a statement of opinion with respect to a future matter.
2. WOR argued that its use of the word “expect”, together with the qualification by reference to “uncertainties in world markets”, indicate that the representation is directed to WOR’s present expectation. Even so, in my view, the expectation is plainly directed to a future matter, namely “earnings in FY2014”. In my view, this is sufficient to warrant a conclusion that the FY14 guidance representation is a representation with respect to a future matter to the extent that it conveyed WOR’s expectation that it would achieve NPAT in excess of $322 million in FY14. To the extent that the FY14 guidance representation conveyed that WOR had reasonable grounds to expect that it would achieve NPAT in excess of $322 million in FY14, that is a representation as to the situation at the time of the making of the representation and is not a representation with respect to a future matter.

### Onus on WOR to adduce evidence of reasonable grounds for representation

1. By s 4(2) of the Australian Consumer Law, for the purpose of applying s 4(1), WOR is taken not to have had reasonable grounds for making the FY14 guidance representation unless evidence is adduced to the contrary. Section 12BB(2) of the ASIC Act operates in a similar way in relation to s 12BB(1).
2. Mr Crowley raised the following issues:
3. Whether the evidence adduced by WOR is, properly assessed, “evidence to the contrary” so as to discharge the low threshold set by the deeming provision.
4. Whether upon all the evidence there were reasonable grounds for the August 2013 earnings guidance statement.
5. As to (1), Mr Crowley referred to the following statement in *Sykes v Reserve Bank of Australia* (1988) 88 FCR 511; [1998] FCA 1405 at 513 (concerning s 51A of the *Trade Practices Act 1974* (Cth), the predecessor provision to s 4 of the Australian Consumer Law):

If there was a representation as to a future matter, s 51A requires the representor to 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.
1. In *McGrath; in the matter of Pan Pharmaceuticals Ltd (in liq) v Australian Naturalcare Products Pty Ltd* [2008] FCAFC 2;(2008) 165 FCR 230 at [191], Allsop J (as his Honour then was) explained that that a provision of this kind “required evidence ‘to the contrary’ to be adduced, that is evidence that tended to establish, or that admitted of the inference that there were, reasonable grounds for making the representation, before the deeming provision ceased to operate”.
2. At [192], his Honour added:

If evidence is adduced by the representor that is said to be evidence to the contrary, it will be for the Court to determine whether it is to the contrary in the sense just discussed. If it is, the deeming provision will cease to operate. … if evidence “to the contrary” is adduced by the representor, and if the representee itself adduces evidence tending to the lack of reasonable grounds, the matter might be equally poised. In such a case, there has been evidence “to the contrary” adduced by the representee, thereby eliminating the operation of the deeming provision, and, on the totality of the evidence, the proof of the reasonableness (or lack thereof) of the grounds is evenly balanced. Section 51A(2) does not, in my view, mean that in those circumstances the representor has not met an onus. The section does not cast the legal or persuasive onus, in such a case, on the representor. Its terms do not say so. The enactment history makes clear that the terms were deliberately chosen not to say so.

1. See also *Botany Bay City Council v Jazabas* *Pty Ltd* [2001] NSWCA 94 at [84] and *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [128].
2. Mr Crowley contended that it was necessary for WOR to identify the relevant decision makers who relied on the asserted evidence to the contrary; and to prove that the asserted evidence to the contrary was in fact relied on by those decision makers.

### Who relied on evidence to the contrary?

1. Mr Crowley submitted, and I accept, that the relevant inquiry is whether WOR’s senior executives (particularly Messrs Wood and Holt) and the Board were aligned in their expectation that WOR would achieve increased earnings in FY14.
2. Mr Crowley contended that it is relevant to consider the state of mind of the Board collectively and Mr Wood individually. I accept that it is appropriate to consider each of these.

### Evidence of reliance on evidence to the contrary

1. In his final submissions, Mr Crowley stated that it was not in dispute that the Board and Mr Wood relied on the outcome of the FY14 budget process as the basis for the August 2013 earnings guidance statement and the FY14 guidance representation.
2. As set out above, I have not found that the FY14 budget was deficient. Accordingly, I reject Mr Crowley’s contentions that the budget process was not reasonable and that the Board did not have a reasonable basis for relying on it. Further, I am not persuaded that the Board was insufficiently sceptical or inquisitive: in particular, I do not accept that the available Board minutes support that inference. In the absence of substantial evidence that the Board’s consideration of the draft FY14 budget was deficient, I do not consider that significant weight should be attached to the fact that none of Board members gave evidence except Mr Wood.
3. Accordingly, I do not accept that ss 4(2) or 12BB(2) operates so that WOR is to be taken not to have had reasonable grounds for making the FY14 guidance representation at any relevant time.

### Conclusions

1. On the available evidence, WOR through its Board considered that its stated expectation was held on reasonable grounds, being the FY14 budget.
2. Further, the Board of WOR and Mr Wood individually had reasonable grounds for the FY14 guidance representation at all relevant times, being the FY14 budget.
3. On the available evidence, the process by which the FY14 budget was developed was reasonable, contrary to Mr Crowley’s contention. Specifically, and addressing Mr Crowley’s closing written submissions, although there is some evidence (particularly in the Holt Memo interview notes) that senior management may have applied unreasonable pressure to locations to grow revenue, grow earnings and reduce overheads, the evidence does not show that particular integers or portions of the FY14 budget were overstated or understated so as to be unreasonable or unjustifiable.
4. Mr Crowley identified reasons for the Board to have approached the FY14 budget with scepticism, such as WOR’s historical performance against budget and the available knowledge concerning market conditions in August 2013. However, the evidence does not demonstrate that the Board was not duly sceptical in its consideration of the WOR budget. Nor does the evidence demonstrate that a more sceptical approach would probably have led the Board to conclude that the FY14 budget should not be approved.
5. The position did not change materially for WOR’s Board between 14 August 2013 and 20 November 2013. That is, there was no circumstance in that period that led the Board to lack a reasonable basis for maintaining or reiterating the FY14 guidance representation.
6. It follows that Mr Crowley has failed to demonstrate that WOR contravened any of the statutory rules against misleading and deceptive conduct by making, repeating and maintaining the FY14 guidance representation.

## Listing Rule compliance representation

1. Mr Crowley stated that his case based on this alleged representation rises and follows on his success on the cases addressed above. As those cases have failed, it is unnecessary to address this aspect of the case in any detail.
2. The alleged **Listing Rule compliance representation contravention** case was that WOR made the following two representations to the **affected market**, being investors and potential investors in WOR shares, in several public statements and communications between 14 August 2013 and 15 October 2013:
3. WOR had told or given the ASX all the information it was required to tell or give under the ASX Listing Rules (**disclosure representation**); and/or
4. WOR had undertaken all necessary and reasonable investigations before making representations as to the state of its business and accounts and had satisfied itself on reasonable grounds following those investigations that its public statements were substantially accurate and not misleading or deceptive in any respect (**reasonable enquiry representation**).
5. Mr Crowley alleged that these representations were conveyed expressly by the 2013 annual report, in the passages set out at [430] above, and were made impliedly, on the basis of WOR’s continuous disclosure obligations and the absence of any statement by WOR in the relevant period to the effect that it had not complied with its continuous disclosure obligations.
6. WOR denied that it made representations. I do not accept that the representations were conveyed by the 2013 annual report as alleged. The annual report identifies processes by which WOR endeavoured to manage risk and comply with its continuous disclosure obligations. In my view, a reasonable reader would not understand the report to convey either the disclosure representation or the reasonable enquiry representation in the absence of clear words to the effect of those representations. The 2013 annual report does not contain clear words to that effect.
7. In the absence of detailed argument as to the effect of the continuous disclosure obligations taken together with the absence of any statement of non-compliance with the obligations, I do not make a finding as to whether the alleged representations were otherwise made.

## Risk management representation

1. I accept that, by section 3.3 of the WOR 2013 annual report (set out at [430] above), WOR represented to the affected market that it had effective management and internal control systems to identify, assess and manage the group’s material financial and non-financial business risks and report those risks to the board.
2. Based on the findings set out above, WOR did not engage in conduct in contravention of any of s 1041H of the Corporations Act, s 12DA(1) of the ASIC Act or s 18 of the Australian Consumer Law because the evidence does not demonstrate that it did not have effective management and internal control systems of the kind that WOR claimed to have had.

# Mr Crowley’s reliance evidence

1. Mr Crowley’s affidavit evidence was that he has relied on his investments to generate ongoing income and capital growth since 2003. His affidavit evidence in relation to his share trading practice was:
2. Mr Crowley’s main source of information when researching a company for share trading is company ASX announcements and company financial reports.
3. Mr Crowley had due regard to any forward looking statements in the Chairman’s report and the CEO’s report in the annual and half yearly reports when making investment decisions.
4. Mr Crowley’s objectives for his overall share portfolio are to generate a base of income producing stocks, and to seek long-term and, from time to time, short to medium term capital gains and to obtain the benefit of franking credits.
5. In about 2005, Mr Crowley placed WOR on a “watch list” on his online broker service. He had previously invested in WOR around that time and made a capital gain.
6. Mr Crowley received alerts when WOR issued ASX announcements. He generally reviewed all financial announcements made by companies on his watch list.
7. In his affidavit, Mr Crowley stated that he recalled reviewing WOR’s 14 August 2013 full year results announcement and the 2013 annual report around the time they were published. Mr Crowley also stated that he recalled reading the August 2013 earnings guidance statement in both the results announcement and the annual report. Mr Crowley recalled “forming the overall impression that, despite there being some volatility in the market for WOR’s services, the management of WOR was confident about its earnings outlook and that it had a growth strategy in place”.
8. In cross-examination, Mr Crowley did not recall reading either of these two documents, but stated that he would have done so.
9. According to his affidavit, after reading the 14 August 2013 full year results announcement and the 2013 annual report, Mr Crowley continued to monitor WOR’s share price with a view to buying shares “at an opportune time”.
10. In cross-examination, Mr Crowley agreed that his interest in WOR shares was not “enlivened” by his review of the 14 August 2013 full year results announcement and the 2013 annual report. The cross-examination revealed that Mr Crowley had acquired and disposed of 17 separate parcels of shares in WOR (amounting to 6779 shares in total). In respect of 11 of these transactions, Mr Crowley held the shares for less than 10 days. In respect of four transactions, Mr Crowley held the shares for one day or less. It was also revealed in cross-examination that Mr Crowley had traded in WOR shares in the weeks prior to the 1 October 2013 purchase by:
11. disposing of a parcel of 433 WOR shares on 17 September 2013;
12. disposing of a parcel of 720 WOR share on 18 September 2013;
13. acquiring and disposing of a parcel of 467 WOR shares on 23 and 24 September 2013.
14. From 27 September 2013, WOR’s share price began to decline. According to his affidavit, Mr Crowley formed the view that this presented a good opportunity to buy shares in WOR as he believe that the share price was likely to rebound in the near to medium term which would allow him to make a capital gain. If that did not occur, Mr Crowley believed that WOR would be a good addition to his portfolio to provide capital gain and income over the longer term.
15. Mr Crowley stated: “It’s a share that I was always going to be interested in, if – if I got it for a good price”.
16. In his affidavit at [24]-[25], Mr Crowley stated:

Because my primary goal in purchasing WOR shares at this time was to obtain a short to medium term capital gain, my decision to purchase the shares was based in large part on the positive growth statements in the Financial Results and the Annual Report (and the absence of any “warning sign” or negative statements which might suggest near term developments which would adversely affect the share price). As discussed above, WOR’s subsequent announcements concerning its new contracts gave me additional confidence in the Outlook Statement in the Annual Report and Results Announcement.

If at any time during the period from 14 August 2013 to the time of my purchase on 1 October 2013 WOR had expressed any significant doubts about its earnings growth prospects for FY 2014, I am confident that I would not have purchased its shares. As I was primarily trading this share for short to medium capital gain, any suggestion of near to medium term volatility in the share price would have put me off purchasing it. I generally only purchase shares which appear to have positive growth prospects.

1. When Ms Harris QC suggested to Mr Crowley that what WOR told the market on 14 August 2013 had nothing to do with his decisions after that date to buy or sell WOR shares, Mr Crowley replied:

It probably strengthened on those – that – those reports come out, what the 14th? It probably strengthened my resolve that the company was in good shape.

1. This answer suggested that Mr Crowley was not definite that WOR’s communications to the market on 14 August 2013 had in fact affected the relevant share trading decisions.
2. When asked again, Mr Crowley was more positive. The relevant passage of the evidence was as follows:

Ms Harris QC: Do you agree with me that – when you look at all of the transactions to which I have taken you, that what Worley told the market on 14 August 2013 had nothing to do with your decisions after that date to buy or sell Worley shares? That is correct, isn’t it?

Mr Crowley: No, it isn’t.

Ms Harris QC: It isn’t?

Mr Crowley: It’s not my – that’s your opinion, not mine.

1. However, when directed to the 1 October 2013 purchase, Mr Crowley gave the following evidence:

Ms Harris QC: Mr Crowley, I want to put to you that you did not acquire Worley shares on 1 October 2013 because you had gained confidence in the growth prospects of the company through the announcements it had made to the market. That’s the first thing I want to put to you.

Her Honour: Is that true or false?

Mr Crowley: It could have been just the share price.

Ms Harris QC: It could have been - - -?

Mr Crowley: It could have been a dive in the market or something. I thought they looked cheap and I jumped in and got them. I would have had to have spare cash available. That’s – that’s all I can really say.

Ms Harris QC: It’s in the same – that acquisition was in the same category as all of the other acquisitions that we have seen, wasn’t it? You see an opportunity and you take it?

Mr Crowley: Yes.

1. In re-examination, there was the following exchange:

Mr Armstrong QC: Mr Crowley, can I ask you the question again. As you sit here today, do you now recall what, if any, role the company’s August 2013 outlook guidance played in your decision to purchase WorleyParsons shares on 1 October 2013?

Mr Crowley: Well, it wasn’t too bad a result at that stage, and if you look at the charts, the projection of the company was to go up. So, yes, that reinforced some of my views.

1. Thus, in cross-examination, Mr Crowley acknowledged that he may not have relied on the August 2013 earnings guidance statement in deciding to purchase WOR shares on 1 October 2013, and may have relied only on the share price. In re-examination, when given the opportunity to re-affirm his reliance on the August 2013 earnings guidance statement, Mr Crowley’s evidence was unclear.
2. WOR contended that the Court should treat Mr Crowley’s affidavit evidence of reliance with “extreme caution”. I accept that the omission from Mr Crowley’s affidavit of facts concerning his historical trading in WOR shares, particularly between 14 August 2013 and 1 October 2013 casts a degree of doubt as to his frankness. However, I do not conclude that Mr Crowley was less than frank in his affidavit. Having observed him giving oral evidence, I was satisfied that Mr Crowley was a truthful witness and I do not doubt that he gave truthful evidence in his affidavit.
3. Mr Crowley acknowledged that his primary goal was to sell his package of WOR shares for a profit. In cross-examination, it was revealed that Mr Crowley agreed that he purchased WOR shares on 23 September 2013 with a view to making a quick profit, that is, a profit within a year of the purchase.
4. Having accepted that Mr Crowley gave truthful evidence in his affidavit, I accept that he read both the August 2013 earnings guidance statement and the statement to similar effect in the 2013 WOR annual report around the time that they were published. I also conclude that, notwithstanding Mr Crowley’s acknowledgement that it is possible that the decision could have been made on “just the share price”, on the balance of probabilities, Mr Crowley did rely on WOR’s statements to the effect of the August 2013 earnings guidance statement in deciding to purchase the 423 WOR shares on 1 October 2013.

# Joint list of issues for determination

1. Based on the findings above, the issues common as between Mr Crowley and the group members, set out in Annexure B of orders made on 22 March 2019 as amended to correspond with terms used in these reasons for judgment, are determined as follows:

**Continuous disclosure case**

1. Question 1: At any time during the relevant period, was it the fact that WOR did not have a reasonable basis for making the August 2013 earnings guidance statement?

Answer 1: No.

1. Question 2: If the answer to 1 is “yes”, was WOR “aware” within the meaning of r 19.12 of the ASX Listing Rules of the Material Information (being that WOR did not have a reasonable basis for making the August 2013 earnings guidance statement) at any time during the relevant period (and if so, when)?

Answer 2: Not applicable.

1. Question 3: At all material times between 14 August 2013 and immediately before WOR's November 2013 revised earnings guidance, was it a fact that the consensus expectation of professional analysts covering the ASX and ordinary shares in WOR, that WOR would deliver between $354 and $368 million in NPAT for FY2014?

Answer 3: No.

1. Question 4: If the answer to paragraph 3 above is “yes”, by 14 August 2013, was WOR aware of the expectation described in Question 3?

Answer 4: Not applicable. However, WOR was aware of the facts found at [87].

1. Question 5: At any time during the relevant period, was it the fact 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?

Answer 5: No.

1. Question 6: If the answer to paragraph 5 above is “yes”, was WOR “aware” within the meaning of r 19.12 of the ASX Listing Rules of the Earnings Expectation Material Information (being 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) at any time during the relevant period (and if so, when)?

Answer 6: Not applicable.

1. Question 7: Did WOR at any time prior to 20 November 2013 become obliged pursuant to r 3.1 of the ASX Listing Rules to tell the ASX of the Material Information and/or the Earnings Expectation Material Information?

Answer 7: No.

1. Question 8: Did WOR contravene s 674(2) of the Corporations Act by not informing the ASX of:
	1. the Material Information on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013; and/or
	2. the Earnings Expectation Material Information on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013?

Answer 8: No.

**Misleading or deceptive conduct case**

1. Question 9: Was the FY14 guidance representation a representation as to future matters and, if so, in what respects?

Answer 9: Yes, to the extent only that it conveyed the representation that WOR expected to achieve NPAT in excess of $322 million in FY14.

1. Question 10: Throughout the relevant period, alternatively in the period from 9 October 2013, 10 October 2013 or 15 October 2013 to the end of the relevant period:
	1. in so far as the FY14 guidance representation was a representation as to present matters, was it misleading or deceptive, or likely to mislead or deceive; and
	2. in so far as the FY14 guidance representation was a representation as to future matters, was it made without a reasonable basis?

Answer 10: No.

1. Question 11: 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 s 1041H(1) of the Corporations Act; s 12DA(1) of the ASIC Act and/or s 18 of the Australian Consumer Law during all or any part of the relevant period (and if so, when)?

Answer 11: No.

1. Question 12: By making the August 2013 earnings guidance statement, did WOR contravene s 1041H(1) of the Corporations Act; s 12DA(1) of the ASIC Act and/or s 18 of the Australian Consumer Law during all or any part of the relevant period (and if so, when)?

Answer 12: No.

1. Question 13: By publicly releasing the announcements listed in 4FASOC para 57, did WOR represent to the affected market that:
	1. it had told or given the ASX all the information it was required to tell or give under the ASX Listing Rules; and/or
	2. it had undertaken all necessary and reasonable investigations before making representations as to the state of its business and accounts and had satisfied itself on reasonable grounds following those investigations that its public statements were substantially accurate and not misleading or deceptive in any respect,

(individually and together, the **Listing Rule compliance representations**)?

Answer 13: See [656] above.

1. Question 14: If WOR made the Listing Rule compliance representations, in so doing did it contravene s 1041H(1) of the Corporations Act; s 12DA(1) of the ASIC Act and/or s 18 of the Australian Consumer Law during all or any part of the relevant period (and if so, when)?

Answer 14: No.

1. Question 15: By making the statements contained in the WOR Annual Report 2013 under the heading “***3.3 MANAGEMENT OF MATERIAL BUSINESS RISKS***” (**risk management statement**) (set out at [430]), did WOR represent to the affected market that it had effective management and internal control systems to identify, assess and manage the group’s material financial and non-financial business risks and report to those risks to the board (r**isk management representation**)?

Answer 15: Yes

1. Question 16: If WOR made the risk management representation, in so doing, did it contravene s 1041H(1) of the Corporations Act; s 12DA(1) of the ASIC Act and/or s 18 of the Australian Consumer Law during all or any part of the relevant period (and if so, when)?
2. Answer 16: No.
3. Question 17: By making the risk management statement, did WOR contravene s 1041H(1) of the Corporations Act; s 12DA(1) of the ASIC Act and/or s 18 of the Australian Consumer Law during all or any part of the relevant period (and if so, when)?

Answer 17: No.

**Causation, loss and damage**

1. Question 18: During the relevant period, did or any of the above contraventions cause the market price for WOR securities to be substantially greater than:
	1. their true value; and/or
	2. the market price that would have prevailed but for the above contraventions (or any of them), and if so, by how much?

Answer 18: Not applicable. There were no contraventions.

1. Question 19: In the decision to acquire WOR shares did Mr Crowley rely directly on the FY14 guidance representation, the August 2013 earnings guidance statement and its repetition on 9, 10 and 15 October 2013, the Listing Rule compliance representation, the risk management representation or the risk management statement?

Answer 19: Mr Crowley relied on the August 2013 earnings guidance statement made on about 14 August 2013 in making his decision to acquire WOR shares on 1 October 2013. Otherwise, no.

1. Question 20: Has the Mr Crowley suffered loss and damage in relation to his interest in WOR securities by and resulting from his reliance on the above contraventions?

Answer 20: Not applicable. There was no contraventions.

# Costs

1. Subject to any application that might be made by WOR for a special costs order or costs, costs should follow the event.

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| I certify that the preceding seven hundred (700) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Gleeson. |

Associate:

Dated: 22 October 2020